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Montana Code Annotated

Annotations 2002

Land Resources & Use • State Lands • Agriculture • Livestock
Minerals, Oil, & Gas • Water Use • Fish & Wildlife
Planning, Research, & Development

ANNOTATIONS

to the

MONTANA CODE ANNOTATED

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PREFACE TO VOLUME 12
(Annotations — September 2002)

Annotations to this volume include case notes of applicable court decisions through public domain citation 2002 MT 90, volume 309 Montana Reports page 341, volume 47 Pacific Reporter (3rd Series) page 628, volume 196 Federal Supplement (2nd Series) page 1379, volume 289 Federal Reporter (3rd Series) page 828, and volume 122 Supreme Court Reporter page 1992. Digests of Montana Attorney General's opinions are provided through volume 49 opinion number 18 of the Report and Official Opinions of Attorney General. Citations to the Administrative Rules of Montana implementing or authorized by a section of law and adopted through Issue 12 of the 2002 Montana Administrative Register are also included.

Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

TITLE 76
LAND RESOURCES AND USE

CHAPTER 1
PLANNING BOARDS

Chapter Compiler's Comments

Severability Clause: Section 21, Ch. 273, L. 1971, was a severability clause.

Chapter Administrative Rules

ARM 36.15.204 Local flood plain regulations — requirements.

Chapter Law Review Articles

An Essay on "Takings", Clifford & Huff, 59 Mont. L. Rev. 9 (1998).

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Land Use Planning and the Montana Legislature: An Overview for 1973, Lundberg, 35 Mont. L. Rev. 38 (1974).

Restrictive Covenants and Land Use Control: Private Zoning, Lundberg, 34 Mont. L. Rev. 199 (1973).

City-County Planning in Montana, Keefer, 25 Mont. L. Rev. 185 (1964).

Constitutional Problems of City-County Planning in Montana, Keefer, 25 Mont. L. Rev. 196 (1964).

The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause, Shoemake, 48 Duke L.J. 891 (1999).

Leapfrogging the Constitution: The Rise of State Takings Legislation, Cordes, 24 Ecology L.Q. 187 (1997).

The Quintessential Best Case for "Takings" Compensation—A Pragmatic Approach to Identifying the Elements of Land-Use Regulations That Present the Best Case for Government Compensation, Boudreaux, 34 San Diego L. Rev. 193 (1997).

Have They Gone "Too Far"? An Evaluation and Comparison of 1995 State Takings Legislation, Douglass, 30 Ga. L. Rev. 1061 (1996).

Resource Use and the Emerging Law of "Takings": A Realistic Appraisal, Thompson, 42 Rocky Mtn. Min. L. Inst. CH 2 (1996).

The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes, Wickersham, 18 Harv. Envtl. L. Rev. 489 (1994).

Property Law—Common-Law Dedication: A Landowner's Intent to Dedicate, Strauss & Wallace-Jackson, 17 Wm. Mitchell L. Rev. 373 (1991).

Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations (Growth Management and the Environment in the 1990s), Stone & Seymour, 24 Loy. L.A.L. Rev. 1205 (1991).

Conserving and Developing the Land, Siegan, 27 San Diego L. Rev. 279 (1990).

Constitutional Rights as Property? The Supreme Court's Solution to the "Takings Issue", Looper-Friedman, 15 Colum. J. Envtl. L. 31 (1990).

Help Developers Through the Land Use Maze, Jennette, 6 Prac. Real Est. Law. 77 (1990).

Takings as Intentional Deprivations of Property Without Moral Justification (The Takings Clause: In Search of Underlying Principles, part 2), Peterson, 78 Calif. L. Rev. 53 (1990).

The First Amendment in Land Use Law, Merriam & Smith, 14 ALI-ABA Course Materials J. 43 (1990).

Growth Control Regulation: What Does It Take to Withstand Judicial Scrutiny?, Losness, 17 W. St. U.L. Rev. 157 (1989).

Law and a New Land Ethic, Humbach, 74 Minn. L. Rev. 339 (1989).

Overlay Zoning, Performance Standards, and Environmental Protection After Nollan, Blackwell, 16 B.C. Envtl. Aff. L. Rev. 615 (1989).

Recent Developments in Community Growth Control: Site Plan Review and Access Adequacy Regulations, Bobrowski, 73 Mass. L. Rev. 36(11) (1988).

Recent Developments in Environmental Preservation and the Rights of Property Owners, Bozung & Alessi, 20 Urb. Law. 969 (1988).

Aesthetic Regulation: A New General Rule, Pace, 90 W. Va. L. Rev. 581 (1987).

Antitrust Implications of Municipal Land Use Planning, Mather, 33 Wayne L. Rev. 965 (1987).

Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals, Wegner, 65 N.C.L. Rev. 957 (1987).

Playing the Numbers: Local Government Authority to Apply Use Quotas in Neighborhood Commercial Districts, McElyea, 14 Ecology L.Q. 325 (1987).

The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing, Reynolds, 71 Minn. L. Rev. 611 (1987).

Local Control of Hazardous Wastes Through Land Use Regulation, Schwenke & Lockett, 21 Real Prop. Prob. & Tr. J. 603 (1986).

Participation and Rules—The Functions of Zoning, Steele, 1986 A.B.F. Res. J. 709 (1986).

Environmentally Based Land Use Planning and Regulation, Palmer, 2 Pace Envtl. L. Rev. 25 (1984).

New Models for Local Land Use Decisions, Rose, 79 Nw. U.L. Rev. 1155 (1984).

The Availability of 42 U.S.C. §1983 in Challenges of Land Use Planning Regulations: A Developer's Dream Come True?, Thompson, 1982 Utah L. Rev. 571.

Chapter Collateral References

83 Am. Jur. 2d Zoning and Planning §§1 through 3.

Our Montana Environment... Where Do We Stand?, Enviromental Quality Council, 1996.

Annexation Laws, Legislative Council, 1980.

Montana's Greenbelt Law, Legislative Council, 1980.

Montana's Subdivision Laws: Problems and Prospects, Legislative Council, 1978.

Preservation of Agricultural Lands: Alternative Approaches, Legislative Council, 1976.

Part 1
General Provisions

Part Compiler's Comments

Validating Clause Not Codified: Section 11-3855, R.C.M. 1947, a validating clause, was not codified. The section has not been repealed and is still valid law. Citation may be made to sec. 55, Ch. 246, L. 1957, as amended by sec. 24, Ch. 247, L. 1963.

Saving Clause: Section 25, Ch. 247, L. 1963, was a saving clause.

Part Attorney General's Opinions

Authority of Self-Governing Local Government to Enforce Master Plan (now Growth Policy): A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan (now growth policy) prohibits divisions of land of such size. A local government that has adopted a master plan (now growth policy) to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan. 42 A.G. Op. 16 (1987).

76-1-101. Planning boards authorized.

Compiler's Comments

Validation Clause Not Codified: Section 11-3802, R.C.M. 1947, validating preexisting planning boards and actions taken by such boards, was not codified. It has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 246, L. 1957.

Case Notes

Adoption of Comprehensive Development Plan (now Growth Policy) as Prerequisite to Zoning Authority: The clear and unambiguous language of 76-2-201 requires that a county adopt a comprehensive development plan (now growth policy) for an entire jurisdictional area. Only after the adoption of such a plan may a county adopt zoning regulations. Allen v. Flathead County, 184 M 58, 601 P2d 399, 36 St. Rep. 1839 (1979). See also Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Law Review Articles

Master Plan Zoning Statute Unconstitutional, Andriolo, 23 Mont. L. Rev. 125 (1961).

Collateral References

Municipal Corporations *key* 41.

62 C.J.S. Municipal Corporations §§83, 227.

83 Am. Jur. 2d Zoning and Planning §§23, 25, 28.
Land Use Planning and Real Estate (CLE Seminar), State Bar of Montana, March 1985.
Liability Issues in Land Use Planning (CLE Seminar), State Bar of Montana, February 1984.

76-1-102. Purpose.

Law Review Articles
Preserving Agricultural Lands: Issues and Answers, Batie & Looney, 1 Agr. L. J. 600 (1980).
Preserving Farmland Through Federal Income Incentives, Daugherty, 33 Nat'l Tax J. 111 (1980).

76-1-103. Definitions.

Compiler's Comments
1999 Amendment: Chapter 582 substituted growth policy for master plan as defined term, after "means" inserted "and is synonymous with", and substituted "master plan, or comprehensive plan that meets the requirements of 76-1-601" for "or any of its parts such as a plan of land use and zoning, of thoroughfares, of sanitation, of recreation, and of other related matters"; inserted definition of neighborhood plan; in definition of plat substituted "on a map or plan" for "upon the earth and represented on paper"; and made minor changes in style. Amendment effective October 1, 1999.
Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.
Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Administrative Rules
ARM 17.36.101 Definitions.

76-1-106. Role of the planning board.

Compiler's Comments
1999 Amendment: Chapter 582 in middle of (1) substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.
Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.
Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

76-1-107. Role of planning board in relation to subdivisions and plats.

Compiler's Comments
1999 Amendment: Chapter 582 at beginning of (1) inserted exception clause and after "adopted" substituted "a growth policy pursuant to this chapter" for "a comprehensive plan"; inserted (2) authorizing planning board to delegate to staff responsibility to advise governing body on proposed minor subdivisions; and made minor changes in style. Amendment effective October 1, 1999.
Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.
Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Collateral References
62 C.J.S. Municipal Corporations §83.

76-1-110. Cooperation with planning board by state and local governments.

Compiler's Comments
1999 Amendment: Chapter 582 in (1) substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.
Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.
Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

76-1-111. Representation of county or additional cities or towns on existing boards.

Compiler's Comments

2001 Amendment: Chapter 574 in (3) near beginning of second sentence after "county" inserted "or town" and deleted former last sentence that read: "The tax may not exceed the maximum levy authorized in 76-1-402 through 76-1-407"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 in (3) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

76-1-112. Joint or consolidated planning boards.

Compiler's Comments

1997 Amendment: Chapter 274 in (3)(c), near middle after "may", inserted "subject to subsection (6)"; inserted (6) requiring consistent representation on a city-county board; and made minor changes in style. Amendment effective July 1, 1997.

Retroactive Applicability: Section 2, Ch. 274, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all joint or consolidated city-county planning boards created after July 1, 1985, which are still in existence. [This act] does not affect any action taken by a joint or consolidated planning board prior to the effective date of [this act]." Effective July 1, 1997.

Attorney General's Opinions

Number and Terms of Board Members — Determination: The number of members and length of their terms on a consolidated planning board may be determined by the interlocal agreement creating the board. (See 1997 amendment.) 39 A.G. Op. 75 (1982).

76-1-113. Effect of chapter on natural resources.

Compiler's Comments

1991 Amendment: At beginning of (1) inserted exception clause; inserted (2) making use, development, or recovery of a mineral by a sand and gravel operation and a concrete mixing or asphalt batching operation subject to local zoning regulations; and made minor changes in style. Amendment effective April 9, 1991.

Applicability: Section 5, Ch. 408, L. 1991, provided: "(1) [This act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] does not apply to:

(a) an area for which a contract was issued prior to [the effective date of this act] [effective April 9, 1991] or for which an application for contract or contract amendment was filed with the department of state lands [functions now transferred to department of natural resources and conservation] prior to February 23, 1991; or

(b) an area:

(i) that is contiguous to an area described in subsection (1)(a);

(ii) for which the holder of the contract has the legal right to mine on [the effective date of this act] [effective April 9, 1991]; and

(iii) for which the contract holder files with the department on or before January 1, 1992, on a form provided by the department, a legal description of the area, evidence of the legal right to mine, and certification that the contract holder holds the property for the purpose of future sand or gravel mining.

(2) Before June 1, 1991, the department shall mail notice of the provisions and passage of [this act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] and the form described in subsection (1)(b)(iii) to each person who holds a current contract on [the effective date of this act] [effective April 9, 1991] or who had, prior to February 23, 1991, submitted an application for contract or contract amendment that the department had not approved or denied as of February 23, 1991.

(3) The department shall maintain a list of areas for which certifications have been filed pursuant to subsection (1)(b) and shall provide a copy of the list to any person who requests the list."

Case Notes

Excavation and Processing of Gravel — County Zoning and Planning Inapplicable: Part of the legislative purpose of this section is clear and unambiguous. It demonstrates the Legislature's awareness that a range of activities must occur on-site in order for the owner of mineral, timber, or

agricultural resources to benefit, and that the Legislature did not intend counties to have the power to prevent the owner from having that benefit. However, the range of activities that cannot be prevented is by no means clear and unambiguous. There is ambiguity in the interpretation and construction of the phrase "complete use, development, or recovery of any mineral . . . resources" and in its application to defendant's gravel extraction and processing. A reasonable construction depends, to some extent, on the circumstances to which this section is applied. Therefore, the court must look to industry practices to discern the extent to which the Legislature intended the owner of the resource to benefit. A county must at least allow the activities necessary to develop the resource to a point at which it can be effectively utilized. In the case at bar, the District Court found that processing occurs at the site of gravel extraction because the cost of transporting the material elsewhere for processing would render the mining economically unfeasible. The District Court also found that gravel processing on-site included washing, crushing, screening, and concrete and asphalt batching and that these activities were part of the recovery of gravel resources. The record supported the District Court's findings. The District Court properly held that 76-1-113 and 76-2-209 exempt the defendant from county zoning and planning. The record concerned gravel mining in a particular geographic location. The Supreme Court declined to announce a broad, sweeping interpretation on such a narrow record and restricted the holding of this opinion accordingly. (See 1991 amendment.) Missoula County v. Am. Asphalt, Inc., 216 M 423, 701 P2d 990, 42 St. Rep. 920 (1985).

Attorney General's Opinions

Prohibition of Sand and Gravel Operations and Certain Concrete and Asphalt Operations in Residential Areas: The effect of the 1991 amendment to this section, through enactment of subsection (2), was to allow a municipal zoning authority to prohibit sand and gravel operations and operations that mix concrete and batch asphalt in areas zoned as residential, within the applicability provisions of sec. 5, Ch. 408, L. 1991, as long as the zoning authority is exercised in accordance with constitutional principles. 44 A.G. Op. 47 (1992).

Zoning of Patented Mining Claims: County Commissioners have the authority to zone land areas which include patented mining claims subject to the mandate that natural resources thereon be allowed to be used, developed, or recovered. 36 A.G. Op. 33 (1975).

Part 2
Membership

Part Case Notes

Consolidated City-County Government — Holdover Plan — No New Planning Board: A zoning ordinance enacted after city-county consolidation based upon a comprehensive plan (now growth policy) adopted by the old City-County Planning Board prior to consolidation was proper in that the new consolidated government had not by that time formed a Planning Board having the same jurisdictional area as the consolidated local government. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

76-1-201. Membership of city-county planning board.

Compiler's Comments

1985 Amendment: At beginning of (1) inserted exception clause; in (1)(e) after "hereinabove provided for" substituted "from the members of the board of supervisors of a conservation district provided for in 76-15-311" for "with the consent and approval of the board of county commissioners and the city council"; and inserted (2) establishing procedure for selection of ninth member of city-county planning board when no member of board of supervisors of conservation district is available.

1985 Preamble: The preamble to Ch. 509, L. 1985, read:

"WHEREAS, House Bill 275, Chapter 349, Laws of 1973, amended section 11-3810(2), R.C.M. 1947, to require membership of conservation district board members in Montana on all county planning boards; and

WHEREAS, most subdivisions are close to the major metropolitan areas or within the 4.5-mile limits; and

WHEREAS, conservation districts are charged with stopping erosion caused by either runoff or wind erosion; and

WHEREAS, many states require a sign-off of subdivision plats by the conservation district boards.

THEREFORE BE IT RESOLVED, that section 76-1-201, MCA, be amended to require membership of a conservation district board member on each city-county planning board."

Attorney General's Opinions

Planning Board Appointees — Residency — Law Not Retroactive: Members of a City-County Planning Board appointed prior to July 1, 1979, remain qualified to serve out their appointed terms although new residence requirements were enacted after they began their terms. A statute must be expressly declared retroactive to be retroactive. The amended residence requirements statute had no such declaration and so has only prospective application. 38 A.G. Op. 28 (1979).

76-1-211. Membership of county planning board.

Attorney General's Opinions

County Planning Board Not to Serve as County Zoning Commission: Because of differences in membership requirements and jurisdictional areas, a County Planning Board may not be designated to serve as the County Zoning Commission. However, members of one board may serve as members of the other if they meet the requirements for membership of each board. 43 A.G. Op. 18 (1989).

76-1-221. Membership of city planning board.

Compiler's Comments

Redundant Provision Not Codified: The last sentence of section 11-3804, R.C.M. 1947, is redundant with 76-1-224(1)(b) and was therefore not codified. The provision has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 246, L. 1957, as amended by sec. 1, Ch. 271, L. 1959.

Part 3
Organization and Administration

76-1-304. Quorum — official action.

Attorney General's Opinions

Power of and Control Over Subcommittee of Board: Harmonizing this section and 76-1-305 and 76-1-306(2) to avoid ambiguity, it appears that: (1) a subcommittee of the planning board may handle administrative functions of the board; (2) the board should exercise general supervision over the subcommittee and write regulations governing the subcommittee's actions; and (3) any official action of the subcommittee carrying the board's recommendation must be approved by a majority of the board at a properly called meeting. Actions specifically delegated to the board by statute must be viewed as official actions and must be considered by the full board. Ministerial acts may be performed by employees or a subcommittee. 39 A.G. Op. 75 (1982).

76-1-305. Administration of board.

Attorney General's Opinions

Power of and Control Over Subcommittee of Board: Harmonizing this section and 76-1-304 and 76-1-306(2) to avoid ambiguity, it appears that: (1) a subcommittee of the planning board may handle administrative functions of the board; (2) the board should exercise general supervision over the subcommittee and write regulations governing the subcommittee's actions; and (3) any official action of the subcommittee carrying the board's recommendation must be approved by a majority of the board at a properly called meeting. Actions specifically delegated to the board by statute must be viewed as official actions and must be considered by the full board. Ministerial acts may be performed by employees or a subcommittee. 39 A.G. Op. 75 (1982).

Collateral References

Injunction *key* 89; Municipal Corporations *key* 601(1).

43 C.J.S. Injunctions §123; 62 C.J.S. Municipal Corporations §226(1).

76-1-306. Board secretary and employees — service contracts.

Attorney General's Opinions

Power of and Control Over Subcommittee of Board: Harmonizing this section and 76-1-304 and 76-1-305 to avoid ambiguity, it appears that: (1) a subcommittee of the planning board may handle administrative functions of the board; (2) the board should exercise general supervision over the subcommittee and write regulations governing the subcommittee's actions; and (3) any official action of the subcommittee carrying the board's recommendation must be approved by a majority of the board at a properly called meeting. Actions specifically delegated to the board by statute

must be viewed as official actions and must be considered by the full board. Ministerial acts may be performed by employees or a subcommittee. 39 A.G. Op. 75 (1982).

Part 4
Financial Administration

76-1-403. Tax levy by county for certain county planning districts authorized.

Compiler's Comments

2001 Amendment: Chapter 574 in last sentence near middle after "levy" substituted "a tax on the taxable value of all taxable property" for "on all property" and after "district" deleted "a tax not to exceed the maximum levy authorized by 76-1-405"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Attorney General's Opinions

Mill Levy in Absence of Planning Board and District: A local government unit cannot levy extra mills for planning purposes unless it has established a planning board and a planning district. 39 A.G. Op. 75 (1982).

76-1-404. Tax levy by county for city-county planning board authorized.

Compiler's Comments

2001 Amendment: Chapter 574 in second sentence near middle after "levy on" substituted "the taxable value of all taxable property" for "all property" and deleted former last sentence that read: "The tax may not exceed the maximum levy authorized in 76-1-405." Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Attorney General's Opinions

Mill Levy in Absence of Planning Board and District: A local government unit cannot levy extra mills for planning purposes unless it has established a planning board and a planning district. 39 A.G. Op. 75 (1982).

76-1-406. Tax levy by municipalities authorized.

Compiler's Comments

2001 Amendment: Chapter 574 near middle after "upon the" substituted "taxable value of all taxable property" for "property" and deleted former last sentence that read: "The tax may not exceed the maximum levy authorized in 76-1-407." Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Attorney General's Opinions

Mill Levy in Absence of Planning Board and District: A local government unit cannot levy extra mills for planning purposes unless it has established a planning board and a planning district. 39 A.G. Op. 75 (1982).

Part 6
Growth Policy

Part Compiler's Comments

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Part Case Notes

Zoning Amendment Considered Illegal Spot Zoning — Little Test: Duck Creek Properties (Duck Creek), a Florida general partnership, owned 323 acres of undeveloped land in the Hebgen Lake Zoning District. In order to increase development options and the value of the property, Duck Creek sought a zoning change from R-10, which allowed one single-family unit for each 10 acres, to planned unit development (PUD), which permitted more diverse uses at much higher density. The resolution approving the zoning amendment was ultimately approved by the Gallatin County Board of County Commissioners, but was then challenged by two nonprofit corporations. The District Court voided the resolution as illegal spot zoning, and the Board and Duck Creek appealed to the Supreme Court. All parties agreed that Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981), correctly stated the applicable law, and the Supreme Court examined all three prongs of the Little test, including whether: (1) the requested use is significantly different from the prevailing use in the area; (2) the area in which the requested use is to apply is small, although not solely in physical size, including how many separate landowners will benefit from the zone classifications; and (3) the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or the general public. Under the first prong, prevailing use need not exclude existing use, and the District Court determined that higher density uses under the proposed PUD would have conflicted with the predominately rural and residential character of the surrounding properties. Under the second prong, the size of the area, it was shown that the Duck Creek parcel was owned by a single entity and that the rezoning would benefit only one landowner. Under the third prong, the District Court found that the Duck Creek parcel was extremely sensitive in its importance to wildlife and wildlife habitat, and the court gave that fact significant weight in evaluating the public welfare, convenience, and necessity. State and national wildlife agencies testified regarding the deleterious effects that a rezone would have on public lands and resources, including the negative impact on habitat for elk, moose, bison, and trout, as well as on grizzly bear habitat and migration. Thus, the District Court properly concluded that the PUD zoning request represented special legislation designed to benefit one landowner at the expense of surrounding landowners and the general public. The court did not err in holding, pursuant to Little, that the proposed Duck Creek parcel was illegal spot zoning. Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County, 2001 MT 99, 305 M 232, 25 P3d 168 (2001).

Consolidated City-County Government — Holdover Plan — No New Planning Board: A zoning ordinance enacted after city-county consolidation based upon a comprehensive plan (now growth policy) adopted by the old City-County Planning Board prior to consolidation was proper in that the new consolidated government had not by that time formed a Planning Board having the same jurisdictional area as the consolidated local government. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

Adherence to Master Plan (now Growth Policy): Local government units, when making zoning decisions, must at least substantially comply with the master plan (now growth policy). Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Master Plan (now Growth Policy) Required to Exercise Zoning Authority: Without a master plan (now growth policy) in effect and without a jurisdictional area defined pursuant to the adoption of a master plan (now growth policy), a county may exercise no zoning authority other than on a temporary interim emergency basis as provided in 76-2-206. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Part Attorney General's Opinions

Extraterritorial Extension of City Zoning Regulations: In the absence of applicable county zoning regulations, 76-2-310 authorizes a city of the first class that has adopted a master plan (now growth policy) to extend its zoning regulations extraterritorially within a 3-mile radius of its corporate limits without reference to county boundary lines. 43 A.G. Op. 22 (1989).

Authority of Self-Governing Local Government to Enforce Master Plan (now Growth Policy): A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan (now growth policy) prohibits divisions of land of such size. A local government that has adopted a master plan (now growth policy) to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan. 42 A.G. Op. 16 (1987).

Part Collateral References

83 Am. Jur. 2d Zoning and Planning §§17, 135 through 140, 146 through 159, 160.

76-1-601. Growth policy — contents.

Compiler's Comments

1999 Amendment: Chapter 582 in first sentence in (1) substituted "growth policy" for "master plan"; substituted language in (2) through (4) outlining required contents of growth policy for former language that read: "(1) careful and comprehensive surveys and studies of existing conditions and the probable future growth of the city and its environs or of the county;

(2) maps, plats, charts, and descriptive material presenting basic information, locations, extent, and character of any of the following:

(a) history, population, and physical site conditions;

(b) land use, including the height, area, bulk, location, and use of private and public structures and premises;

(c) population densities;

(d) community centers and neighborhood units;

(e) blighted and slum areas;

(f) streets and highways, including bridges, viaducts, subways, parkways, alleys, and other public ways and places;

(g) sewers, sanitation, and drainage, including handling, treatment, and disposal of excess drainage waters, sewage, garbage, refuse, and other wastes;

(h) flood control and prevention;

(i) public and private utilities, including water, light, heat, communication, and other services;

(j) transportation, including rail, bus, truck, air, and water transport and their terminal facilities;

(k) local mass transit, including motor and trolley bus; street, elevated, or underground railways; and taxicabs;

(l) parks and recreation, including parks, playgrounds, reservations, forests, wildlife refuges, and other public grounds, spaces, and facilities of a recreational nature;

(m) public buildings and institutions, including governmental administration and service buildings, hospitals, infirmaries, clinics, penal and correctional institutions, and other civic and social service buildings;

(n) education, including location and extent of schools, colleges, and universities;

(o) land utilization, including areas for manufacturing and industrial uses, concentration of wholesale business, retail business, and other commercial uses, residential uses, and areas for mixed uses;

(p) conservation of water, soil, agricultural, and mineral resources;

(q) any other factors which are a part of the physical, economic, or social situation within the city or county;

(3) reports, maps, charts, and recommendations setting forth plans for the development, redevelopment, improvement, extension, and revision of the subjects and physical situations of the city or county set out in subsection (2) so as to substantially accomplish the object of this chapter as set out in 76-1-101 and 76-1-102;

(4) a long-range development program of public works projects, based on the recommended plans of the planning board, for the purpose of eliminating unplanned, unsightly, untimely, and extravagant projects and with a view to stabilizing industry and employment and the keeping of such program up-to-date for all separate taxing units within the city or county, respectively, for the purpose of assuring efficient and economic use of public funds;

(5) recommendations setting forth the development, improvement, and extension of areas, if any, to be set aside for use as trailer courts and sites for mobile homes"; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 36, Ch. 582, L. 1999, provided that the requirements for a growth policy in 76-1-601 apply to the adoption of zoning regulations pursuant to Title 76, chapter 2, part 2 or 3, after October 1, 2001.

Case Notes

Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper: It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the

LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals: Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Attorney General's Opinions

Plan Mandatory — Adherence to Plan: This section's provision that "the planning board shall prepare and propose a master plan [now growth policy]" is mandatory. The governmental unit need not strictly adhere to the plan but must substantially adhere to it, amending the plan when the governing unit wishes to change it. 39 A.G. Op. 75 (1982).

76-1-602. Public hearing on proposed growth policy.

Compiler's Comments

1999 Amendment: Chapter 582 in two places in (1) substituted "growth policy" for "master plan" or "plan". Amendment effective October 1, 1999.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Case Notes

Constitutionality: The former provision in this section "that additional powers be granted legislative bodies of cities and counties" was invalid, insofar as it applied to counties, as an unconstitutional attempt to delegate legislative powers to counties in violation of Art. IV, sec. 1, 1889 Mont. Const. (now Art. III, sec. 1, Mont. Const.). Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961).

76-1-603. Adoption of growth policy by planning board.

Compiler's Comments

1999 Amendment: Chapter 582 after "proposed" substituted "growth policy" for "master plan". Amendment effective October 1, 1999.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

76-1-604. Adoption, revision, or rejection of growth policy.

Compiler's Comments

1999 Amendment: Chapter 582 throughout section substituted "growth policy" for "master plan" or "plan"; and made minor changes in style. Amendment effective October 1, 1999.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1995 Amendment: Chapter 387 in (2) inserted second sentence requiring a special election to be held in conjunction with a regular or primary election; and made minor changes in style.

1981 Amendment: Substituted "The governing bodies shall adopt a resolution of intention to adopt" for "The governing bodies shall adopt" at the beginning of (1); and added (2) through (4) granting governing bodies authority to adopt, revise, or repeal plan and discretion to submit plan to qualified electorate for adoption at primary, general, or special election or for adoption, revision, or repeal by initiative or referendum.

Attorney General's Opinions

Plan Mandatory — Adherence to Plan: Provision of 76-1-601 that "the planning board shall prepare and propose a master plan [now growth policy]" is mandatory. The governmental unit need not strictly adhere to the plan but must substantially adhere to it, amending the plan when the governing unit wishes to change it. 39 A.G. Op. 75 (1982).

76-1-605. Use of adopted growth policy.

Compiler's Comments

2001 Amendment: Chapter 527 deleted former (3) that read: "(3) adoption of subdivision controls"; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 527, L. 2001, provided: "WHEREAS, section 76-1-606, MCA, allows local governments to require subdivision plats to conform to the provisions of adopted growth policies; and

WHEREAS, section 76-3-604, MCA, has been interpreted to allow local governments to deny or condition the approval of subdivision plats based on the growth policy; and

WHEREAS, many adopted growth policies contain ambiguous and subjective provisions that cannot be applied to subdivisions in an objective manner; and

WHEREAS, it is inconsistent with accepted precepts of planning to authorize a local government to enforce a growth policy without properly adopted land use controls; and

WHEREAS, the Legislature intends to clarify that growth policies should be implemented through the proper adoption of land use controls; and

WHEREAS, a statutory procedure is in place that allows local governments to implement growth policies through properly adopted land use controls; and

WHEREAS, this land use control adoption procedure incorporates the due process and other constitutional protections that are not included under section 76-1-606, MCA."

Transition — Applicability: Section 5, Ch. 527, L. 2001, provided: "[This act] applies to jurisdictions that adopted a growth policy pursuant to Title 76, chapter 1, before October 1, 2001, beginning October 1, 2002."

1999 Amendment: Chapter 582 in two places in introduction substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Case Notes

Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper: It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals: Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Adherence to Master Plan (now Growth Policy): Local government units, when making zoning decisions, must at least substantially comply with the master plan (now growth policy). Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Denial of Building Permit When Use Conflicts With Master Plan (now Growth Policy): City officials may refuse to process a building permit application when the proposed use is in conflict

with the master plan (now growth policy). Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Collateral References

Plan: requirement that zoning variances or exceptions be made in accordance with comprehensive plan. 40 ALR 3d 372.

76-1-606. Effect of growth policy on subdivision regulations.

Compiler's Comments

2001 Amendment: Chapter 527 in first sentence after "approved" substituted "the subdivision regulations adopted pursuant to chapter 3 of this title must be made in accordance with the growth policy" for "the city council may by ordinance or the board of county commissioners may by resolution require subdivision plats to conform to the provisions of the growth policy" and deleted former second sentence in former (1) and deleted former (2) through (6) that read: "Certified copies of the ordinance must be filed with the city or town clerk and with the county clerk and recorder of the county.

(2) When the city council has adopted an ordinance pursuant to subsection (1), a plat involving lands within the corporate limits of the city and covered by the growth policy may not be filed without first presenting it to the planning board, which shall make a report to the city council advising as to compliance or noncompliance of the plat with the growth policy. The city council has the final authority to approve the filing of a plat within the city limits.

(3) When the board of county commissioners has adopted a resolution pursuant to subsection (1), a plat involving lands outside the corporate limits of the city and covered by a growth policy may not be filed without first presenting it to the planning board, which shall make a report to the board of county commissioners advising as to compliance or noncompliance of the plat with the growth policy. The board of county commissioners has the final authority to approve the filing of the plat.

(4) The planning board may delegate to its staff its responsibility to report to the city council or the board of county commissioners under subsection (2) or (3).

(5) This section may not be interpreted to limit the present powers of city or county governments.

(6) The requirements of this section must be met before any plat may be filed of record or entitled to be recorded"; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 527, L. 2001, provided: "WHEREAS, section 76-1-606, MCA, allows local governments to require subdivision plats to conform to the provisions of adopted growth policies; and

WHEREAS, section 76-3-604, MCA, has been interpreted to allow local governments to deny or condition the approval of subdivision plats based on the growth policy; and

WHEREAS, many adopted growth policies contain ambiguous and subjective provisions that cannot be applied to subdivisions in an objective manner; and

WHEREAS, it is inconsistent with accepted precepts of planning to authorize a local government to enforce a growth policy without properly adopted land use controls; and

WHEREAS, the Legislature intends to clarify that growth policies should be implemented through the proper adoption of land use controls; and

WHEREAS, a statutory procedure is in place that allows local governments to implement growth policies through properly adopted land use controls; and

WHEREAS, this land use control adoption procedure incorporates the due process and other constitutional protections that are not included under section 76-1-606, MCA."

Transition — Applicability: Section 5, Ch. 527, L. 2001, provided: "[This act] applies to jurisdictions that adopted a growth policy pursuant to Title 76, chapter 1, before October 1, 2001, beginning October 1, 2002."

1999 Amendment: Chapter 582 throughout section substituted "growth policy" for "master plan"; inserted (4) allowing planning board to delegate reporting responsibility to staff; and made minor changes in style. Amendment effective October 1, 1999.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Case Notes

Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper: It was

improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals: Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Denial of Building Permit When Use Conflicts With Master Plan (now Growth Policy): City officials may refuse to process a building permit application when the proposed use is in conflict with the master plan (now growth poicy). Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Attorney General's Opinions

Size Parcel Prohibited by Master Plan (now Growth Policy) — Certificate Filing Required — Conditional Issuance of Permit: A local government unit with self-governing powers may not refuse to file a certificate of survey simply because the parcel encompasses less than 40 but equal to or greater than 20 acres, even if its master plan (now growth policy) prohibits divisions of land of such size. However, the local government may condition issuance of permits for construction, alteration, or enlargement of structures upon compliance with the master plan (now growth policy). 42 A.G. Op. 16 (1987).

CHAPTER 2
PLANNING AND ZONING

Chapter Compiler's Comments

Severability Clause: Section 21, Ch. 273, L. 1971, was a severability clause.

Chapter Case Notes

Existing Telecommunications Tower Not Inclusive of Tower Not Yet Built: Mesa Communications Group (Mesa) sought a permit from Yellowstone County to construct a telecommunications tower within the county's zoning jurisdiction. County regulations required that all commercial telecommunications towers over 50 feet high be located at least 1 mile from any other communications tower. Mesa's application was denied because a 100-foot tower had been built and a 300-foot tower had been approved but not yet built within 1 mile of the tower proposed by Mesa. The regulations provided for waiver of the 1-mile restriction by the Board of County Commissioners upon special review if an applicant established that an existing tower could not accommodate the applicant's proposed antenna. Mesa requested special review and presented evidence that the proposed antenna could not be accommodated on the existing 100-foot tower, but the application was nevertheless denied because Mesa's proposed tower was still within 1 mile of the approved but as yet unconstructed 300-foot tower. Mesa sought relief from application of the 1-mile restriction in District Court. The court granted summary judgment for Mesa, concluding that the restriction applied only to towers that had been constructed, but not to unconstructed towers approved for construction. The county appealed, but the Supreme Court affirmed. The term "existing tower" as used in the regulation was neither ambiguous nor imprecise and did not include a tower that was not yet built or even begun. Mesa Communications Group, LLC v. Yellowstone County, 2002 MT 73, 309 M 233, 45 P3d 37 (2002).

Zoning Amendment Considered Illegal Spot Zoning — Little Test: Duck Creek Properties (Duck Creek), a Florida general partnership, owned 323 acres of undeveloped land in the Hebgen Lake Zoning District. In order to increase development options and the value of the property, Duck Creek sought a zoning change from R-10, which allowed one single-family unit for each 10 acres, to planned unit development (PUD), which permitted more diverse uses at much higher density. The resolution approving the zoning amendment was ultimately approved by the Gallatin County Board of County Commissioners, but was then challenged by two nonprofit corporations. The District Court voided the resolution as illegal spot zoning, and the Board and Duck Creek appealed to the Supreme Court. All parties agreed that Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981), correctly stated the applicable law, and the Supreme Court examined all three prongs of the Little test, including whether: (1) the requested use is significantly different from the prevailing use in the area; (2) the area in which the requested use is to apply is small, although not solely in physical size, including how many separate landowners will benefit from the zone classifications; and (3) the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or the general public. Under the first prong, prevailing use need not exclude existing use, and the District Court determined that higher density uses under the proposed PUD would have conflicted with the predominately rural and residential character of the surrounding properties. Under the second prong, the size of the area, it was shown that the Duck Creek parcel was owned by a single entity and that the rezoning would benefit only one landowner. Under the third prong, the District Court found that the Duck Creek parcel was extremely sensitive in its importance to wildlife and wildlife habitat, and the court gave that fact significant weight in evaluating the public welfare, convenience, and necessity. State and national wildlife agencies testified regarding the deleterious effects that a rezone would have on public lands and resources, including the negative impact on habitat for elk, moose, bison, and trout, as well as on grizzly bear habitat and migration. Thus, the District Court properly concluded that the PUD zoning request represented special legislation designed to benefit one landowner at the expense of surrounding landowners and the general public. The court did not err in holding, pursuant to Little, that the proposed Duck Creek parcel was illegal spot zoning. Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County, 2001 MT 99, 305 M 232, 25 P3d 168 (2001).

Fuel Storage Tank as Part of Pipeline — Construction in Agricultural-Open Zone Permitted: After careful and conscientious review by the zoning coordinator and planning department, a building permit for a 35,000-barrel diesel fuel tank on property zoned agricultural-open space was properly granted. The tank could be considered part of a pipeline, which is a permitted use within such a zone. The Supreme Court found that contentions of error in interpreting the county zoning plan, which disallowed liquid fuel storage in a tank no matter how temporary or in what context in any agricultural-open zone, to be too narrow and rigid. The court held that since zoning laws and ordinances are in derogation of the common-law right to free use of private property, such ordinances must be strictly construed and must be given a fair and reasonable interpretation, by the officials assigned to interpret and apply the zoning laws, with some regard to the proposed use. Whistler v. Burlington N. RR Co., 228 M 150, 741 P2d 422, 44 St. Rep. 1415 (1987). The presumption of reasonableness of adopted regulations was applied in McElwain v. Flathead County, 248 M 231, 811 P2d 1267, 48 St. Rep. 410 (1991).

Spot Zoning Defined: There is no single, comprehensive definition of spot zoning applicable to all fact situations. Generally, however, three factors enter into determining whether spot zoning exists in any given instance: (1) the requested use is significantly different from the prevailing use in the area; (2) the area in which the requested use is to apply is rather small; and (3) the requested change is more in the nature of special legislation. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981), followed in Boland v. Great Falls, 275 M 128, 910 P2d 890, 53 St. Rep. 69 (1996), and Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County, 2001 MT 99, 305 M 232, 25 P3d 168 (2001).

Constitutionality: Zoning ordinances and statutes authorizing them are constitutional under both the Due Process Clause and the Equal Protection Clause, in that they constitute a valid exercise of the police power; i.e., they have a substantial bearing upon the public health, safety, morals, and general welfare of a community. Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934).

Chapter Attorney General's Opinions

Revenue Department Not Zoning Authority — Designation of Property for Assessment Purposes Only: The Department of Revenue is not a bona fide zoning authority that may designate an area as commercial for outdoor advertising purposes. A property designation made by the Department

applies to tax assessment classifications only and may not be extended to zoning restrictions. 42 A.G. Op. 43 (1987).

Chapter Law Review Articles

Landowner Liability in Montana, Nelson, 47 Mont. L. Rev. 109 (1986).

The Definition of "Family" in Single-Family Zoning, Newman, 42 Mont. L. Rev. 165 (1981).

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Land Use Planning and the Public: Zoning by Initiative, Davis, 36 Mont. L. Rev. 301 (1975).

Land Use Planning and the Montana Legislature: An Overview for 1973, Lundberg, 35 Mont. L. Rev. 38 (1974).

Restrictive Covenants and Land Use Control: Private Zoning, Lundberg, 34 Mont. L. Rev. 199 (1973).

County Zoning in Montana: A New Look at an Old Problem, Lundberg, 33 Mont. L. Rev. 52 (1972).

Constitutional Problems of City-County Planning in Montana, Keefer, 25 Mont. L. Rev. 196 (1964).

City-County Planning in Montana, Keefer, 25 Mont. L. Rev. 185 (1964).

Privatizing the Neighborhood: A Proposal to Replace Zoning With Private Collective Property Rights to Existing Neighborhoods, Nelson, 7 Geo. Mason L. Rev. 827 (1999).

Privatizing Urban Land Use Regulations: The Problem of Consent, Eagle, 7 Geo. Mason L. Rev. 905 (1999).

The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause, Shoemake, 48 Duke L. J. 891 (1999).

The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes, Wickersham, 18 Harv. Envtl. L. Rev. 489 (1994).

Exclusionary Zoning and Growth Controls: A Comment on the APA's Endorsement of the Mount Laurel Doctrine, Fischel, 40 Wash. U.J. Urb. & Contemp. L. 65 (1991).

Interaction: Property Lawyer, Zoning Lawyer (Real Estate & Title Trends), Kowaloff, 205 N.Y.L.J. 35 (1991).

Recent Developments in Land Use Law, Kramer, Inst. on Plan. Zoning & Eminent Domain 1-1(70) (1991).

Regulatory Takings: A State and Federal Perspective, Morgan, Inst. on Plan. Zoning & Eminent Domain 6-1(28) (1991).

The Modernization of Zoning: Enabling Act Revision as a Means to Reform, Liebmann, 23 Urb. Law. 1 (1991).

Recent Developments in Land Use, Planning and Zoning Law, Roddewig, 22 Urb. Law. 719 (1990).

Municipal Approval of Innovative Land Use Proposals: Practical Advice for the Municipal Attorney, Wolfe & Henderson, 12 Zoning & Plan. L. Rep. 137 (1989).

Politics, Administration, and Local Land-Use Regulation: Analyzing Zoning as a Policy Process, Fleischmann, 49 Pub. Ad. Rev. 337 (1989).

Overlay Zoning, Performance Standards, and Environmental Protection After Nollan, Blackwell, 16 B.C. Envtl. Aff. L. Rev. 615 (1989).

Shelters for the Homeless and Zoning Use Restrictions, Bockian, 74 Mass. L. Rev. 75(8) (1989).

Recent Developments in Community Growth Control: Site Plan Review and Access Adequacy Regulations, Bobrowski, 73 Mass. L. Rev. 36(11) (1988).

Recent Developments in Environmental Preservation and the Rights of Property Owners, Bozung & Alessi, 20 Urb. Law. 969 (1988).

Aesthetic Regulation: A New General Rule, Pace, 90 W. Va. L. Rev. 581 (1987).

Antitrust Implications of Municipal Land Use Planning, Mather, 33 Wayne L. Rev. 965 (1987).

Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals, Wegner, 65 N.C.L. Rev. 957 (1987).

Playing the Numbers: Local Government Authority to Apply Use Quotas in Neighborhood Commercial Districts, McElyea, 14 Ecology L.Q. 325 (1987).

The Due Process Issue in Zoning for Historic Preservation, Netherton, 19 Urb. Law. 77 (1987).

The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing, Reynolds, 71 Minn. L. Rev. 611 (1987).

Local Control of Hazardous Wastes Through Land Use Regulation, Schwenke & Lockett, 21 Real Prop. Prob. & Tr. J. 603 (1986).

Participation and Rules—The Functions of Zoning, Steele, 1986 A.B.F. Res. J. 709 (1986).

Environmentally Based Land Use Planning and Regulation, Palmer, 2 Pace Envtl. L. Rev. 25 (1984).

Land Use Controls: Public Use and Private Beneficiaries, Burch, Bozung, Miller, & Hill, 16 Urb. Law. 713 (1984).

Local Land Use Controls: An Idea Whose Time Has Passed, Delogu, 36 Me. L. Rev. 261 (1984).

New Models for Local Land Use Decisions, Rose, 79 Nw. U.L. Rev. 1155 (1984).

Mobile Homes, Public and Private Controls, Schwartz, 29 Wayne L. Rev. 177 (1982).

Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, McFarlane, 57 Wash. L. Rev. 715 (1982).

The Availability of 42 U.S.C. §1983 in Challenges of Land Use Planning Regulations: A Developer's Dream Come True?, Thompson, 1982 Utah L. Rev. 571.

Freedom of Speech (The Supreme Court, 1980 term), 95 Harv. L. Rev. 211 (1981).

Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion, Cunningham, 76 NW. U. L. Rev. 786 (1981).

Environmental Performance Zoning: An Emerging Trend?, Fredland, 12 Urb. Law. 678 (1980).

Chapter Collateral References

2 Am. Jur. POF2d Change of Use: Material Change in Purpose for Which Building Is Used, pp. 753 through 790; 8 Am. Jur. POF2d Unreasonableness of Zoning Restriction, pp. 53 through 100.

Keeping of domestic animal as constituting public or private nuisance. 90 ALR 5th 619.

Determination whether zoning or rezoning of particular parcel constitutes illegal spot zoning. 73 ALR 5th 223.

Construction and application of terms "agricultural", "farm", "farming", or the like, in zoning regulations. 38 ALR 5th 357.

Validity and construction of zoning regulations relating to illuminated signs. 30 ALR 5th 549.

Zoning authority as estopped from revoking legally issued building permit. 26 ALR 5th 736.

Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses. 10 ALR 5th 538.

Validity of provisions for amortization of nonconforming uses. 8 ALR 5th 391.

Construction and application of zoning laws setting minimum lot size requirements. 2 ALR 5th 553.

Validity of statutes requiring the construction of fences—modern cases. 87 ALR 4th 1129.

Validity and construction of zoning laws setting minimum requirements for floor space or cubic footage inside residence. 87 ALR 4th 294.

Validity, construction, and application of state hazardous waste regulations. 86 ALR 4th 401.

Provision in lease as to purpose for which premises are to be used as excluding other uses. 86 ALR 4th 259.

Validity and construction of state statutes requiring construction of handicapped access facilities in buildings open to public. 82 ALR 4th 121.

Scope of prescriptive easement for access (easement of way). 79 ALR 4th 604.

Laches as defense in suit by governmental entity to enjoin zoning violation. 73 ALR 4th 870.

Zoning: residential off-street parking requirements. 71 ALR 4th 529.

Zoning: construction and effect of statute requiring that zoning application be treated as approved if not acted on within specified period of time. 66 ALR 4th 1012.

Alteration, extension, reconstruction, or repair of nonconforming structure or structure devoted to nonconforming use as violation of zoning ordinance. 63 ALR 4th 275.

Change in type of activity of nonconforming use as violation of zoning ordinance. 61 ALR 4th 902.

Change in volume, intensity, or means of performing nonconforming use as violation of zoning ordinance. 61 ALR 4th 806.

Addition of another activity to existing nonconforming use as violation of zoning ordinance. 61 ALR 4th 724.

Zoning: what constitutes "incidental" or "accessory" use of property zoned, and primarily used, for business or commercial purposes. 60 ALR 4th 907.

Change in area or location of nonconforming use as violation of zoning ordinance. 56 ALR 4th 769.

Zoning: what constitutes "incidental" or "accessory" use of property zoned, and primarily used, for residential purposes. 54 ALR 4th 1034.

Beachfront: validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents. 18 ALR 4th 568.

Discrimination: enforcement of zoning regulation as affected by other violations. 4 ALR 4th 462.

Public facilities: validity of municipality's ban on construction until public facilities comply with specific standards. 92 ALR 3d 1073.

Floating zones: zoning regulations creating and placing "floating zones". 80 ALR 3d 95.

Special restrictions: validity, construction, and effect of agreement to rezone, or amendment to zoning ordinance, creating special restrictions or conditions not applicable to other property similarly zoned. 70 ALR 3d 125.

Adjoining landowner: standing of owner of property adjacent to zoned property, but not within territory of zoning authority, to attack zoning. 69 ALR 3d 805.

Mandamus to compel zoning officials to cancel permit granted in violation of zoning regulation. 68 ALR 3d 166.

Retroactive effect—application: retroactive effect of zoning regulation in absence of saving clause, on pending application for building permit. 50 ALR 3d 596.

Saving provisions: zoning provisions protecting landowners who applied for or received building permit prior to change in zoning. 49 ALR 3d 1150.

Retroactive effect—building permit: retroactive effect of zoning regulation, in absence of saving clause, on validly issued building permit. 49 ALR 3d 13.

Exclusionary zoning. 48 ALR 3d 1210.

Planned-unit, cluster, or greenbelt zoning. 43 ALR 3d 888.

Zoning or other public restrictions on the use of property as affecting rights and remedies of parties to contract for the sale thereof. 39 ALR 3d 362.

Interim zoning: validity and effect of "interim" zoning ordinance. 30 ALR 3d 1196.

Aesthetic objectives or considerations as affecting validity of zoning ordinance. 21 ALR 3d 1222.

Pre-existing condition: purchaser of real property as precluded from attacking validity of zoning regulations existing at the time of the purchase and affecting the purchased property. 17 ALR 3d 743.

Lease: construction and effect of clause making lease contingent or conditional upon the lessee obtaining a use permit from public building or zoning authorities. 90 ALR 2d 1031.

Sale of property: effect of provision in real-estate option or land sale contract making the contract subject to zoning or rezoning of the property. 76 ALR 2d 1195.

Injuries or death, violation of zoning ordinance or regulation as affecting or creating liability for. 31 ALR 2d 1469.

Civil rights: right of real property owner to relief under Federal Civil Rights Acts against amendment of zoning ordinance increasing minimum lot requirements. 25 ALR Fed. 850.

Part 1
County Planning and Zoning Commission

Part Administrative Rules

ARM 36.15.204 Local flood plain regulations — requirements.

Part Case Notes

County Adoption of Local Vicinity Plan Not Creation of Zoning District: The Jefferson County Board of Commissioners adopted a comprehensive master plan (now growth policy) regarding development in the county, and over a period of years following the adoption, a group of residents developed a local vicinity plan (LVP) that included proposed zoning regulations for a specific area of the county. The LVP also set goals for air and water quality, location standards for the placement of facilities dealing with hazardous waste, and guides for future development in the local vicinity consistent with the master plan (now growth policy). Although the County Commissioners stated that they adopted the LVP as an amendment to the master plan (now growth policy), the LVP was given precedence over the master plan (now growth policy) in cases of conflict between provisions in the plans. When a cement company in the local vicinity challenged the validity of the LVP, the District Court granted summary judgment for the county. On appeal, the Supreme Court reversed, holding that the LVP did not meet the statutory criteria for a zoning district and thus could not form the foundation for adoption of zoning regulations. Because the LVP related to planning, not to zoning, the county did not unlawfully establish the boundaries of a zoning district through adoption of the LVP. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Substantial Compliance as Standard of Whether Procedural Requirements Met: The proper issue facing a District Court's interpretation of zoning district statutes is whether a Board of County Commissioners substantially complied with the procedural steps for creating zoning districts. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions: In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they were inconsistent with governing statutory standards. Appellants further claimed that the districts were defective on constitutional grounds because the zoning decisions had not been based on rational criteria and were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Planning and Zoning Districts Not Spot Zoning: Plaintiffs contended the county engaged in spot zoning when it established planning and zoning districts under this part. The Supreme Court said that in accepting the legality of procedures under this part, they were bound to accept the reasonable consequences of that decision. One consequence is that parcels of 40 acres or more are entitled to be designated as planning and zoning districts under 76-2-101 without being considered spot zoning. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

When Comprehensive Plan (now Growth Policy) Not Necessary: A countywide comprehensive plan (now growth policy) is not necessary prior to adoption of a county planning and zoning district, and further, in making and adopting a development district it is not necessary that there be created a countywide development pattern. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963), explained in Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Constitutionality: This part does not contravene Art. IV, sec. 1, 1889 Mont. Const. (now Art. III, sec. 1, Mont. Const.), as an unlawful delegation of power, since sufficient guidelines are set out. Missoula v. Missoula County, 139 M 256, 362 P2d 539 (1961), explained in Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961), followed in Doull v. Wohlschlager, 139 M 274, 363 P2d 542 (1961), followed in Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Part Attorney General's Opinions

Addition or Withdrawal of Freeholder's Name Following Certification of Petition to Board of County Commissioners for Review: In determining how long a freeholder may add or withdraw the freeholder's name from a zoning petition under this part, "final action" occurs when the County Clerk certifies the petition to the Board of County Commissioners for review. The practice of extending until a date certain the time in which signatures may be added or withdrawn, although not to be encouraged, is harmless as long as the date certain is public knowledge and precedes the Commission's decision to create the district, assuming that the boundaries remain the same and that, as of the date certain, the signatures of 60% of freeholders within the proposed district remain on the petition. 48 A.G. Op. 5 (1999).

Advisory Role of County Planning Board in Development Process: When a planning and zoning district is created in a county that has adopted a comprehensive master plan (now growth policy), the district's development pattern, which must substantially adhere to the master plan (now growth policy), is determined by the planning and zoning commission, subject to approval by the Board of County Commissioners. A county planning board has no statutory authority over a planning and zoning district created within the planning board's jursidictional area. However, nothing precludes the planning and zoning commission or the Board of County Commissioners

from requesting input from the county planning board during the process of determining and approving the development pattern. 48 A.G. Op. 5 (1999).

Law Applicable to County Adoption of Planning and Zoning District: A county that has adopted a comprehensive master plan (now growth policy) is not limited to zoning pursuant to Title 76, ch. 2, part 2, but may also create planning and zoning districts under this part. The planning and zoning vehicles in part 2 and this part are separate and distinct; however, this part constitutes the mechanism by which freeholders may initiate zoning changes and is a process that is available to freeholders whether or not their county has adopted a comprehensive master plan (now growth policy). 48 A.G. Op. 5 (1999).

No Power of Planning and Zoning Commission to Alter District Boundaries: A planning and zoning commission is empowered to create a development pattern for a planning and zoning district. However, a planning and zoning commission may not unilaterally alter planning and zoning district boundaries to include land not referenced in the petition. The boundaries are proposed by the petitioners and set by the Board of County Commissioners when it accepts the petition creating the district. 48 A.G. Op. 5 (1999).

Function of Planning and Zoning Commission: A petition for a county planning and zoning district need not include zoning regulations that the petitioners desire for the district. The county planning and zoning commission has the exclusive duty to make and adopt a development pattern for the district. 28 A.G. Op. 1 (1959).

Part Law Review Articles

Agricultural Exemptions Under Planning and Zoning Act, Wilson, 24 Mont. L. Rev. 187 (1963).

Restrictive Zoning of Mobile Homes: The Mobile Home Is Still More "Mobile" Than "Home" Under the Law, Berry, 21 Idaho L. Rev. 141 (1985).

Mobile Homes, Public and Private Controls, Schwartz, 29 Wayne L. Rev. 177 (1982).

Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, McFarlane, 57 Wash. L. Rev. 715 (1982).

The Availability of 42 U.S.C. §1983 in Challenges of Land Use Planning Regulations: A Developer's Dream Come True?, Thompson, 1982 Utah L. Rev. 571.

Freedom of Speech (The Supreme Court, 1980 term), 95 Harv. L. Rev. 211 (1981).

Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion, Cunningham, 76 Nw. U. L. Rev. 786 (1981).

Agricultural Districts and Zoning: A State-Local Approach, Geier, 8 Ecology L.Q. 655 (1980).

Part Collateral References

Our Montana Environment...Where Do We Stand?, Environmental Quality Council, 1996.

Annexation Laws, Legislative Council, 1980.

Montana's Greenbelt Law, Legislative Council, 1980.

Montana's Subdivision Laws: Problems and Prospects, Legislative Council, 1978.

Preservation of Agricultural Lands: Alternative Approaches, Legislative Council, 1976.

76-2-101. Planning and zoning commission and district.

Compiler's Comments

2001 Amendment: Chapter 288 in (1) near end increased membership of a planning and zoning commission from five to seven members; and made minor changes in style. Amendment effective October 1, 2001.

Transition: Section 5, Ch. 288, L. 2001, provided: "On or before October 1, 2002, the county board of commissioners shall appoint new members to the planning and zoning commission, as provided in [sections 1 and 2] [76-2-101 and 76-2-102], for each planning and zoning district that exists as of [the effective date of this act]." Effective October 1, 2001.

1995 Amendment: Chapter 591 in (1), at beginning, inserted "Subject to the provisions of subsection (5)"; in (4), at beginning, inserted exception clause, near middle, after "commenced", deleted "by October 1, 1994, or", and at end deleted "if the district was created after October 1, 1989"; and inserted (5) concerning protest by freeholders.

Case Notes

Countywide Zoning Statutes Inapplicable to Rural Zoning District Statutes: Appellant contended that 76-2-201 required establishment of an actual jurisdictional area prior to adoption of a zoning district pursuant to this section. The Supreme Court held that procedural requirements for zoning jurisdictional areas under the countywide zoning statutes had no application to the requirements for the creation of zoning districts under the rural zoning laws. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

Motion to Create District Sufficient to Satisfy Requirement That Zoning Commission Be Appointed: A motion by the Board of County Commissioners creating a zoning district and stating that a "meeting of the Zoning Commission will be called to determine a development pattern for this area" was sufficient to satisfy the requirement that the Board appoint a zoning commission at the time the district is created. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions: In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they were inconsistent with governing statutory standards. Appellants further claimed that the districts were defective on constitutional grounds because the zoning decisions had not been based on rational criteria and were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Planning and Zoning Districts Not Spot Zoning: Plaintiffs contended the county engaged in spot zoning when it established planning and zoning districts under this part. The Supreme Court said that in accepting the legality of procedures under this part, they were bound to accept the reasonable consequences of that decision. One consequence is that parcels of 40 acres or more are entitled to be designated as planning and zoning districts under this section without being considered spot zoning. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Adoption of Comprehensive Development Plan (now Growth Policy) as Prerequisite to Zoning Authority: The clear and unambiguous language of 76-2-201 requires that a county adopt a comprehensive development plan (now growth policy) for an entire jurisdictional area. Only after the adoption of such a plan may a county adopt zoning regulations. Allen v. Flathead County, 184 M 58, 601 P2d 399, 36 St. Rep. 1839 (1979).

Petition for Establishment: A Board of County Commissioners does not have the power to create a planning and zoning district and to make a survey in portions of the county in the absence of a petition by 60% of the freeholders. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

Size of District:

A district under this section need not comprise an area of 40 acres, none of which are used for grazing, horticulture, agriculture, or the growing of timber. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

This section contemplated districts which would be less than an entire county. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

Survey: A countywide survey is unnecessary for the establishment of a planning and zoning district unless authorized by the requisite petition under this section. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).) See also Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Constitutionality: Title 76, ch. 2, part 1 does not contravene Art. IV, sec. 1, 1889 Mont. Const. (now Art. III, sec. 1, 1972 Mont. Const.), as an unlawful delegation of power, since sufficient guidelines are set out. Missoula v. Missoula County, 139 M 256, 362 P2d 539 (1961), explained in Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961), followed in Doull v. Wohlschlager, 139 M 274, 362 P2d 542 (1961), followed in Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Attorney General's Opinions

Addition or Withdrawal of Freeholder's Name Following Certification of Petition to Board of County Commissioners for Review: In determining how long a freeholder may add or withdraw the

freeholder's name from a zoning petition under Title 76, ch. 2, part 1, "final action" occurs when the County Clerk certifies the petition to the Board of County Commissioners for review. The practice of extending until a date certain the time in which signatures may be added or withdrawn, although not to be encouraged, is harmless as long as the date certain is public knowledge and precedes the Commission's decision to create the district, assuming that the boundaries remain the same and that, as of the date certain, the signatures of 60% of freeholders within the proposed district remain on the petition. 48 A.G. Op. 5 (1999).

Acreage Requirements: This section requires that acreage in a zoning district be one contiguous 40-acre parcel. 42 A.G. Op. 43 (1987).

Zoning Study Proper Function of Planning and Zoning Commission: Studies necessary to the establishment of zoning districts may be undertaken by a planning and zoning commission established under 76-2-101, but not by the Board of County Commissioners. 26 A.G. Op. 65 (1956).

Collateral References

Counties *key* 21 ½; Zoning and Planning *key* 21 through 150.

20 C.J.S. Counties §39; 101A C.J.S. Zoning and Land Planning §§1 through 153.

83 Am. Jur. 2d Zoning and Planning §§23, 164 through 174.

Regulation and licensing of privately owned parking places. 29 ALR 2d 856.

76-2-102. Organization and operation of commission.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 288 in (1) near middle of first sentence after "surveyor" inserted "two citizen members, each of whom resides in a different planning and zoning district" and inserted second sentence regarding appointment and terms of citizen members; in (3) near middle after "expenses of the" substituted "commission's members" for "members of the board"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 574 in (3) near end after "levy" substituted "on the taxable value of all taxable property" for "of not to exceed 1 mill on the taxable valuation of the real property". Amendment effective July 1, 2001.

Transition: Section 5, Ch. 288, L. 2001, provided: "On or before October 1, 2002, the county board of commissioners shall appoint new members to the planning and zoning commission, as provided in [sections 1 and 2] [76-2-101 and 76-2-102], for each planning and zoning district that exists as of [the effective date of this act]." Effective October 1, 2001.

1999 Amendment: Chapter 584 at beginning of (3) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Special Session Amendment: Chapter 27 in (1), in first sentence, substituted "a county official appointed by the county commissioners" for "the county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Attorney General's Opinions

Proper Use of One-Mill Levy: A city-county zoning district may not receive funding from the 1-mill levy provision of subsection (3) of this section. 33 A.G. Op. 34 (1970).

76-2-103. Powers of commission and employees.

Attorney General's Opinions

Zoning Rules Not Enforceable by Criminal Proceeding: The county planning and zoning commission does not have the authority to enforce its rules and regulations by criminal proceedings. 30 A.G. Op. 19 (1963).

Collateral References

101A C.J.S. Zoning and Land Planning §§7 through 11.

83 Am. Jur. 2d Zoning and Planning §§28 through 33.

76-2-104. Development pattern.

Case Notes

Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper: It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals: Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Multiple Uses Not Required: The reference in the plural to a development pattern for "districts" in subsection (2) of this section does not mandate that each district, which may be as small as 40 acres, be fractionalized into several smaller districts with different regulations for each fraction. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

Single Land Use Classification and Notice of Legal Description — Statutory Requirement for Descriptive Matter Substantially Met: A development pattern recommended a single land use classification, and the notice of the public hearing held prior to the zoning commission's recommendation on the development pattern contained a legal description of the district. Under these circumstances, the statutory requirement for reference to maps, charts, and descriptive matters was substantially met. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions: In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they had not been based on rational criteria and were defective on constitutional grounds because the zoning decisions were either inconsistent with governing statutory standards or were clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Unreasonable and Discriminatory: Zoning of plaintiff's vacant lot and commercial building as part of a residential zone was unreasonable and discriminatory since the residential zone was contiguous with a commercial zone, contained only one residence surrounded by commercial properties, and the Board of County Commissioners gave no reason for failing to include the property in the commercial zone. Alden v. Bd. of Zoning Comm'rs, 165 M 364, 528 P2d 1320 (1974).

Construction: Since the Legislature used the word "district" in the plural in the second sentence of this section and in the singular in the first sentence, it must be assumed that the

Legislature knew the difference and intended the use of the singular when so used. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963). See also 1-2-105.)

Countywide Survey: It is unnecessary to make a countywide survey unless so authorized by the requisite petition under 76-2-101. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

Maps and Plats: The need for maps and plats under this section would only seem to exist when the Planning and Zoning Commission has divided the district into separate areas within which it is permissible and other areas within which it is not permissible to erect and maintain certain types of "industries, trades, or callings". Such a provision is intended to provide notice where the regulations may vary from block to block and lot to lot. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

Residential Units: The Planning and Zoning Commission has complied with the provisions of this section requiring it "to make and adopt a development pattern for the physical and economic development of the planning and zoning district" when it provides for residential expansion and the protection of economic values by restricting the development to residential units. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

Attorney General's Opinions

No Power of Planning and Zoning Commission to Alter District Boundaries: A planning and zoning commission is empowered to create a development pattern for a planning and zoning district. However, a planning and zoning commission may not unilaterally alter planning and zoning district boundaries to include land not referenced in the petition. The boundaries are proposed by the petitioners and set by the Board of County Commissioners when it accepts the petition creating the district. 48 A.G. Op. 5 (1999).

Function of Planning and Zoning Commission: A petition for a county planning and zoning district need not include zoning regulations that the petitioners desire for the district. The county planning and zoning commission has the exclusive duty to make and adopt a development pattern for the district. 28 A.G. Op. 1 (1959).

76-2-105. Continuation of prior nonconforming uses.

Case Notes

Unreasonable and Discriminatory Zoning: Zoning of plaintiff's vacant lot and commercial building as part of a residential zone was unreasonable and discriminatory under zoning plan that did not permit the continuance of nonconforming uses. Alden v. Bd. of Zoning Comm'rs, 165 M 364, 528 P2d 1320 (1974).

Collateral References

Zoning and Planning *key* 321 through 350.

101A C.J.S. Zoning and Land Planning §§154 through 176, 203.

83 Am. Jur. 2d Zoning and Planning §§624 through 967.

Activities in preparation for building as establishing valid nonconforming use or vested right to engage in construction for intended use. 38 ALR 5th 737.

Validity of provisions for amortization of nonconforming uses. 8 ALR 5th 391.

Alteration, extension, reconstruction, or repair of nonconforming structure or structure devoted to nonconforming use as violation of zoning ordinance. 63 ALR 4th 275.

Change in type of activity of nonconforming use as violation of zoning ordinance. 61 ALR 4th 902.

Change in volume, intensity, or means of performing nonconforming use as violation of zoning ordinance. 61 ALR 4th 806.

Addition of another activity to existing nonconforming use as violation of zoning ordinance. 61 ALR 4th 724.

Change in area or location of nonconforming use as violation of zoning ordinance. 56 ALR 4th 769.

Zoning: what constitutes "incidental" or "accessory" use of property zoned, and primarily used, for residential purposes. 54 ALR 4th 1034.

Zoning: occupation of less than all dwelling units as discontinuance or abandonment of multifamily dwelling nonconforming use. 40 ALR 4th 1012.

New building or structure: construction of new building or structure on premises devoted to nonconforming use as violation of zoning ordinance. 10 ALR 4th 1122.

Intended use: building in course of construction as establishing valid nonconforming use or vested right to complete construction for intended use. 89 ALR 3d 1051.

Government-owned property: applicability of zoning regulation to nongovernmental lessee of government-owned property. 84 ALR 3d 1187.

Advertising structures: classification and maintenance of advertising structures as nonconforming use. 80 ALR 3d 630.

Repair: right to repair or reconstruct building operating as nonconforming use, after damage or destruction by fire or other casualty. 57 ALR 3d 419.

Zoning: right to resume nonconforming use of premises after voluntary or unexplained break in the continuity of nonconforming use. 57 ALR 3d 279.

Zoning: right to resume nonconforming use of premises after involuntary break in the continuity of nonconforming use caused by governmental activity. 56 ALR 3d 138.

Zoning: right to resume nonconforming use of premises after involuntary break in the continuity of nonconforming use caused by difficulties unrelated to governmental activity. 56 ALR 3d 14.

New application: zoning board's grant of new application for zoning change, variance, or special exception after denial of previous application covering same property or part thereof. 52 ALR 3d 494.

Pending application: retroactive effect of zoning regulation in absence of saving clause on pending application for building permit. 50 ALR 3d 596.

Saving provisions: zoning provisions protecting landowners who applied for or received building permit prior to change in zoning. 49 ALR 3d 1150.

Authority of zoning commission to impose, as condition of allowance of special zoning exception, permit, or variance, requirements as to highway and traffic changes. 49 ALR 3d 492.

Retroactive effect of zoning regulation, in absence of saving clause, on validly issued building permit. 49 ALR 3d 13.

Plan: requirement that zoning variances or exceptions be made in accordance with comprehensive plan. 40 ALR 3d 372.

Notice: construction and application of statute or ordinance requiring notice as prerequisite to granting variance or exception to zoning requirement. 38 ALR 3d 167.

Imposing restriction as to hours or days of operation of business as condition of allowance of special zoning exception or variance. 99 ALR 2d 227.

Who may apply for variance, special exception, or use permit. 89 ALR 2d 663.

Consent: validity of zoning ordinance or similar public regulation requiring consent of neighboring property owners to permit or sanction specified uses or construction of buildings. 21 ALR 2d 551.

Change in ownership of nonconforming business or use as affecting right to continuance thereof. 9 ALR 2d 1039.

76-2-106. Adoption of development district.

Case Notes

Application of Other Statutes: Section 76-2-203, requiring adherence to a comprehensive development plan (now growth policy) in adopting zoning regulations, does not apply to action taken by Planning and Zoning Commission under this section. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Variance and Nonconforming Use Distinguished: District Court decision limiting nonconforming use for mobile homes to six trailers and court order to remove trailers exceeding that number did not make the question of a variance res judicata, and landowners were entitled to a hearing on the merits on their petition for variance. Wheeler v. Armstrong, 159 M 392, 498 P2d 300 (1972).

Attorney General's Opinions

No Power of Planning and Zoning Commission to Alter District Boundaries: A planning and zoning commission is empowered to create a development pattern for a planning and zoning district. However, a planning and zoning commission may not unilaterally alter planning and zoning district boundaries to include land not referenced in the petition. The boundaries are proposed by the petitioners and set by the Board of County Commissioners when it accepts the petition creating the district. 48 A.G. Op. 5 (1999).

When Map or Narrative Legal Description Defines District Boundaries: When presented with the question of whether a narrative legal description contained in a zoning petition or an accompanying map that is inconsistent with the legal description defines the boundaries of a

proposed planning and zoning district, the Attorney General applied 70-20-201, which contains the rules for construing the description of real property being conveyed when construction is doubtful and no other sufficient method exists by which to determine the description. In this case, if signatures were obtained on the petition as a result of reference to the map, the map defines the district boundaries; however, if the map was created from the narrative legal description contained in the zoning petition, the narrative controls. The planning and zoning commission shall ascertain the exact facts through the public hearing process provided for in 76-2-101. 48 A.G. Op. 5 (1999).

Collateral References

Validity of conditions imposed by municipality to approval of subdivision map or plat. 11 ALR 2d 532.

76-2-107. Preparation of resolutions and other materials.

Collateral References

Applicability of zoning regulations to governmental projects or activities. 53 ALR 5th 1.

Zoning: what constitutes "incidental" or "accessory" use of property zoned, and primarily used, for residential purposes. 54 ALR 4th 1034.

Airport operations or flight of aircraft as constituting taking or damaging of property. 22 ALR 4th 863.

Zoning regulations limiting use of property near airport as taking of property. 18 ALR 4th 542.

Zoning regulations as applied to public elementary and high schools. 74 ALR 3d 136.

Zoning regulations as applied to private and parochial schools below the college level. 74 ALR 3d 14.

Zoning regulations as applied to colleges, universities, or similar institutions for higher education. 64 ALR 3d 1138.

What constitutes "school", "educational use", or the like within zoning ordinance. 64 ALR 3d 1087.

Zoning regulations as to shopping centers. 76 ALR 2d 1172.

Zoning regulations as affecting churches. 74 ALR 2d 377, §19 superseded by 62 ALR 3d 197.

Attack on validity of zoning ordinance on ground of improper delegation of authority to board or officer. 58 ALR 2d 1083.

Validity of zoning regulations with respect to uncertainty and indefiniteness of district boundary lines. 39 ALR 2d 766.

Violation of zoning ordinance and regulation as affecting or creating liability for injuries or death. 31 ALR 2d 1469.

76-2-108. Permits authorized.

Case Notes

Vested Interest Not Gained by Mere Submission of Beer and Wine Application — Retroactive Application of General Rule on Denial of Building Permit: Town Pump, Inc. (Town Pump), was required to obtain subdivision approval in order to complete a property conveyance for the building of a convenience store, gas station, and casino wherein beer and wine would be sold. After Town Pump had submitted an application for a beer and wine license, the property was rezoned as a commercial highway, and the city subsequently adopted a development code requiring a conditional use permit for the property in order for beer and wine to be sold on premises. Town Pump's application was denied based on the provisions of the new development code. Applying the rationale in Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996 (1986), and Wallace v. Dept. of Fish, Wildlife, and Parks, 269 M 364, 889 P2d 817 (1995), the Supreme Court held that Town Pump did not gain a vested interest in the beer and wine application merely because the application was submitted before the adoption of the development plan. The general rule is that the denial of an application for a building permit may be based on a zoning regulation enacted or becoming effective after the application was made; therefore, a zoning regulation may be retroactively applied to deny an application for a building permit, even though the permit could have been lawfully issued at the time of application. The court concluded that the development code was neither arbitrary nor unreasonable in its effects, that it did not impair or burden any vested interest or passed transaction held by Town Pump, and that retroactive application of the development code did not deny Town Pump's constitutional right to due process. Town Pump, Inc. v. Bd. of Adjustment of Red Lodge, 1998 MT 294, 292 M 6, 971 P2d 349, 55 St. Rep. 1205 (1998).

Fuel Storage Tank as Part of Pipeline — Construction in Agricultural-Open Zone Permitted: After careful and conscientious review by the zoning coordinator and planning department, a

building permit for a 35,000-barrel diesel fuel tank on property zoned agricultural-open space was properly granted. The tank could be considered part of a pipeline, which is a permitted use within such a zone. The Supreme Court found that contentions of error in interpreting the county zoning plan, which disallowed liquid fuel storage in a tank no matter how temporary or in what context in any agricultural-open zone, to be too narrow and rigid. The court held that since zoning laws and ordinances are in derogation of the common-law right to free use of private property, such ordinances must be strictly construed and must be given a fair and reasonable interpretation, by the officials assigned to interpret and apply the zoning laws, with some regard to the proposed use. Whistler v. Burlington N. RR Co., 228 M 150, 741 P2d 422, 44 St. Rep. 1415 (1987). The presumption of reasonableness of adopted regulations was applied in McElwain v. Flathead County, 248 M 231, 811 P2d 1267, 48 St. Rep. 410 (1991).

Collateral References

Zoning and Planning *key* 371 through 480.

76-2-109. Effect on natural resources.

Case Notes

Composition of District:

District Court was in error in holding that a planning and zoning district must comprise an area of 40 acres, none of which are used for grazing, horticulture, agriculture, or the growing of timber, since 76-2-101, defining a district, makes no such distinction. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

The word "used" in this section is a verb used in a noun phrase as a participial adjective rather than in the past tense of the verb form. When a verb is so used it indicates a present rather than a past meaning. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

Farmlands:

Lands used for grazing, horticulture, agriculture, or the growing of timber at the time of survey are not thereafter exempt from regulation. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

The Legislature intended under this section to preserve the identity of farmlands from the encroachment of expanding towns and cities but only so long as such lands are so employed. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

Attorney General's Opinions

Zoning of Patented Mining Claims: County Commissioners have the authority to zone land areas which include patented mining claims subject to the mandate that natural resources thereon be allowed to be used, developed, or recovered. 36 A.G. Op. 33 (1975).

76-2-110. Appeal procedure.

Case Notes

Planned Unit Development — Certiorari Inappropriate: Writ of certiorari was an inappropriate remedy for review of a zoning commission's approval of planned unit development because petitioner had an adequate appeal remedy under this section. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995).

Approval of Preliminary Plat Not Appealable: Kalispell argued that the issuing of a preliminary plat approval by the city-county planning board was illegal because it did not conform with the master zoning plan adopted by the city and county. The Supreme Court followed the precedent of its decision in Sourdough v. Bd. of County Comm'rs, 253 M 325, 833 P2d 207 (1992), holding that there is no statutory appeal process from the approval of a preliminary plat. Kalispell v. Flathead County, 260 M 258, 859 P2d 458, 50 St. Rep. 1033 (1993).

Dismissal of Appeal of Preliminary Subdivision Plat Approval Upheld: The Sourdough Protective Association petitioned the District Court for a writ of mandamus and moved to stay the Board of County Commissioners from further proceedings concerning a subdivision project for which it had granted preliminary approval. The Supreme Court held that the association had no basis to support its petition because the Board was not subject to the Montana Administrative Procedure Act and the Legislature had not created an appeal process for cases involving conditional approval of preliminary plats. Sourdough Protective Ass'n, Inc. v. Bd. of County Comm'rs of Gallatin County, 253 M 325, 833 P2d 207, 49 St. Rep. 563 (1992).

Timeliness of Appeal of Planning and Zoning District — When Properly Raised: County Commissioners adopted a planning and zoning district, and a complaint was filed in response seeking declaratory judgment, but filing was not made within the 30-day time limit of this section. This section was not raised as an affirmative defense by the landowner, intervenors, or the county officers. Some time later, at the "total hearing", the defendants filed a motion to dismiss the appeal based on the 30-day time limitations in this section. The District Court denied this motion and was upheld on appeal. The Supreme Court said the proper method of raising the question of a timely appeal is by an affirmative defense pleaded in an answer to a complaint. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Collateral References

Zoning and Planning *key* 561 through 760.
101A C.J.S. Zoning and Land Planning §§265 through 333.
83 Am. Jur. 2d Zoning and Planning §§1019 through 1071.

76-2-112. Effect on powers of incorporated communities to plan adjacent areas.

Collateral References

Standing of lot owner to challenge validity or regularity of zoning changes dealing with neighboring property. 37 ALR 2d 1143.

76-2-113. Enforcement of zoning provisions.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Part 2
County Zoning

Part Case Notes

County Adoption of Local Vicinity Plan Not Creation of Zoning District: The Jefferson County Board of Commissioners adopted a comprehensive master plan (now growth policy) regarding development in the county, and over a period of years following the adoption, a group of residents developed a local vicinity plan (LVP) that included proposed zoning regulations for a specific area of the county. The LVP also set goals for air and water quality, location standards for the placement of facilities dealing with hazardous waste, and guides for future development in the local vicinity consistent with the master plan (now growth policy). Although the County Commissioners stated that they adopted the LVP as an amendment to the master plan (now growth policy), the LVP was given precedence over the master plan (now growth policy) in cases of conflict between provisions in the plans. When a cement company in the local vicinity challenged the validity of the LVP, the District Court granted summary judgment for the county. On appeal, the Supreme Court reversed, holding that the LVP did not meet the statutory criteria for a zoning district and thus could not form the foundation for adoption of zoning regulations. Because the LVP related to planning, not to zoning, the county did not unlawfully establish the boundaries of a zoning district through adoption of the LVP. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions: In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they were inconsistent with governing statutory standards. Appellants further claimed that the districts were defective on constitutional grounds because the zoning decisions had not been based on rational criteria and were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive

and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Part Attorney General's Opinions

Law Applicable to County Adoption of Planning and Zoning District: A county that has adopted a comprehensive master plan (now growth policy) is not limited to zoning pursuant to this part, but may also create planning and zoning districts under Title 76, ch. 2, part 1. The planning and zoning vehicles in part 1 and this part are separate and distinct; however, part 1 constitutes the mechanism by which freeholders may initiate zoning changes and is a process that is available to freeholders whether or not their county has adopted a comprehensive master plan (now growth policy). 48 A.G. Op. 5 (1999).

Part Law Review Articles

Restrictive Zoning of Mobile Homes: The Mobile Home Is Still More "Mobile" Than "Home" Under the Law, Berry, 21 Idaho L. Rev. 141 (1985).

Mobile Homes, Public and Private Controls, Schwartz, 29 Wayne L. Rev. 177 (1982).

Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, McFarlane, 57 Wash. L. Rev. 715 (1982).

The Availability of 42 U.S.C. §1983 in Challenges of Land Use Planning Regulations: A Developer's Dream Come True?, Thompson, 1982 Utah L. Rev. 571.

Freedom of Speech (The Supreme Court, 1980 term), 95 Harv. L. Rev. 211 (1981).

Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion, Cunningham, 76 NW. U. L. Rev. 786 (1981).

Part Collateral References

Our Montana Environment...Where Do We Stand?, Environmental Quality Council, 1996.

Annexation Laws, Legislative Council, 1980.

Montana's Greenbelt Law, Legislative Council, 1980.

Montana's Subdivision Laws: Problems and Prospects, Legislative Council, 1978.

Preservation of Agricultural Lands: Alternative Approaches, Legislative Council, 1976.

76-2-201. County zoning authorized.

Compiler's Comments

1999 Amendment: Chapter 582 near beginning after "welfare" deleted "of the people in cities and towns and counties whose governing bodies have adopted a comprehensive development plan for jurisdictional areas pursuant to chapter 1" and after "commissioners" substituted "that has adopted a growth policy for the entire jurisdictional area pursuant to chapter 1" for "in such counties"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Case Notes

Zoning Amendment Considered Illegal Spot Zoning — Little Test: Duck Creek Properties (Duck Creek), a Florida general partnership, owned 323 acres of undeveloped land in the Hebgen Lake Zoning District. In order to increase development options and the value of the property, Duck Creek sought a zoning change from R-10, which allowed one single-family unit for each 10 acres, to planned unit development (PUD), which permitted more diverse uses at much higher density. The resolution approving the zoning amendment was ultimately approved by the Gallatin County Board of County Commissioners, but was then challenged by two nonprofit corporations. The District Court voided the resolution as illegal spot zoning, and the Board and Duck Creek appealed to the Supreme Court. All parties agreed that Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981), correctly stated the applicable law, and the Supreme Court examined all three prongs of the Little test, including whether: (1) the requested use is significantly different from the prevailing use in the area; (2) the area in which the requested use is to apply is small, although not solely in physical size, including how many separate landowners will benefit from the zone classifications; and (3) the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or the general public. Under the first prong, prevailing use need not exclude existing use, and the District Court determined that higher density uses under the proposed PUD would have conflicted with the predominately rural and residential character of the surrounding properties. Under the second

prong, the size of the area, it was shown that the Duck Creek parcel was owned by a single entity and that the rezoning would benefit only one landowner. Under the third prong, the District Court found that the Duck Creek parcel was extremely sensitive in its importance to wildlife and wildlife habitat, and the court gave that fact significant weight in evaluating the public welfare, convenience, and necessity. State and national wildlife agencies testified regarding the deleterious effects that a rezone would have on public lands and resources, including the negative impact on habitat for elk, moose, bison, and trout, as well as on grizzly bear habitat and migration. Thus, the District Court properly concluded that the PUD zoning request represented special legislation designed to benefit one landowner at the expense of surrounding landowners and the general public. The court did not err in holding, pursuant to Little, that the proposed Duck Creek parcel was illegal spot zoning. Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County, 2001 MT 99, 305 M 232, 25 P3d 168 (2001).

Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper: It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances and Other Planning Documents — Validity of Development Approvals: Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Countywide Zoning Statutes Inapplicable to Rural Zoning District Statutes: Appellant contended that this section required establishment of an actual jurisdictional area prior to adoption of a zoning district pursuant to 76-2-101. The Supreme Court held that procedural requirements for zoning jurisdictional areas under the countywide zoning statutes had no application to the requirements for the creation of zoning districts under the rural zoning laws. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

Jurisdictional Area: The jurisdictional area referred to in the introductory sentence of this section is the jurisdictional area of the planning board, not of the local government. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

"Comprehensive Development Plan" (now Growth Policy) as Master Plan (now Growth Policy): The term "comprehensive development plan [now growth policy]" contained in this section refers to the planning and organizational statutes (76-1-101 through 76-2-112) by which a master plan (now growth policy) is derived. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Master Plan (now Growth Policy) Required to Exercise Zoning Authority:

Without a master plan (now growth policy) in effect and without a jurisdictional area defined pursuant to the adoption of a master plan (now growth policy), a county may exercise no zoning authority other than on a temporary interim emergency basis as provided in 76-2-206. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

The clear and unambiguous language of this section requires that a county adopt a comprehensive development plan (now growth policy) for an entire jurisdictional area. Only after the adoption of such a plan may a county adopt zoning regulations. Allen v. Flathead County, 184 M 58, 601 P2d 399, 36 St. Rep. 1839 (1979).

Attorney General's Opinions

Municipality's Duty in Absence of Board or Commission: Neither the creation of a planning board nor creation of a zoning commission is mandated; and if neither is created, the local governing unit must resolve zoning issues under the general authority granted by this section,

subject to the requirement that a comprehensive plan (now growth policy) has been adopted. 39 A.G. Op. 75 (1982).

Zoning of Patented Mining Claims: County Commissioners have the authority to zone land areas which include patented mining claims subject to the mandate that natural resources thereon be allowed to be used, developed, or recovered. 36 A.G. Op. 33 (1975).

Law Review Articles

The Definition of "Family" in Single-Family Zoning, Newman, 42 Mont. L. Rev. 165 (1981).

City-County Planning in Montana—Its Status and Prospects, Keefer, 25 Mont. L. Rev. 185 (Spring 1964).

Mobile Homes, Public and Private Controls, Schwartz, 29 Wayne L. Rev. 177 (1982).

Collateral References

Counties *key* 47.

20 C.J.S. Counties §70; 101A C.J.S. Zoning and Land Planning §§1 through 153.

83 Am. Jur. 2d Zoning and Planning §§4, 10 through 16, 38, 40 through 48, 51, 52, 54, 55, 57 through 60, 63, 130, 141 through 145, 609 through 611, 613, 614, 623.

Land Use Planning and Real Estate (CLE Seminar), State Bar of Montana, March 1985.

Liability Issues in Land Use Planning (CLE Seminar), State Bar of Montana, February 1984.

76-2-202. Establishment of zoning districts — regulations.

Compiler's Comments

1997 Amendment: Chapter 42 in (1)(b), near middle after "commenced", deleted "by October 1, 1994, or" and at end deleted "if the district was created after October 1, 1989"; in (6), near end, substituted "mobile home or housetrailer, as defined in 61-1-501" for "mobile home, as defined in 61-4-309, or a housetrailer, as defined in 61-1-501"; and made minor changes in style. Amendment effective March 12, 1997.

1993 Amendment: Chapter 505 inserted (3) relating to rebuttable presumption concerning manufactured housing within residential zoning district; inserted (6) defining manufactured housing; inserted (7) prohibiting section being construed to limit conditions imposed in historic districts, local design review standards, existing covenants, or ability to enter into covenants; and made minor changes in style.

Preamble: The preamble attached to Ch. 505, L. 1993, provided: "WHEREAS, certain zoning codes in Montana prohibit the placement of manufactured housing within districts where the construction of comparable site-built housing is permitted; and

WHEREAS, the reasons for treating manufactured housing differently from site-built housing have, because of significant improvements in the quality and regulation of manufactured housing, lost whatever historical justification they may once have had.

THEREFORE, the Legislature of the State of Montana finds it desirable and appropriate to discourage discrimination within zoning districts between manufactured and site-built housing."

Case Notes

Existing Telecommunications Tower Not Inclusive of Tower Not Yet Built: Mesa Communications Group (Mesa) sought a permit from Yellowstone County to construct a telecommunications tower within the county's zoning jurisdiction. County regulations required that all commercial telecommunications towers over 50 feet high be located at least 1 mile from any other communications tower. Mesa's application was denied because a 100-foot tower had been built and a 300-foot tower had been approved but not yet built within 1 mile of the tower proposed by Mesa. The regulations provided for waiver of the 1-mile restriction by the Board of County Commissioners upon special review if an applicant established that an existing tower could not accommodate the applicant's proposed antenna. Mesa requested special review and presented evidence that the proposed antenna could not be accommodated on the existing 100-foot tower, but the application was nevertheless denied because Mesa's proposed tower was still within 1 mile of the approved but as yet unconstructed 300-foot tower. Mesa sought relief from application of the 1-mile restriction in District Court. The court granted summary judgment for Mesa, concluding that the restriction applied only to towers that had been constructed, but not to unconstructed towers approved for construction. The county appealed, but the Supreme Court affirmed. The term "existing tower" as used in the regulation was neither ambiguous nor imprecise and did not include a tower that was not yet built or even begun. Mesa Communications Group, LLC v. Yellowstone County, 2002 MT 73, 309 M 233, 45 P3d 37 (2002).

Mobile Homes Prohibited by Restrictive Covenant — Manufactured Home Towed to Site Construed to Be "Mobile Home": The Kreisches purchased a manufactured home and had it towed

to the Fox Farm subdivision outside Great Falls. Restrictive covenants of the subdivision provided that "no structure of a temporary character, mobile home, [or] trailer" could be used on the property in the subdivision. The Supreme Court, citing Newman v. Wittmer, 277 M 1, 917 P2d 926 (1996), and Toavs v. Sayre, 281 M 243, 934 P2d 165 (1997), held that the Kreisches' home was a "mobile home", as that term is used in its ordinary sense, because the home: (1) was manufactured away from the lot that it was intended to be placed on; (2) was built with features allowing it to be towed; and (3) would be issued a certificate of ownership by the Department of Justice. The Supreme Court noted that the District Court relied on this section, which had not been cited in either Newman or Toavs, and that, considering this section and the fact that the home would be placed on a permanent foundation, the District Court determined that the home had been changed in character and was therefore not a "mobile home". This section was not determinative of the issue, the Supreme Court held, and should be just one of the statutes considered in determining whether the Kreisches' home was a "mobile home". The Supreme Court relied upon the reasoning in Timmerman v. Gabriel, 155 M 294, 470 P2d 528 (1970), and held that it is the nature of the construction of a movable home and not its subsequent mobility after placement on its site that is determinative. Because the home was designed and built offsite, to be transported to and installed on a different site, the Supreme Court determined the home to be a "mobile home" within the meaning of the restrictive covenant. Fox Farm Estates Landowners Ass'n v. Kreisch, 285 M 264, 947 P2d 79, 54 St. Rep. 1142 (1997).

Attorney General's Opinions

Funding for City-County Zoning Districts: A city-county zoning district may not receive funding from the 1-mill levy provision of 76-2-102(3), nor may it receive money from other county funds. 33 A.G. Op. 34 (1970).

Law Review Articles

The Definition of "Family" in Single-Family Zoning, Newman, 42 Mont. L. Rev. 165 (1981).

Exclusionary Zoning and Purposeful Racial Segregation in Housing: Two Wrongs Deserving Separate Remedies, Kmiec, 18 Urb. Law. 393 (1986).

Collateral References

Counties *key* 47; Zoning and Planning *key* 21 through 150.

20 C.J.S. Counties §70; 101A C.J.S. Zoning and Land Planning §§18 through 64.

83 Am. Jur. 2d Zoning and Planning §§17, 28, 34 through 37.

ALR — CONSTRUCTION OF REGULATIONS

What is "mobile home," "house trailer," "trailer house," or "trailer" within meaning of restrictive covenant. 83 ALR 5th 651.

Construction and application of terms "agricultural", "farm", "farming", or the like, in zoning regulations. 38 ALR 5th 357.

Validity and construction of zoning regulations relating to illuminated signs. 30 ALR 5th 549.

Construction and application of zoning laws setting minimum lot size requirements. 2 ALR 5th 553.

Validity and construction of statute or ordinance regulating commercial video game enterprises. 38 ALR 4th 930.

What constitutes accessory or incidental use of religious or educational property within zoning ordinance. 11 ALR 4th 1084.

Adjoining or abutting landowners: validity and construction of provisions of zoning statute or ordinance regarding protest by neighboring property owners. 7 ALR 4th 732.

Validity of zoning for senior citizen communities. 83 ALR 3d 1084.

Family: what constitutes a "family" within meaning of zoning regulation or restrictive covenant. 71 ALR 3d 693.

Schools: what constitutes "school", "educational use", or the like within zoning ordinance. 64 ALR 3d 1087.

Religious societies: what constitutes "church", "religious use", or the like within zoning ordinance. 62 ALR 3d 197.

Lot divided by zone lines: construction and application of provisions of zoning regulations respecting permissible use, where lot or parcel is divided by zone boundary lines. 58 ALR 3d 1241.

Buffer provision in zoning ordinance as applicable to abutting land in adjoining municipality. 48 ALR 3d 1303.

Exclusionary zoning. 48 ALR 3d 1210.

Compensation: validity and construction of "zoning with compensation" regulation. 41 ALR 3d 636.

Front setback: construction of front setback provisions in zoning ordinance or regulation. 93 ALR 2d 1244.

"Racing" or "race track" within zoning regulation forbidding such activity. 83 ALR 2d 877.

"Home occupation" or the like within accessory use provision of zoning regulation. 73 ALR 2d 439.

Lodging house or boardinghouse within provision of zoning ordinance or regulation. 64 ALR 2d 1167.

Attack on validity of zoning statute, ordinance, or regulation on ground of improper delegation of authority to board or officer. 58 ALR 2d 1083.

"Club" or "clubhouse" within provisions of zoning regulations. 52 ALR 2d 1098.

Territory annexed to a municipality, what zoning regulations are applicable to. 41 ALR 2d 1463.

Nurseries and greenhouses, permissible activities under zoning laws permitting. 40 ALR 2d 1459.

Garage as part of house with which it is physically connected within zoning regulations. 7 ALR 2d 593.

Air quality standards: what are "land-use and transportation controls" which may be imposed, under §100(a)(2)(B) of Clean Air Act of 1970 (42 USCS §1857c-5(a)(2)(B)), to insure maintenance of national primary ambient air quality standards. 30 ALR Fed. 156.

ALR — GENERAL SUBJECTS OF REGULATION

Applicability of zoning regulations to governmental projects or activities. 53 ALR 5th 1.

Validity of zoning laws setting minimum lot size requirements. 1 ALR 5th 622.

Validity and construction of zoning laws setting minimum requirements for floorspace or cubic footage inside residence. 87 ALR 4th 294.

Zoning regulation of intoxicating liquor as pre-empted by state law. 65 ALR 4th 555.

Wetlands: local use zoning of wetlands or floodplain as taking without compensation. 19 ALR 4th 756.

Beachfront: validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents. 18 ALR 4th 568.

Airports: zoning regulations limiting use of property near airport as taking of property. 18 ALR 4th 542.

Validity of zoning or building regulations restricting mobile homes or trailers to established mobile home or trailer parks. 17 ALR 4th 106.

Number of persons: validity of ordinance restricting number of unrelated persons who can live together in residential zone. 12 ALR 4th 238.

What constitutes accessory or incidental use of religious or educational property within zoning ordinance. 11 ALR 4th 1084.

Fences: zoning regulations prohibiting or limiting fences, hedges, or walls. 1 ALR 4th 373.

Population: validity of statutory classifications based on population—zoning, building, and land use statutes. 98 ALR 3d 679.

Trailers and vans: validity of zoning ordinances prohibiting or regulating outside storage of house trailers, motor homes, campers, vans, and the like, in residential neighborhoods. 95 ALR 3d 378.

Construction: validity of municipality's ban on construction until public facilities comply with specific standards. 92 ALR 3d 1073.

Lease: applicability of zoning regulation to nongovernmental lessee of government-owned property. 84 ALR 3d 1187.

Aged persons: zoning regulations as applied to homes or housing for the elderly. 83 ALR 3d 1103.

Aged persons: validity of zoning for senior citizen communities. 83 ALR 3d 1084.

Schools: zoning regulations as applied to public elementary and high schools. 74 ALR 3d 136.

Schools: zoning regulations as applied to private and parochial schools below the college level. 74 ALR 3d 14.

Colleges and universities: regulations as applied to colleges, universities, or similar institutions for higher education. 64 ALR 3d 1138.

Schools: what constitutes "school", "educational use", or the like within zoning ordinance. 64 ALR 3d 1087.

Residential development: validity of zoning ordinance deferring residential development until establishment of public services in area. 63 ALR 3d 1184.

Low income housing: validity and construction of zoning ordinance requiring developer to devote specified part of development to low and moderate income housing. 62 ALR 3d 880.

Waste disposal: applicability of zoning regulations to waste disposal facilities of state or local governmental entities. 59 ALR 3d 1244.

Residential development: validity of ordinance zoning the entire municipality for residential use. 54 ALR 3d 1282.

Architectural restrictions: validity and construction of restrictive covenant controlling architectural style of buildings to be erected on property. 47 ALR 3d 1397.

Conservation: validity, construction, and application of enactments restricting land development by dredging or filling. 46 ALR 3d 1422.

Design: validity and construction of zoning ordinance regulating architectural style or design of structure. 41 ALR 3d 1397.

Lease: rights between landlord and tenant as affected by zoning regulations restricting contemplated use of premises. 37 ALR 3d 1018.

Colleges and universities: application of zoning regulations as to college fraternities or sororities. 25 ALR 3d 921.

Aesthetic objectives or considerations as affecting validity of zoning ordinance. 21 ALR 3d 1222.

Civil defense: construction and application of zoning regulations in connection with bomb or fallout shelters. 7 ALR 3d 1443.

Research and laboratory facilities, application of zoning requirements to. 98 ALR 2d 225.

Dimensions or area: validity and construction of zoning regulations prescribing maximum percentage of residence lot area which may be covered by building. 96 ALR 2d 1396.

Width or frontage for residence lots. 96 ALR 2d 1367.

Trailer: use of trailer or similar structure for residence purposes as within zoning provision. 96 ALR 2d 232, §5 superseded by 17 ALR 4th 106, §15 superseded by 83 ALR 5th 651.

Yards: construction of zoning regulations requiring side or rear yards. 94 ALR 2d 419.

Front setback: validity of front setback provision in zoning ordinance or regulation. 93 ALR 2d 1223.

Swimming pools: zoning regulations relating to private residential swimming pools. 92 ALR 2d 1283.

Churches: zoning regulations as affecting churches. 74 ALR 2d 377. See also 62 ALR 3d 197.

Parking: validity and construction of zoning regulation requiring garage or parking space. 74 ALR 2d 418.

Boundaries: validity of zoning regulations with respect to uncertainty and indefiniteness of district boundary lines. 39 ALR 2d 766.

Parking: zoning regulations as to privately owned parking places. 29 ALR 2d 867.

Minimum lot requirements: right of real property owner to relief under Federal Civil Rights Acts against amendment of zoning ordinance increasing minimum lot requirements. 25 ALR Fed. 850.

ALR — BUSINESS-RELATED ACTIVITIES

Application of zoning regulations to golf courses, swimming pools, tennis courts, or the like. 63 ALR 5th 607.

Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses. 10 ALR 5th 538.

Airport, zoning regulations limiting use of land near airport as taking of property. 18 ALR 4th 542.

Halfway houses: housing facilities for former patients of mental hospital as violating zoning restrictions. 100 ALR 3d 876.

Billiard rooms and bowling alleys: zoning or licensing regulation prohibiting or restricting location of billiard rooms and bowling alleys. 100 ALR 3d 252.

Cemeteries: zoning regulations in relation to cemeteries. 96 ALR 3d 921. See also 50 ALR 2d 905.

Funeral homes: construction and application of zoning regulations concerning. 92 ALR 3d 328.

Utilities: applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain. 87 ALR 3d 1265.

Radio: application of zoning regulation to radio or television facilities. 81 ALR 3d 1086.

Condominiums: zoning or building regulations as applied to condominiums. 71 ALR 3d 866.

Multiple dwellings: what constitutes a "family" within meaning of zoning regulation or restrictive covenant. 71 ALR 3d 693.

Junkyards: validity, construction, and application of zoning ordinance relating to operation of junkyard or scrap metal processing plant. 50 ALR 3d 837.

Gasoline stations: validity and construction of statute or ordinance regulating or prohibiting self-service gasoline filling stations. 46 ALR 3d 1393.

Tourist or trailer camps: validity and application of zoning regulations relating to mobile home or trailer parks. 42 ALR 3d 598.

Hotels: meaning of the term "hotel" as used in zoning ordinances. 28 ALR 3d 1240.

Hospitals: validity and construction of zoning regulations expressly referring to hospitals, sanitariums, nursing homes. 27 ALR 3d 1022.

Motor courts or motels: application of zoning regulations to motels or motor courts. 23 ALR 3d 1210.

Vending machines: application of zoning regulations to automatic vending machines. 11 ALR 3d 1004.

Minerals: prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits. 10 ALR 3d 1226.

Intoxicating liquor: zoning regulations in respect of. 7 ALR 3d 809; 9 ALR 2d 877, superseded in part by 65 ALR 4th 555.

Apartments: validity, construction, and effect of zoning regulations as regards "garden-type apartments" and "row housing". 99 ALR 2d 873.

Laundries: zoning regulation of self-service laundries. 87 ALR 2d 1009.

Dancing schools, zoning regulations as applied to. 85 ALR 2d 1150.

Restaurants: zoning regulations as forbidding or restricting restaurants, diners, "drive-ins", or the like. 82 ALR 2d 989.

Shopping centers, zoning regulations as to. 76 ALR 2d 1172.

Access: refusal of use of residentially zoned land for business access by abutter to street or highway. 73 ALR 2d 679.

Accountants, zoning regulations as to. 70 ALR 2d 454.

Access: to industrial, commercial, or business premises over premises differently zoned. 63 ALR 2d 1446.

Motor vehicles, zoning regulations as to business of selling. 57 ALR 2d 1295.

Exclusion from municipality of industrial activities inconsistent with residential character. 9 ALR 2d 683.

Size of commercial or industrial enterprises or units, constitutionality of zoning based on. 7 ALR 2d 1007.

76-2-203. Criteria and guidelines for zoning regulations.

Compiler's Comments

1999 Amendment: Chapter 582 in (1) substituted "the growth policy" for "a comprehensive development plan"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Case Notes

Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper: It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals: Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy)

must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Application: This section, requiring adherence to a comprehensive development plan (now growth policy) in adopting zoning regulations, does not apply to action taken by Planning and Zoning Commission under Title 76, ch. 2, part 1, in adopting development pattern for the planning and zoning district. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

When Comprehensive Plan (now Growth Policy) Not Necessary: A countywide comprehensive plan (now growth policy) is not necessary prior to adoption of a county planning and zoning district, and, further, in making and adopting a development district it is not necessary that there be created a countywide development pattern. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963), explained in Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Collateral References

83 Am. Jur. 2d Zoning and Planning §§20, 74 through 77, 79, 83, 85, 86, 92 through 99, 100 through 127.

76-2-204. Role of planning boards.

Case Notes

Failure to Involve Planning Board — Action Invalid: The Flathead County Commissioners adopted a resolution of intent to zone a tract of land as commercial without demanding, requesting, or reviewing written recommendations from the City-County Planning Board. Even though the statute provides that the recommendations are "advisory only", the statute clearly mandates that the Planning Board's recommendation be considered. Failure of the Commissioners to involve the Planning Board renders the Commissioners' action invalid. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

76-2-205. Procedure for adoption of regulations and boundaries.

Compiler's Comments

1995 Amendment: Chapter 591 in (6), in second sentence after "roll", inserted "or if the freeholders representing 50% of the titled property ownership whose property is taxed for agricultural purposes under 15-7-202 or whose property is taxed as forest land under Title 15, chapter 44, part 1"; and made minor changes in style.

Case Notes

Failure to Involve Planning Board — Action Invalid: The Flathead County Commissioners adopted a resolution of intent to zone a tract of land as commercial without demanding, requesting, or reviewing written recommendations from the City-County Planning Board. Even though the statute provides that the recommendations are "advisory only", the statute clearly mandates that the Planning Board's recommendation be considered. Failure of the Commissioners to involve the Planning Board renders the Commissioners' action invalid. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Amendments to Zoning Regulations: Subsection (4) applies not only to applications to create zoning districts but also to amendments of zoning regulations. Dover Ranch v. Yellowstone County, 187 M 276, 609 P2d 711, 37 St. Rep. 727 (1980).

"May" Construed: The District Court set aside an amended resolution of the Board of Yellowstone County Commissioners which granted an application for a zoning change on the grounds that the county did not comply with subsections (4), (5), and (6) of this section. The county argues that the use of the word "may" in subsection (4) makes the requirements of subsections (4), (5), and (6) discretionary. The Supreme Court found that "may" as used in subsection (4) means that the Commissioners may deny the application or they may pass a resolution if they intend to grant the application. The Commissioners cannot grant the application and ignore the statutory procedures of this section. Dover Ranch v. Yellowstone County, 187 M 276, 609 P2d 711, 37 St. Rep. 727 (1980).

Interim Zoning Notice and Hearing Requirements: The provision of this section for notice and hearing is applicable to 76-2-206 authorizing interim emergency zoning, and a zoning ordinance adopted without such notice and hearing is void. State ex rel. Christian, Spring, Sielbach & Assoc. v. Miller, 169 M 242, 545 P2d 660 (1976).

Attorney General's Opinions

Enlargement of Protest Rights for Agricultural and Forest Land Freeholders — Proportionate Share of Freehold Interest to Be Included in Calculation of Protest Area: Resolving an ambiguous interpretation of subsection (6) of this section, the Attorney General opined that the 1995 amendment to that subsection enlarged protest rights for freeholders whose property is classified for real property tax purposes as agricultural or forest land when their combined title ownership represents 50% of the total property ownership within the proposed or revised zoning district. Those protest rights supplement the protest rights provided to 40% of the freeholders within the district whose names appear on the last-completed assessment roll. The phrase "freeholders representing 50% of the titled property ownership" requires all owners of property held in joint or common ownership to join in the protest for the area of the parcel to be included in the calculation of the protest area. Condominium owners or purchasers may have their proportionate share of the freehold interest in the land area of the particular development included in the calculation of the protest area. 46 A.G. Op. 22 (1996).

Protests to Creation of Zoning Districts: For purposes of counting protests pursuant to this section, all freeholders within a zoning district whose names appear on the last completed assessment roll of the county are entitled to one vote without regard to the number of parcels they own within the district. 37 A.G. Op. 47 (1977).

Collateral References

83 Am. Jur. 2d Zoning and Planning §§581 through 623.

76-2-206. Interim zoning map or regulation.

Compiler's Comments

1999 Amendment: Chapter 582 inserted (1) and (1)(a) authorizing county commissioners to adopt interim zoning map or regulation as emergency measure to classify and regulate uses that constitute emergency; in (1)(b)(ii)(A) substituted "growth policy" for "master plan"; in (1)(b)(ii)(C) after "part" deleted "the board of county commissioners in order to promote the public health, safety, morals, and general welfare may adopt as an emergency measure a temporary interim zoning map or temporary interim zoning regulation, the purpose of which shall be to classify and regulate uses and related matters as constitutes the emergency"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Case Notes

Master Plan (now Growth Policy) Required to Exercise Zoning Authority: Without a master plan (now growth policy) in effect and without a jurisdictional area defined pursuant to the adoption of a master plan (now growth policy), a county may exercise no zoning authority other than on a temporary interim emergency basis as provided in this section. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Interim Zoning Regulations Suggested: The Supreme Court suggested that the defendants take note of this section for interim zoning regulations in emergency situations to alleviate the potentially serious consequences of the decision in the instant case. Allen v. Flathead County, 184 M 58, 601 P2d 399, 36 St. Rep. 1839 (1979).

Notice Required: This section is governed by the provisions of 76-2-205, providing for notice and hearing; thus, temporary interim resolution enacted in emergency session for the purpose of stopping completion of building was void. State ex rel. Christian, Spring, Sielbach & Assoc. v. Miller, 169 M 242, 545 P2d 660 (1976); Bryant Dev. Ass'n v. Dagel, 166 M 252, 531 P2d 1320 (1975).

Collateral References

Interim zoning: validity and effect of "interim" zoning ordinance. 30 ALR 3d 1196.

76-2-207. Permits authorized.

Collateral References

Zoning and Planning *key* 371 through 480.

101A C.J.S. Zoning and Land Planning §§191 through 203.

76-2-208. Continuation of nonconforming uses.

Case Notes

Unreasonable and Discriminatory: Zoning of plaintiff's vacant lot and commercial building as part of a residential zone was unreasonable and discriminatory under zoning plan that did not permit the continuance of nonconforming uses. Alden v. Bd. of Zoning Comm'rs, 165 M 364, 528 P2d 1320 (1974).

Collateral References

Zoning and Planning *key* 321 through 350.

101A C.J.S. Zoning and Land Planning §§154 through 176, 203.

83 Am. Jur. 2d Zoning and Planning §§624 through 697.

Activities in preparation for building as establishing valid nonconforming use or vested right to engage in construction for intended use. 38 ALR 5th 737.

Validity of provisions for amortization of nonconforming uses. 8 ALR 5th 391.

Alteration, extension, reconstruction, or repair of nonconforming structure or structure devoted to nonconforming use as violation of zoning ordinance. 63 ALR 4th 275.

Change in type of activity of nonconforming use as violation of zoning ordinance. 61 ALR 4th 902.

Change in volume, intensity, or means of performing nonconforming use as violation of zoning ordinance. 61 ALR 4th 806.

Addition of another activity to existing nonconforming use as violation of zoning ordinance. 61 ALR 4th 724.

Change in area or location of nonconforming use as violation of zoning ordinance. 56 ALR 4th 769.

New building or structure: construction of new building or structure on premises devoted to nonconforming use as violation of zoning ordinance. 10 ALR 4th 1122.

Intended use: building in course of construction as establishing valid nonconforming use or vested right to complete construction for intended use. 89 ALR 3d 1051.

Government-owned property: applicability of zoning regulation to nongovernmental lessee of government-owned property. 84 ALR 3d 1187.

Advertising structures: classification and maintenance of advertising structures as nonconforming use. 80 ALR 3d 630.

Repair: right to repair or reconstruct building operating as nonconforming use, after damage or destruction by fire or other casualty. 57 ALR 3d 419.

Zoning: right to resume nonconforming use of premises after voluntary or unexplained break in the continuity of nonconforming use. 57 ALR 3d 279.

Zoning: right to resume nonconforming use of premises after involuntary break in the continuity of nonconforming use caused by governmental activity. 56 ALR 3d 138.

Zoning: right to resume nonconforming use of premises after involuntary break in the continuity of nonconforming use caused by difficulties unrelated to governmental activity. 56 ALR 3d 14.

New application: zoning board's grant of new application for zoning change, variance, or special exception after denial of previous application covering same property or part thereof. 52 ALR 3d 494.

Pending application: retroactive effect of zoning regulation in absence of saving clause on pending application for building permit. 50 ALR 3d 596.

Saving provisions: zoning provisions protecting landowners who applied for or received building permit prior to change in zoning. 49 ALR 3d 1150.

Authority of zoning commission to impose, as condition of allowance of special zoning exception, permit, or variance, requirements as to highway and traffic changes. 49 ALR 3d 492.

Retroactive effect of zoning regulation, in absence of saving clause, on validly issued building permit. 49 ALR 3d 13.

Plan: requirement that zoning variances or exceptions be made in accordance with comprehensive plan. 40 ALR 3d 372.

Notice: construction and application of statute or ordinance requiring notice as prerequisite to granting variance or exception to zoning requirement. 38 ALR 3d 167.

Imposing restriction as to hours or days of operation of business as condition of allowance of special zoning exception or variance. 99 ALR 2d 227.

Who may apply for variance, special exception, or use permit. 89 ALR 2d 663.

Consent: validity of zoning ordinance or similar public regulation requiring consent of neighboring property owners to permit or sanction specified uses or construction of buildings. 21 ALR 2d 551.

Change in ownership of nonconforming business or use as affecting right to continuance thereof. 9 ALR 2d 1039.

76-2-209. Effect on natural resources.

Compiler's Comments

1991 Amendment: At beginning of (1) inserted exception clause; inserted (2) making use, development, or recovery of a mineral by a sand and gravel operation and a concrete mixing or asphalt batching operation subject to local zoning regulations; and made minor changes in style. Amendment effective April 9, 1991.

Applicability: Section 5, Ch. 408, L. 1991, provided: "(1) [This act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] does not apply to:

(a) an area for which a contract was issued prior to [the effective date of this act] [effective April 9, 1991] or for which an application for contract or contract amendment was filed with the department of state lands [functions now transferred to department of natural resources and conservation] prior to February 23, 1991; or

(b) an area:

(i) that is contiguous to an area described in subsection (1)(a);

(ii) for which the holder of the contract has the legal right to mine on [the effective date of this act] [effective April 9, 1991]; and

(iii) for which the contract holder files with the department on or before January 1, 1992, on a form provided by the department, a legal description of the area, evidence of the legal right to mine, and certification that the contract holder holds the property for the purpose of future sand or gravel mining.

(2) Before June 1, 1991, the department shall mail notice of the provisions and passage of [this act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] and the form described in subsection (1)(b)(iii) to each person who holds a current contract on [the effective date of this act] [effective April 9, 1991] or who had, prior to February 23, 1991, submitted an application for contract or contract amendment that the department had not approved or denied as of February 23, 1991.

(3) The department shall maintain a list of areas for which certifications have been filed pursuant to subsection (1)(b) and shall provide a copy of the list to any person who requests the list."

Case Notes

Excavation and Processing of Gravel — County Zoning and Planning Inapplicable: Part of the legislative purpose of this section is clear and unambiguous. It demonstrates the Legislature's awareness that a range of activities must occur on-site in order for the owner of mineral, timber, or agricultural resources to benefit, and that the Legislature did not intend counties to have the power to prevent the owner from having that benefit. However, the range of activities that cannot be prevented is by no means clear and unambiguous. There is ambiguity in the interpretation and construction of the phrase "complete use, development, or recovery of any mineral . . . resources" and in its application to defendant's gravel extraction and processing. A reasonable construction depends, to some extent, on the circumstances to which this section is applied. Therefore, the court must look to industry practices to discern the extent to which the Legislature intended the owner of the resource to benefit. A county must at least allow the activities necessary to develop the resource to a point at which it can be effectively utilized. In the case at bar, the District Court found that processing occurs at the site of gravel extraction because the cost of transporting the material elsewhere for processing would render the mining economically unfeasible. The District Court also found that gravel processing on-site included washing, crushing, screening, and concrete and asphalt batching and that these activities were part of the recovery of gravel resources. The record supported the District Court's findings. The District Court properly held that 76-1-113 and 76-2-209 exempt the defendant from county zoning and planning. The record concerned gravel mining in a particular geographic location. The Supreme Court declined to announce a broad, sweeping interpretation on such a narrow record and restricted the holding of

this opinion accordingly. (See 1991 amendment.) Missoula County v. Am. Asphalt, Inc., 216 M 423, 701 P2d 990, 42 St. Rep. 920 (1985).

Attorney General's Opinions

Zoning of Patented Mining Claims: County Commissioners have the authority to zone land areas which include patented mining claims subject to the mandate that natural resources thereon be allowed to be used, developed, or recovered. 36 A.G. Op. 33 (1975).

76-2-210. Enforcement of zoning provisions.

Case Notes

Existing Telecommunications Tower Not Inclusive of Tower Not Yet Built: Mesa Communications Group (Mesa) sought a permit from Yellowstone County to construct a telecommunications tower within the county's zoning jurisdiction. County regulations required that all commercial telecommunications towers over 50 feet high be located at least 1 mile from any other communications tower. Mesa's application was denied because a 100-foot tower had been built and a 300-foot tower had been approved but not yet built within 1 mile of the tower proposed by Mesa. The regulations provided for waiver of the 1-mile restriction by the Board of County Commissioners upon special review if an applicant established that an existing tower could not accommodate the applicant's proposed antenna. Mesa requested special review and presented evidence that the proposed antenna could not be accommodated on the existing 100-foot tower, but the application was nevertheless denied because Mesa's proposed tower was still within 1 mile of the approved but as yet unconstructed 300-foot tower. Mesa sought relief from application of the 1-mile restriction in District Court. The court granted summary judgment for Mesa, concluding that the restriction applied only to towers that had been constructed, but not to unconstructed towers approved for construction. The county appealed, but the Supreme Court affirmed. The term "existing tower" as used in the regulation was neither ambiguous nor imprecise and did not include a tower that was not yet built or even begun. Mesa Communications Group, LLC v. Yellowstone County, 2002 MT 73, 309 M 233, 45 P3d 37 (2002).

Collateral References

Zoning and Planning *key* 761 through 805.

101A C.J.S. Zoning and Land Planning §§334 through 354.

83 Am. Jur. 2d Zoning and Planning §§643 through 645, 647 through 650.

Violation of zoning ordinance or regulation as affecting or creating liability for injuries or death. 31 ALR 2d 1469.

76-2-211. Violations and penalties.

Collateral References

101A C.J.S. Zoning and Land Planning §§355 through 361.

Violation of zoning ordinance or regulation as affecting or creating liability for injuries or death. 31 ALR 2d 1469.

76-2-220. Zoning commission — appointment — duties.

Attorney General's Opinions

County Planning Board Not to Serve as County Zoning Commission: Because of differences in membership requirements and jurisdictional areas, a County Planning Board may not be designated to serve as the County Zoning Commission. However, members of one board may serve as members of the other if they meet the requirements for membership of each board. 43 A.G. Op. 18 (1989).

76-2-221. Board of adjustment.

Collateral References

Counties *key* 47, 58.

20 C.J.S. Counties §§70, 94 through 96.

83 Am. Jur. 2d Zoning and Planning §§721 through 726.

76-2-222. Membership and term of board members — vacancies.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), at beginning, deleted "Except as provided in subsection (3)"; deleted (3) that read: "(3) Within 30 days after January 1, 1988, the board of county commissioners shall designate two members of the board of adjustment whose terms must end in

1988 and three members whose terms must end in 1989. Subsequent appointments must be made for a term of 2 years"; and made minor changes in style. Amendment effective March 12, 1997.

1987 Amendment: At beginning of (1) inserted exception clause; and inserted (3) requiring County Commissioners to designate two Board of Adjustment members whose terms end in 1988 and three those terms end in 1989.

Collateral References

83 Am. Jur. 2d Zoning and Planning §§727, 728.

76-2-223. Powers of board of adjustment.

Collateral References

101A C.J.S. Zoning and Land Planning §§228 through 264.

83 Am. Jur. 2d Zoning and Planning §§733, 734, 750 through 755.

76-2-225. Public access to board activities.

Collateral References

82 Am. Jur. 2d Zoning and Planning §§296 through 321.

76-2-226. Appeals to board of adjustment.

Collateral References

83 Am. Jur. 2d Zoning and Planning §§756 through 761.

76-2-227. Appeals from board to court of record.

Case Notes

Scope of Review: Although scope of review on Writ of Certiorari is ordinarily limited to whether the inferior tribunal has exceeded its jurisdiction, further inquiry is permitted under provisions of this statute which grant the District Courts a broader scope of review than the general Montana statutes pertaining to certiorari. Bryant Dev. Ass'n v. Dagel, 166 M 252, 531 P2d 1320 (1975).

Collateral References

Zoning and Planning *key* 561 through 760.

101A C.J.S. Zoning and Land Planning §§265 through 333.

83 Am. Jur. 2d Zoning and Planning §§1019, 1026 through 1043, 1046 through 1061.

Standing to bring action relating to real property of condominium. 74 ALR 4th 165.

Standing of zoning board of appeals or similar body to appeal reversal of its decision. 13 ALR 4th 1130.

Standing of civic or property owners' association to challenge zoning board decision (as aggrieved party). 8 ALR 4th 1087.

Protest or petition by property owners, validity and construction of provisions of zoning statute or ordinance respecting. 7 ALR 4th 732.

Boundaries: necessary or proper parties to suit or proceeding to establish private boundary line. 73 ALR 3d 948.

Standing owner: standing of owner of property adjacent to zoned property, but not within territory of zoning authority, to attack zoning. 69 ALR 3d 805.

Mandamus to compel zoning officials to cancel permit granted in violation of zoning regulation. 68 ALR 3d 166.

New application: zoning board's grant of new application for zoning change, variance, or special exception after denial of previous application covering same property or part thereof. 52 ALR 3d 494.

Standing municipality: standing of municipal corporation or other governmental body to attack zoning of land lying outside its borders. 49 ALR 3d 1126.

Sale of property: zoning or other public restrictions on the use of property as affecting rights and remedies of parties to contract for the sale thereof. 39 ALR 3d 362.

Notice: construction and application of statute or ordinance requiring notice as prerequisite to granting variance or exception to zoning requirement. 38 ALR 3d 167.

Cross-examination: right to cross-examination of witnesses in hearings before administrative zoning authorities. 27 ALR 3d 1304.

Sale of property: purchaser of real property as precluded from attacking validity of zoning regulation existing at the time of the purchase and affecting the purchased property. 17 ALR 3d 743.

Disqualification for bias or interest of administrative officer sitting in zoning proceeding. 10 ALR 3d 694.

Eminent domain: zoning or other governmental regulations as to use of property as a factor in determination of damages in eminent domain. 9 ALR 3d 291.

Notice: inclusion or exclusion of first and last days in computing time for giving notice of zoning hearing which must be given a certain number of days before a known future date. 98 ALR 2d 1394.

Notice: validity and construction of statutory notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation. 96 ALR 2d 449.

Judgment denying permit for use of premises under zoning regulations as bar to subsequent application. 71 ALR 2d 1362.

Motives: inquiry, upon review of zoning regulation, into motive of members of municipal authority approving or adopting it. 71 ALR 2d 568.

Intervention in court review of zoning proceeding, right as to. 46 ALR 2d 1059.

Remedies to compel municipal officials to enforce zoning regulations. 35 ALR 2d 1135.

Civil rights: right of real property owner to relief under Federal Civil Rights Acts against amendment of zoning ordinance increasing minimum lot requirements. 25 ALR Fed. 850.

Part 3
Municipal Zoning

Part Administrative Rules

ARM 36.15.204 Local flood plain regulations — requirements.

Part Case Notes

Mobile Homes — Restrictive Zoning Based on Health and Safety Reasons: Summary judgment striking down a zoning ordinance restricting mobile homes to certain areas that comprised a very small percentage of the municipal area was improperly granted because factual controversies existed. The first issue to be resolved was whether the ordinance required overly restrictive placement of all mobile homes, thus unconstitutionally excluding them, or whether restrictions applied for health or safety reasons only to those mobile homes not in compliance with Uniform Building Code (UBC) standards (which had been adopted by the local government), thus allowing all UBC complying mobile homes to be located with other complying residences. If the ordinance was to be construed as excluding only non-UBC complying structures, it should then be determined whether mobile homes complied or could reasonably be altered to comply with UBC standards before determining they were unconstitutionally excluded. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions: In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they were inconsistent with governing statutory standards. Appellants further claimed that the districts were defective on constitutional grounds because the zoning decisions had not been based on rational criteria and were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

No City Commission Duty to Keep Formal Record: It was inappropriate for the District Court to issue a Writ of Mandamus, in essence directing the City Commission to undertake certain procedures that it had no duty to perform. There was no requirement under law that the City Commission, in support of a decision granting or denying a rezoning request, enter written findings of fact, keep a verbatim record of the proceedings, or conduct its proceedings in an

adjudicative manner so as to give an applicant full procedural due process rights. Foster v. City Comm'n, 189 M 64, 614 P2d 1072, 37 St. Rep. 1362 (1980).

Void Building Permit: Building permit that was issued in violation of city zoning ordinance is void ab initio and creates no legal rights. State ex rel. Russell Center v. Missoula, 166 M 385, 533 P2d 1087 (1975).

Constitutionality: This part, authorizing the creation of zoning ordinances in cities and towns and the appointment of a Board of Adjustment, as well as such an ordinance involved in the case at bar, is free from constitutional objections. Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934).

State Delegation of Police Power to Municipality: The state, in which the police power is lodged, may by act of the Legislature delegate such power to a municipality for the purpose of enacting zoning ordinances, as it did in this state by enacting Ch. 136, L. 1929 (this part). Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934).

Part Attorney General's Opinions

Municipal Planning Board Not to Be Vested With Municipal Zoning Commission Powers: Authorization does not exist for designation of a city planning board as a zoning commission, and 7-1-114 prohibits establishment of an alternative zoning system by local ordinance. Therefore, a city exercising self-government powers may not vest its municipal planning board with powers vested in municipal zoning commissions by 76-2-307. 47 A.G. Op. 4 (1997).

Part Law Review Articles

The Definition of "Family" in Single-Family Zoning, Newman, 42 Mont. L. Rev. 165 (1981).

Putting the Use Back In Metropolitan Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws, Poradek, 81 Minn. L. Rev. 1343 (1997).

Exclusionary Zoning and Purposeful Racial Segregation in Housing: Two Wrongs Deserving Separate Remedies, Kmiec, 18 Urb. Law. 393 (1986).

Restrictive Zoning of Mobile Homes: The Mobile Home is Still More "Mobile" Than "Home" Under the Law, Berry, 21 Idaho L. Rev. 141 (1985).

Mobile Homes, Public and Private Controls, Schwartz, 29 Wayne L. Rev. 177 (1982).

Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, McFarlane, 57 Wash. L. Rev. 715 (1982).

The Availability of 42 U.S.C. §1983 in Challenges of Land Use Planning Regulations: A Developer's Dream Come True?, Thompson, 1982 Utah L. Rev. 571.

Freedom of Speech (The Supreme Court, 1980 term), 95 Harv. L. Rev. 211 (1981).

Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion, Cunningham, 76 Nw. U. L. Rev. 786 (1981).

Constitutional and Judicial Limitations on the Community's Power to Downzone, Williamson, 12 Urb. Law 157 (1980).

LCDC Goal 10: Oregon's Solution to Exclusionary Zoning, Gangle, 16 Willamette L. J. 873 (1980).

Part Collateral References

Municipal Corporations *key* 601(1).

62 C.J.S. Municipal Corporations §226(1), et seq.

13 Am. Jur. 2d Buildings §§2, 3.

Determination whether zoning or rezoning of particular parcel constitutes illegal spot zoning. 73 ALR 5th 223.

Construction and application of terms "agricultural," "farm," "farming," or the like, in zoning regulations. 38 ALR 5th 357.

Alteration, extension, reconstruction, or repair of nonconforming structure or structure devoted to nonconforming use as violation of zoning ordinance. 63 ALR 4th 275.

Change in type of activity of nonconforming use as violation of zoning ordinance. 61 ALR 4th 902.

Change in volume, intensity, or means of performing nonconforming use as violation of zoning ordinance. 61 ALR 4th 806.

Addition of another activity to existing nonconforming use as violation of zoning ordinance. 61 ALR 4th 724.

Change in area or location of nonconforming use as violation of zoning ordinance. 56 ALR 4th 769.

Construction of new building or structure on premises devoted to nonconforming use as violation of zoning ordinance. 10 ALR 4th 1122.

Zoning regulations in relation to cemeteries. 96 ALR 3d 921.

Radio and television facilities, application of zoning regulation to. 81 ALR 3d 1086.

Construction and application of provisions of zoning regulations respecting permissible use, where lot or parcel is divided by zone boundary lines. 58 ALR 3d 1241.

Zoning: right to repair or reconstruct building operating as nonconforming use, after damage or destruction by fire or other casualty. 57 ALR 3d 419.

Purchaser of real property as precluded from attacking validity of zoning regulations existing at the time of the purchase and affecting the purchased property. 17 ALR 3d 743.

Zoning regulations with respect to garages. 11 ALR 3d 1187.

Application of zoning regulations to automatic vending machines. 11 ALR 3d 1004.

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits. 10 ALR 3d 1226.

Construction and application of zoning regulations in connection with bomb or fallout shelters. 7 ALR 3d 1443.

Zoning regulations in respect of intoxicating liquors. 7 ALR 3d 809; 9 ALR 2d 877, superseded in part by 65 ALR 4th 555.

Constitutionality of statute or ordinance limiting height of buildings. 8 ALR 2d 963.

Our Montana Environment...Where Do We Stand?, Environmental Quality Council, 1996.

Annexation Laws, Legislative Council, 1980.

Montana's Greenbelt Law, Legislative Council, 1980.

Montana's Subdivision Laws: Problems and Prospects, Legislative Council, 1978.

Preservation of Agricultural Lands: Alternative Approaches, Legislative Council, 1976.

76-2-301. Municipal zoning authorized.

Case Notes

Salvation Army Goods Not Junk: A citizens group sought to have a building permit for a Salvation Army warehouse revoked, arguing that it violated a local building code prohibiting the storing of junk. The Supreme Court affirmed the lower court's decision that used items intended for resale were not junk. Westside Neighborhood Betterment Comm. v. Great Falls, 242 M 58, 788 P2d 335, 47 St. Rep. 542 (1990).

Annexation Agreement — Issue of Intent One of Fact — Summary Judgment Improper: The term "residential purposes" in a "Waiver of Right to Protest Annexation and Agreement on Non-Conforming Use" was not so clear on its face as to preclude multifamily residential purposes. Supreme Court held that District Court erred in granting summary judgment for city based on the District Court's determination of the intention of the parties and remanded the case for trial on the issue of intent. Issue of intent is one of fact and cannot be decided on summary judgment. Derrenger v. Billings, 213 M 469, 691 P2d 1379, 41 St. Rep. 2276 (1984).

No Abuse of Zoning Authority: Based upon the record, Anaconda-Deer Lodge County acted within the authority delegated under this section by formulating its zoning ordinances with sensitivity to the peculiar suitabilities and most appropriate use of the land throughout the municipality. Were the Supreme Court to hold that a zoning ordinance must ensure each property owner the highest and best use of his property, an intolerable burden would be placed on local governments and the entire purpose of local planning legislation would be defeated. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691, 37 St. Rep. 693 (1980).

Elemental Fairness: Where plaintiff's building permit was denied after he had moved a house onto his lot in reliance upon Mayor's representation that the building permit had been approved, the conduct of the Town Council and the Mayor was so fundamentally unfair as to require reversal. State ex rel. Barker v. Stevensville, 164 M 375, 523 P2d 1388 (1974).

Constitutionality: Zoning ordinances and statutes authorizing them are conditional under both the Due Process Clause and the Equal Protection Clause, in that they constitute a valid exercise of the police power; i.e., they have a substantial bearing upon the public health, safety, morals, and general welfare of a community. Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934), followed in Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648, 47 St. Rep. 2287 (1990), and Boland v. Great Falls, 275 M 128, 910 P2d 890, 53 St. Rep. 69 (1996).

Law Review Articles

The Definition of "Family" in Single-Family Zoning, Newman, 42 Mont. L. Rev. 165 (1981).

Collateral References

62 C.J.S. Municipal Corporations §226; 101A C.J.S. Zoning and Land Planning §§1 through 64.

83 Am. Jur. 2d Zoning and Planning §§17, 70 through 86, 213 through 219.

Land Use Planning and Real Estate (CLE Seminar), State Bar of Montana, March 1985.
Liability Issues in Land Use Planning (CLE Seminar), State Bar of Montana, February 1984.

76-2-302. Zoning districts.

Compiler's Comments

1997 Amendment: Chapter 42 in (4), near end, substituted "mobile home or housetrailer, as defined in 61-1-501" for "mobile home, as defined in 61-4-309, or a housetrailer, as defined in 61-1-501"; and made minor changes in style. Amendment effective March 12, 1997.

1993 Amendment: Chapter 505 inserted (3) relating to rebuttable presumption concerning manufactured housing within residential zoning district; inserted (4) defining manufactured housing; inserted (5) prohibiting section being construed to limit conditions imposed in historic districts, local design review standards, existing covenants, or ability to enter into covenants; and made minor changes in style.

Preamble: The preamble attached to Ch. 505, L. 1993, provided: "WHEREAS, certain zoning codes in Montana prohibit the placement of manufactured housing within districts where the construction of comparable site-built housing is permitted; and

WHEREAS, the reasons for treating manufactured housing differently from site-built housing have, because of significant improvements in the quality and regulation of manufactured housing, lost whatever historical justification they may once have had.

THEREFORE, the Legislature of the State of Montana finds it desirable and appropriate to discourage discrimination within zoning districts between manufactured and site-built housing."

Case Notes

Void Building Permit: Building permit which was issued in violation of city zoning ordinance is void ab initio and creates no legal rights. State ex rel. Russell Center v. Missoula, 166 M 385, 533 P2d 1087 (1975).

Law Review Articles

The Definition of "Family" in Single-Family Zoning, Newman, 42 Mont. L. Rev. 165 (1981).

Collateral References

Zoning and Planning *key* 21 through 150.
101A C.J.S. Zoning and Land Planning §§18 through 64.
83 Am. Jur. 2d Zoning and Planning §§164 through 174.

ALR — CONSTRUCTION OF REGULATIONS

What is "mobile home," "house trailer," "trailer house," or "trailer" within meaning of restrictive covenant. 83 ALR 5th 651.

Construction and application of terms "agricultural", "farm", "farming", or the like, in zoning regulations. 38 ALR 5th 357.

Validity and construction of zoning regulations relating to illuminated signs. 30 ALR 5th 549.

Construction and application of zoning laws setting minimum lot size requirements. 2 ALR 5th 553.

Validity and construction of condominium bylaws or regulations placing special regulations, burdens, or restrictions on nonresident unit owners. 76 ALR 4th 295.

Validity and construction of statute or ordinance regulating commercial video game enterprises. 38 ALR 4th 930.

What constitutes accessory or incidental use of religious or educational property within zoning ordinance. 11 ALR 4th 1084.

Adjoining or abutting landowners: validity and construction of provisions of zoning statute or ordinance regarding protest by neighboring property owners. 7 ALR 4th 732.

Zoning: regulations creating and placing "floating zones". 80 ALR 3d 95.

Family: what constitutes a "family" within meaning of zoning regulation or restrictive covenant. 71 ALR 3d 693.

Schools: what constitutes "school", "educational use", or the like within zoning ordinance. 64 ALR 3d 1087.

Religious societies: what constitutes "church", "religious use", or the like within zoning ordinance. 62 ALR 3d 197.

Lot divided by zone lines: construction and application of provisions of zoning regulations respecting permissible use, where lot or parcel is divided by zone boundary lines. 58 ALR 3d 1241.

Buffer provision in zoning ordinance as applicable to abutting land in adjoining municipality. 48 ALR 3d 1303.

Compensation: validity and construction of "zoning with compensation" regulation. 41 ALR 3d 636.

Front setback: construction of front setback provisions in zoning ordinance or regulation. 93 ALR 2d 1244.

"Racing" or "race track" within zoning regulation forbidding such activity. 83 ALR 2d 877.

"Home occupation" or the like within accessory use provision of zoning regulation. 73 ALR 2d 439.

Lodging house or boardinghouse within provision of zoning ordinance or regulation. 64 ALR 2d 1167.

"Club" or "clubhouse" within provisions of zoning regulations. 52 ALR 2d 1098.

Territory annexed to a municipality, what zoning regulations are applicable to. 41 ALR 2d 1463.

Nurseries and greenhouses, permissible activities under zoning laws permitting. 40 ALR 2d 1459.

Garage as part of house with which it is physically connected within zoning regulations. 7 ALR 2d 593.

Air quality standards: what are "land-use and transportation controls" which may be imposed, under §100(a)(2)(B) of Clean Air Act of 1970 (42 USCS §1857c-5(a)(2)(B)), to insure maintenance of national primary ambient air quality standards. 30 ALR Fed. 156.

ALR — GENERAL SUBJECTS OF REGULATION

Applicability of zoning regulations to governmental projects or activities. 53 ALR 5th 1.

Validity of zoning laws setting minimum lot size requirements. 1 ALR 5th 622.

Validity and construction of zoning laws setting minimum requirements for floorspace or cubic footage inside residence. 87 ALR 4th 294.

Wetlands: local use zoning of wetlands or flood plain as taking without compensation. 19 ALR 4th 756.

Beachfront: validity of beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents. 18 ALR 4th 568.

Airports: zoning regulations limiting use of property near airport as taking of property. 18 ALR 4th 542.

Validity of zoning or building regulations restricting mobile homes or trailers to established mobile home or trailer parks. 17 ALR 4th 106.

Number of persons: validity of ordinance restricting the number of unrelated persons who can live together in residential zone. 12 ALR 4th 238.

What constitutes accessory or incidental use of religious or education property within zoning ordinance. 11 ALR 4th 1084.

Fences: zoning regulations prohibiting or limiting fences, hedges, or walls. 1 ALR 4th 373.

Population: validity of statutory classifications based on population—zoning, building, and land use statutes. 98 ALR 3d 679.

Trailers and vans: validity of zoning ordinances prohibiting or regulating outside storage of house trailers, motor homes, campers, vans, and the like, in residential neighborhoods. 95 ALR 3d 378.

Construction: validity of municipality's ban on construction until public facilities comply with specific standards. 92 ALR 3d 1073.

Lease: applicability of zoning regulation to nongovernmental lessee of government-owned property. 84 ALR 3d 1187.

Aged persons: zoning regulations as applied to homes or housing for the elderly. 83 ALR 3d 1103.

Aged persons: validity of zoning for senior citizen communities. 83 ALR 3d 1084.

Schools: zoning regulations as applied to public elementary and high schools. 74 ALR 3d 136.

Schools: zoning regulations as applied to private and parochial schools below the college level. 74 ALR 3d 14.

Colleges and universities: regulations as applied to colleges, universities, or similar institutions for higher education. 64 ALR 3d 1138.

Schools: what constitutes "school", "educational use", or the like within zoning ordinance. 64 ALR 3d 1087.

Residential development: validity of zoning ordinance deferring residential development until establishment of public services in area. 63 ALR 3d 1184.

Low income housing: validity and construction of zoning ordinance requiring developer to devote specified part of development to low and moderate income housing. 62 ALR 3d 880.

Waste disposal: applicability of zoning regulations to waste disposal facilities of state or local governmental entities. 59 ALR 3d 1244.

Residential development: validity of ordinance zoning the entire municipality for residential use. 54 ALR 3d 1282.

Architectural restrictions: validity and construction of restrictive covenant controlling architectural style of buildings to be erected on property. 47 ALR 3d 1232.

Conservation: validity, construction, and application of enactments restricting land development by dredging or filling. 46 ALR 3d 1422.

Validity and construction of zoning ordinance regulating architectural style or design of structure. 41 ALR 3d 1397.

Lease: rights between landlord and tenant as affected by zoning regulations restricting contemplated use of premises. 37 ALR 3d 1018.

Colleges and universities: application of zoning regulations as to college fraternities or sororities. 25 ALR 3d 921.

Aesthetic objectives or considerations as affecting validity of zoning ordinance. 21 ALR 3d 1222.

Civil defense: construction and application of zoning regulations in connection with bomb or fallout shelters. 7 ALR 3d 1443.

Research and laboratory facilities, application of zoning requirements to. 98 ALR 2d 225.

Dimensions or area: validity and construction of zoning regulations prescribing maximum percentage of residence lot area that may be covered by building. 96 ALR 2d 1396.

Width or frontage for residence lots. 96 ALR 2d 1367.

Trailer: use of trailer or similar structure for residence purposes as within zoning provision. 96 ALR 2d 232, §5 superseded by 17 ALR 4th 106, §15 superseded by 83 ALR 5th 651.

Yards: construction of zoning regulations requiring side or rear yards. 94 ALR 2d 419.

Front setback: validity of front setback provision in zoning ordinance or regulation. 93 ALR 2d 1223.

Swimming pools: zoning regulations relating to private residential swimming pools. 92 ALR 2d 1283.

Parking: validity and construction of zoning regulation requiring garage or parking space. 74 ALR 2d 418.

Churches: zoning regulations as affecting churches. 74 ALR 2d 377. See also 62 ALR 3d 197.

Boundaries: validity of zoning regulations with respect to uncertainty and indefiniteness of district boundary lines. 39 ALR 2d 766.

Parking: zoning regulations as to privately owned parking places. 29 ALR 2d 867.

Minimum lot requirements: right of real property owner to relief under Federal Civil Rights Acts against amendment of zoning ordinance increasing minimum lot requirements. 25 ALR Fed. 850.

ALR — BUSINESS-RELATED ACTIVITIES

Application of zoning regulations to golf courses, swimming pools, tennis courts, or the like. 63 ALR 5th 607.

Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses. 10 ALR 5th 538.

Zoning regulation of intoxicating liquor as pre-empted by state law. 65 ALR 4th 555.

Airport, zoning regulations limiting use of land near airport as taking of property. 18 ALR 4th 542.

Billiard rooms and bowling alleys: zoning or licensing regulation prohibiting or restricting location of billiard rooms and bowling alleys. 100 ALR 3d 252.

Cemeteries: zoning regulations in relation to cemeteries. 96 ALR 3d 921. See also 50 ALR 2d 905.

Funeral homes: construction and application of zoning regulations concerning. 92 ALR 3d 328.

Utilities: applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain. 87 ALR 3d 1265.

Radio: application of zoning regulation to radio or television facilities. 81 ALR 3d 1086.

Condominiums: zoning or building regulations as applied to condominiums. 71 ALR 3d 866.

Multiple dwellings: what constitutes a "family" within meaning of zoning regulation or restrictive covenant. 71 ALR 3d 693.

Junkyards: validity, construction, and application of zoning ordinance relating to operation of junkyard or scrap metal processing plant. 50 ALR 3d 837.

Gasoline stations: validity and construction of statute or ordinance regulating or prohibiting self-service gasoline filling stations. 46 ALR 3d 1393.

Tourist or trailer camps: validity and application of zoning regulations relating to mobile home or trailer parks. 42 ALR 3d 598.

Hotels: meaning of the term "hotel" as used in zoning ordinances. 28 ALR 3d 1240.

Hospitals: validity and construction of zoning regulations expressly referring to hospitals, sanitariums, nursing homes. 27 ALR 3d 1022.

Motor courts or motels: application of zoning regulations to motels or motor courts. 23 ALR 3d 1210.

Vending machines: application of zoning regulations to automatic vending machines. 11 ALR 3d 1004.

Minerals: prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits. 10 ALR 3d 1226.

Intoxicating liquor: zoning regulations in respect of. 7 ALR 3d 809; 9 ALR 2d 877, superseded in part by 65 ALR 4th 555.

Apartments: validity, construction, and effect of zoning regulations as regards "garden-type apartments" and "row housing". 99 ALR 2d 873.

Laundries: zoning regulation of self-service laundries. 87 ALR 2d 1009.

Dancing schools, zoning regulations as applied to. 85 ALR 2d 1150.

Restaurants: zoning regulations as forbidding or restricting restaurants, diners, "drive-ins", or the like. 82 ALR 2d 989.

Shopping centers, zoning regulations as to. 76 ALR 2d 1172.

Access: refusal of use of residentially zoned land for business access by abutter to street or highway. 73 ALR 2d 679.

Accountants, zoning regulations as to. 70 ALR 2d 454.

Access: to industrial, commercial, or business premises over premises differently zoned. 63 ALR 2d 1446.

Motor vehicles, zoning regulations as to business of selling. 57 ALR 2d 1295.

Exclusion from municipality of industrial activities inconsistent with residential character. 9 ALR 2d 683.

Size of commercial or industrial enterprises or units, constitutionality of zoning based on. 7 ALR 2d 1007.

76-2-303. Procedure to administer certain annexations and zoning laws — hearing and notice.

Compiler's Comments

1999 Amendment — Code Commissioner Change: Chapter 355 in (1) near end after "enforced, and" deleted "from time to time amended, supplemented, or" and after "changed" inserted "subject to the requirements of subsection (2)"; in (3)(a) near end after "provided that the" substituted "proposed municipal zoning regulations for" for "municipality continues on"; in (3)(a)(i) at beginning inserted "authorize"; inserted (3)(a)(ii) allowing a hearing on an annexation that authorizes land uses consistent with approved land uses; inserted (3)(a)(iii) allowing a hearing on an annexation that is consistent with zoning requirements; and made minor changes in style. Amendment effective October 1, 1999.

Pursuant to sec. 34, Ch. 582, L. 1999, in (3)(a)(iii) the code commissioner changed "master plan" to "growth policy".

1997 Amendment: Chapter 217 inserted (3) regarding a municipal annexation hearing or joint annexation and zoning hearing; and made minor changes in style.

Case Notes

When Written Record Not Required: Because there is no statutory requirement that a City Commission, in granting or denying a rezoning request, enter written findings of fact, keep a verbatim record of the proceedings, and conduct the proceedings in an adjudicative manner so as to preserve applicant's full procedural due process rights, it was improper for lower court to issue Writ of Mandamus ordering City Commission to hold rehearing, when applicant failed to raise these procedural questions during initial hearing. Foster v. City Comm'n, 189 M 64, 614 P2d 1072 (1980).

Board of Adjustment Discretionary Power for Variances: Variance order granted for the operation of a law office in a zoned residential area will not be set aside without a showing that the variance was contrary to public interest and thus an abuse of discretion. Rygg v. Kalispell Bd. of Adjustment, 169 M 93, 544 P2d 1228 (1976).

Zoning Modification: Where zoning ordinance amending preexisting zoning ordinances of city to reclassify lots was unanimously passed by City Commission, amendatory ordinance was valid irrespective of number of protests by landowners in area. Olson v. City Comm'n, 146 M 386, 407 P2d 374 (1965).

Collateral References

62 C.J.S. Municipal Corporations §227; 101A C.J.S. Zoning and Land Planning §§84 through 97.

83 Am. Jur. 2d Zoning and Planning §§164 through 174, 586 through 598.

Notice: construction and application of statute or ordinance requiring notice as prerequisite to granting variance or exception to zoning requirement. 38 ALR 3d 167.

76-2-304. Purposes of zoning.

Compiler's Comments

1999 Amendment: Chapter 582 in (1) substituted "growth policy" for "comprehensive plan"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Case Notes

Equitable Estoppel Not Applicable Absent Misrepresentation or Concealment of Material Facts: When Sutey Oil Company (Sutey) requested an expansion of its convenience store business that would involve adding a room with gambling machines, Sutey was informed by the county permit official that a special permit would not be required because gambling would be considered an expansion of an existing retail and service use but that Sutey would have to adhere to all county and state requirements before construction could commence. Sutey contended that the official's statement that a special-use permit was not required equitably estopped the county from denying the request for gambling machines. The District Court properly found nothing in the record showing any conduct, act, language, or silence on the part of the county that would lend itself to equitable estoppel because, despite the official's statement, Sutey had failed to demonstrate misrepresentation or concealment of material fact, the first element of equitable estoppel. In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496, 55 St. Rep. 499 (1998).

Impact of Special-Use On-Premises Gambling on Neighboring Land Uses — Sufficient Information as Basis for Denial of Permit Notwithstanding Statutory Criteria: Sutey Oil Company (Sutey) petitioned for a special-use permit for on-premises gambling at its convenience store in Anaconda. The permit was denied by the county planning board, and the denial was affirmed by the District Court. Sutey contended that failure by the planning board to consider and comply with the statutory criteria in this section was an abuse of discretion similar to Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974). Although each of the 12 statutory criteria was not specifically evaluated, the District Court did not err in rejecting Sutey's argument that each of the criteria had to be examined or in holding that the planning board had sufficient information on which to deny the permit, based on grounds of incompatibility with neighboring single-family residential land use. In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496, 55 St. Rep. 499 (1998).

Arbitrary Failure to Issue Building Permit — Violation of Due Process Rights: A citizens group sought to have the building permit for a Salvation Army warehouse revoked on the grounds that the warehouse adversely impacted the character of the neighborhood. The Supreme Court upheld the city's issuance of the permit, stating that the proposed building was in compliance with all building codes and any denial of the permit would have violated the property owner's substantive due process rights. Westside Neighborhood Betterment Comm. v. Great Falls, 242 M 58, 788 P2d 335, 47 St. Rep. 542 (1990).

Mobile Homes — Restrictive Zoning Based on Health and Safety Reasons: Summary judgment striking down a zoning ordinance restricting mobile homes to certain areas that comprised a very small percentage of the municipal area was improperly granted because factual controversies existed. The first issue to be resolved was whether the ordinance required overly restrictive placement of all mobile homes, thus unconstitutionally excluding them, or whether restrictions applied for health or safety reasons only to those mobile homes not in compliance with Uniform Building Code (UBC) standards (which had been adopted by the local government), thus allowing

all UBC complying mobile homes to be located with other complying residences. If the ordinance was to be construed as excluding only non-UBC complying structures, it should then be determined whether mobile homes complied or could reasonably be altered to comply with UBC standards before determining they were unconstitutionally excluded. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

Consolidated City-County Government — Holdover Plan — No New Planning Board: A zoning ordinance enacted after city-county consolidation based upon a comprehensive plan (now growth policy) adopted by the old City-County Planning Board prior to consolidation was proper in that the new consolidated government had not by that time formed a Planning Board having the same jurisdictional area as the consolidated local government. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

Highest and Best Use of Land Not Valid Consideration in Itself: This section does not require that zoning ordinances take into account highest and best use of each parcel of real estate within a zone but rather that peculiar suitabilities and most appropriate use of land throughout municipality be considered. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980), followed in Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648, 47 St. Rep. 2287 (1990), and Boland v. Great Falls, 275 M 128, 910 P2d 890, 53 St. Rep. 69 (1996).

Formal Record Requirement: The record made by the City Council (and relied on by the District Court) in exercising its zoning authority was so lacking in factual information that it cannot be said that the requirements of this section have been followed. Schanz v. Billings, 182 M 328, 597 P2d 67 (1979); Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974).

Rezoning Ordinance: A rezoning ordinance, like a zoning ordinance, is a legislative enactment and is entitled to the presumption of validity and reasonableness. However, where the information upon which a City Council and District Court act is so lacking in fact and foundation as to make judicial review impossible, it is clearly unreasonable and constitutes an abuse of discretion. An ordinance for zoning or rezoning is invalid unless made in accordance with the provisions of this section. Schanz v. Billings, 182 M 328, 597 P2d 67, 36 St. Rep. 1163 (1979), followed in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Zoning as Legislative Action — Rezoning or Granting or Denying Variance as Administrative or Quasi-Judicial Action: There is sound distinction between "zoning" and "rezoning" or granting or denying a variance. The former constitutes a legislative act, while the latter is more of an administrative or quasi-judicial act in applying provisions of existing ordinance or law and requires the making of a record upon which judicial review can be had. Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974). Distinction overruled in Schanz v. Billings, 182 M 328, 597 P2d 67 (1979). The contradictory language in the opinion was overruled in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995), which followed Schanz. See also Foster v. City Comm'n, 189 M 64, 614 P2d 1072 (1980).

Collateral References

62 C.J.S. Municipal Corporations §226.

83 Am. Jur. 2d Zoning and Planning §§70 through 99.

76-2-305. Alteration of zoning regulations — protest.

Compiler's Comments

1999 Amendment: Chapter 492 in (2) at beginning inserted prohibition against amendment becoming effective unless approved by a two-thirds vote of council or legislative body of municipality, inserted "pursuant to subsection (1)", and increased number of required signers of protest from 20% to 25%; in (2)(b) substituted "those lots 150 feet from a lot included in a proposed change" for "those immediately adjacent in the rear thereof extending 150 feet therefrom or of those adjacent on either side thereof within the same block or of those directly opposite thereof extending 150 feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the city or town council or legislative body of such municipality"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 2, Ch. 492, L. 1999, was a saving clause.

Case Notes

Administrative Remedies to Be Exhausted Before Seeking District Court Relief: The Supreme Court upheld the lower court's dismissal of a suit on the basis that state law and city ordinances provided procedures for protesting zoning changes and that the plaintiffs had not exhausted those remedies. Kunz v. Butte-Silver Bow, 244 M 271, 797 P2d 224, 47 St. Rep. 1615 (1990).

When Written Record Not Required: Because there is no statutory requirement that a City Commission, in granting or denying a rezoning request, enter written findings of fact, keep a verbatim record of the proceedings, and conduct the proceedings in an adjudicative manner so as to preserve applicant's full procedural due process rights, it was improper for lower court to issue Writ of Mandamus ordering City Commission to hold rehearing, when applicant failed to raise these procedural questions during initial hearing. Foster v. City Comm'n, 189 M 64, 614 P2d 1072 (1980).

Conditions for Granting Variance: In exercise of its authority the Board of Adjustment must determine that grant of a variance would not be contrary to the public interest, that literal enforcement of the zoning ordinance would create unnecessary hardship due to conditions unique to the property, and that the spirit of the ordinance is observed and substantial justice is done. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980); Rygg v. Kalispell Bd. of Adjustment, 169 M 93, 544 P2d 1228 (1976); Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969).

Void Building Permit: Building permit which allowed owner to use land for a purpose for which it was not zoned had the effect of rezoning without compliance with this section and was therefore void. State ex rel. Russell Center v. Missoula, 166 M 385, 533 P2d 1087 (1975).

Zoning Modification: Where zoning ordinance amending preexisting zoning ordinances of city to reclassify lots was unanimously passed by City Commission, amendatory ordinance was valid irrespective of number of protests by landowners in area. Olson v. City Comm'n, 146 M 386, 407 P2d 374 (1965).

Attorney General's Opinions

Protest Provisions Applicable When Zoning Regulation Changed by Interim Zoning Authority: The protest provisions in subsection (2) of this section are available to affected landowners whenever an existing zoning regulation is changed within the scope of subsection (1) of this section through exercise by a city or town council of the zoning authority in 76-2-306. 46 A.G. Op. 5 (1995).

Applicability of Protest Provisions to Irregularly Shaped Parcels: The protest provisions of this section apply to proposed zoning amendments affecting nonrectangular or nonsquare parcels of land. Identification of the statutorily defined protest areas must be made with reference to the particular facts. 41 A.G. Op. 68 (1986).

Area for Computing Valid Protest: A single rezoning proposal which entails separable changes in two separate districts must be considered as two separate proposals for the purpose of mapping protest areas and determining the voting requirements. 37 A.G. Op. 58 (1977).

Collateral References

Zoning and Planning *key* 151 through 230.

62 C.J.S. Municipal Corporations §227(10); 101A C.J.S. Zoning and Land Planning §§65 through 100.

Zoning: validity and construction of provisions of zoning statute or ordinance regarding protest by neighboring property owners. 7 ALR 4th 732.

Authority of zoning commission to impose, as condition of allowance of special zoning exception, permit, or variance, requirements as to highway and traffic changes. 49 ALR 3d 492.

Imposing restriction as to hours or days of operation of business as condition of allowance of special zoning exception or variance. 99 ALR 2d 227.

Who may apply for variance, special exception, or use permit. 89 ALR 2d 663.

Consent: validity of zoning ordinance or similar public regulation requiring consent of neighboring property owners to permit or sanction specified uses or construction of buildings. 21 ALR 2d 551.

76-2-306. Interim zoning ordinances.

Case Notes

Moratorium on Conditional-Use Permits — Zoning — Mandamus — Prohibition — Declaratory Judgment: Appellant requested a conditional-use permit for a planned shopping center. In response, the city of Helena established a 1-year moratorium on the granting of all conditional-use permits. Appellant then filed his complaint and petition for a declaratory judgment, Writ of Mandate, and order to show cause. On appeal, the court found: (1) the city may adopt a reasonable general moratorium, but the procedure required by this section must be followed; (2) the discretion of the City Commission to approve, modify, or deny the recommendation of the zoning commission cannot be controlled by Writ of Mandate, prohibition,

or by declaratory judgment; and (3) a Writ of Mandate requiring the city to act on appellant's application within a reasonable time is proper under the circumstances in this case. State ex rel. Diehl Co. v. Helena, 181 M 306, 593 P2d 458, 36 St. Rep. 735 (1979).

Attorney General's Opinions

Protest Provisions Applicable When Zoning Regulation Changed by Interim Zoning Authority: The protest provisions in 76-2-305(2) are available to affected landowners whenever an existing zoning regulation is changed within the scope of 76-2-305(1) through exercise by a city or town council of the zoning authority in this section. 46 A.G. Op. 5 (1995).

Collateral References

Public facilities: validity of municipality's ban on construction until public facilities comply with specific standards. 92 ALR 3d 1073.

Interim zoning: validity and effect of "interim" zoning ordinance. 30 ALR 3d 1196.

76-2-307. Zoning commission.

Attorney General's Opinions

Municipal Planning Board Not to Be Vested With Municipal Zoning Commission Powers: Authorization does not exist for designation of a city planning board as a zoning commission, and 7-1-114 prohibits establishment of an alternative zoning system by local ordinance. Therefore, a city exercising self-government powers may not vest its municipal planning board with powers vested in municipal zoning commissions by this section. 47 A.G. Op. 4 (1997).

Collateral References

Municipal Corporations *key* 621(39).

62 C.J.S. Municipal Corporations §227(1).

76-2-308. Enforcement of zoning regulations and ordinances.

Case Notes

Writ of Mandate Improper Where Other Adequate Remedy Lies: Where builders had invested approximately $114,000 and were one-third completed, city was estopped from revoking building permit, after builders relied on it to their detriment, to meet setback requirements of city zoning ordinance. Writ of Mandate brought by residents to command builders to conform to setback requirements could not lie, as 76-2-321 through 76-2-328 provide residents with a speedy and adequate remedy at law and a Writ of Mandate is an extraordinary remedy to be permitted only when no other adequate remedy lies. State ex rel. May v. Hartson, 167 M 441, 539 P2d 376 (1975).

Collateral References

Municipal Corporations *key* 621(48), 631(2); Zoning and Planning *key* 761 through 799.

62 C.J.S. Municipal Corporations §§228(1), 315, et seq.; 101A C.J.S. Zoning and Land Planning §§334 through 354.

83 Am. Jur. 2d Zoning and Planning §§1084 through 1104.

Right to resume nonconforming use after period of nonuse or of a different use from that in effect at or before the time of zoning. 57 ALR 3d 279; 56 ALR 3d 14, 138.

76-2-309. Conflict with other laws.

Collateral References

Municipal Corporations *key* 592(1).

62 C.J.S. Municipal Corporations §143.

76-2-310. Extension of municipal zoning and subdivision regulations beyond municipal boundaries.

Compiler's Comments

1999 Amendment: Chapter 582 at beginning of (1) inserted exception clause, after "adopted" substituted "growth policy" for "master plan", and after "direction" substituted "subject to the following limits" for "but not in a county which has adopted such regulations within the contemplated area"; at beginning of (1)(a) inserted "up to 3 miles beyond the limits of" and after "7-1-4111" deleted "may not extend the application of its zoning or subdivision regulations, or both, more than 3 miles beyond its limits"; at beginning of (1)(b) inserted "up to 2 miles beyond the limits of" and after "class" deleted "may not so extend more than 2 miles beyond its limits"; at beginning of (1)(c) inserted "up to 1 mile beyond the limits of" and after "class" deleted "may not

so extend more than 1 mile beyond its limits"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Attorney General's Opinions

Extraterritorial Extension of City Zoning Regulations: In the absence of applicable county zoning regulations, this section authorizes a city of the first class that has adopted a master plan (now growth policy) to extend its zoning regulations extraterritorially within a 3-mile radius of its corporate limits without reference to county boundary lines. 43 A.G. Op. 22 (1989).

76-2-311. Administration of regulations in extended area.

Compiler's Comments

1999 Amendment: Chapter 582 in two places substituted "growth policy" for "master plan"; in (1) after "regulations" substituted "adopted pursuant to 76-2-310" for "in the area to the same extent"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

76-2-312. Exclusion for commission-manager plan municipalities.

Case Notes

Authority of Board of County Commissioners to Approve Subdivisions Within Three-Mile Area Outside Corporate Limits: The city of Bozeman sought a reversal of 43 A.G. Op. 26 (1989), in which the Attorney General held that the Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. Bozeman asserted that this section was not a limitation on the authority of commission-manager governments but rather an acknowledgement by the Legislature that such municipal governments already had extraterritorial subdivision authority under 7-3-4444 and that this section exempted cities with a commission-manager form of government from procedural requirements that other forms of municipal government have to follow in order to exercise their extraterritorial subdivision authority. However, 7-3-4444 does not refer to the city commission, but instead clearly provides that the authority granted is to the city director of public services to ensure that the involved plat complies with platting regulations. If the plat complies, the director must approve it. The District Court properly found that this section took away the extraterritorial subdivision authority over subdivisions that Bozeman, as a commission-manager form of government, would otherwise have had under 76-2-310 and 76-2-311. Bozeman v. Racicot, 253 M 204, 832 P2d 767, 49 St. Rep. 435 (1992).

Attorney General's Opinions

Authority of County Commissioners to Approve Subdivisions Under Commission-Manager Government: The Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. 43 A.G. Op. 26 (1989).

76-2-315. Violations and penalties.

Collateral References

Zoning and Planning *key* 801 through 805.

Injuries or death, violation of zoning ordinance or regulation as affecting or creating liability for. 31 ALR 2d 1469.

76-2-321. Board of adjustment.

Case Notes

Board of Adjustment's Discretionary Power for Variances: Variance order granted for the operation of a law office in a zoned residential area will not be set aside without a showing that the variance was contrary to public interest and thus an abuse of discretion. Rygg v. Kalispell Bd. of

Adjustment, 169 M 93, 544 P2d 1228 (1976). (Comment: Case gives three criteria for the establishment of variances in Montana.)

Attorney General's Opinions

Local Government Subject to State Zoning Laws — Ordinance Creating Appeal Prohibited: Section 7-1-114 prohibits a local legislative body from providing for an option appeal of decisions from the local zoning Board of Adjustment to the legislative body since 76-2-327 provides that appeal may only be to a court of record. This section authorizes the local legislative body to act instead of the Board of Adjustment in certain cases, not in addition to the Board. 38 A.G. Op. 98 (1980).

Collateral References

Municipal Corporations *key* 621(39).

62 C.J.S. Municipal Corporations §227(2).

83 Am. Jur. 2d Zoning and Planning §§721 through 732, 736, 742 through 744.

Validity and construction of provisions of zoning statute or ordinance respecting protest or petition by property owners. 7 ALR 4th 732.

Validity of zoning ordinance or similar public regulation requiring consent of neighboring property owners to permit or sanction specified uses or construction of buildings. 21 ALR 2d 551.

76-2-322. Membership and term of board members — vacancies.

Compiler's Comments

1987 Amendment: In (1) authorized increase of Board size from mandatory five members to not more than seven members.

1985 Amendment: In (1) after "term", inserted provision that legislative body may specify the term; and made minor changes in phraseology.

76-2-323. Powers of board of adjustment.

Case Notes

Authority of Board of Adjustment Regarding Land Use Upheld: The Bozeman Board of Adjustment acted within its jurisdiction under this section in granting a zoning variance that imposed limits on the number of waterfowl landowners can raise on their land. Schendel v. Bd. of Adjustment, 237 M 278, 774 P2d 379, 46 St. Rep. 800 (1989).

Denial of Variance Request — No Abuse: Because the record reveals that granting of a variance request to use certain property as a tavern would increase fire hazards, traffic congestion, and interference with emergency vehicle access, the Anaconda-Deer Lodge County Board of Adjustment and the District Court did not abuse their discretion in denying the request. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691, 37 St. Rep. 693 (1980).

Conditions for Granting Variance: In exercise of its authority the Board of Adjustment must determine that grant of a variance would not be contrary to the public interest, that literal enforcement of the zoning ordinance would create unnecessary hardship due to conditions unique to the property, and that the spirit of the ordinance is observed and substantial justice is done. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980); Rygg v. Kalispell Bd. of Adjustment, 169 M 93, 544 P2d 1228 (1976); Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969).

Writ of Mandate Improper Where Other Adequate Remedy Lies: Where builders had invested approximately $114,000 and were one-third completed, city was estopped from revoking building permit, after builders relied on it to their detriment, to meet setback requirements of city zoning ordinance. Writ of Mandate brought by residents to command builders to conform to setback requirements could not lie, as 76-2-321 through 76-2-328 provide residents with a speedy and adequate remedy at law and a Writ of Mandate is an extraordinary remedy to be permitted only when no other adequate remedy lies. State ex rel. May v. Hartson, 167 M 441, 539 P2d 376 (1975).

Refusal of Variance: Refusal of variance to expand trailer court was sufficiently supported by evidence that there were sanitation problems in the neighborhood and that the hardship conditions were self-imposed by the act of the owner in proceeding with expansion before receiving the variance. Wheeler v. Armstrong, 166 M 363, 533 P2d 964 (1975).

Powers of Board of Adjustment Broad, General, and Discretionary: Contention that the powers of the Board of Adjustment (or Appeal) created by this act, authorizing the enactment of zoning ordinances in cities and towns, are limited to slight variations, such as the height of a building, the distance it must be from the street, etc., held not meritorious, but that on the contrary the Board, an administrative body vested with general power to act as a factfinding body and determine

whether in any specific case unusual hardship might result from an enforcement of the strict letter of the ordinance, possesses broad and general powers with a considerable latitude for the exercise of discretion, the conferring of which powers does not constitute an unlawful delegation of legislative authority. Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934), distinguished in Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963).

Law Review Articles

Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One but Himself to Blame?, Reynolds, 20 Urb. Law. 1 (1988).

Zoning Variance for Solar Systems, Michaelson, 2 Solar L. Rep. 463 (1980).

Zoning Variance for Wind Tower, Lange, 2 Solar L. Rep. 483 (1980).

Collateral References

101A C.J.S. Zoning and Land Planning §§228 through 264.

83 Am. Jur. 2d Zoning and Planning §§750 through 755.

76-2-325. Public access to board activities.

Collateral References

83 Am. Jur. 2d Zoning and Planning §§742 through 786.

76-2-326. Appeals to board of adjustment.

Case Notes

Writ of Mandate Improper Where Other Adequate Remedy Lies: Where builders had invested approximately $114,000 and were one-third completed, city was estopped from revoking building permit, after builders relied on it to their detriment, to meet setback requirements of city zoning ordinance. Writ of Mandate brought by residents to command builders to conform to setback requirements could not lie, as 76-2-321 through 76-2-328 provide residents with a speedy and adequate remedy at law and a Writ of Mandate is an extraordinary remedy to be permitted only when no other adequate remedy lies. State ex rel. May v. Hartson, 167 M 441, 539 P2d 376 (1975).

Collateral References

83 Am. Jur. 2d Zoning and Planning §§742 through 749.

76-2-327. Appeals from board to court of record.

Case Notes

Review of Board of Adjustment Decision — Scope Broader Than General: A District Court's scope of review upon a writ of certiorari ordinarily cannot be extended further than to determine whether an inferior tribunal, board, or officer has regularly acted within its authority. However, under this section, a District Court has a broader scope of review of an appeal from a decision by the Board of Adjustment. The court may hold a hearing and reverse, modify, or affirm a Board decision. In reviewing a District Court decision involving the exercise of the statutory option to take additional evidence, the standard applied by the Supreme Court is whether the District Court abused its discretion and whether the decision was supported by substantial evidence. In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496, 55 St. Rep. 499 (1998). See also Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969), Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980), and Whistler v. Burlington N. RR Co., 228 M 150, 741 P2d 422 (1987).

Taking Additional Evidence Within Discretion of Trial Court: This section provides the District Court with authorization to take additional evidence on an appeal from a board of adjustment. The court may, in the exercise of its discretion, determine not to take additional evidence if it appears that additional evidence is not necessary to properly dispose of the matter. Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648, 47 St. Rep. 2287 (1990).

Review of Board of Adjustment Decision: The District Court's review under 27-25-303 of a zoning decision of the Bozeman Board of Adjustment was proper because the court determined that the Board lawfully granted a zoning variance upon which it properly placed restrictions. Schendel v. Bd. of Adjustment, 237 M 278, 774 P2d 379, 46 St. Rep. 800 (1989).

Substantial and Competent Evidence: When the evidence showed that the refusal of the Zoning Board was based on a concern for public health, that the hardship caused the owners of a trailer court was of their own creation, and that the spirit of the zoning ordinance would be observed by denying a variance for an expansion of the trailer court, there was substantial and competent evidence to sustain the action of the court sustaining the denial of the variance. Wheeler v. Armstrong, 166 M 363, 533 P2d 964 (1975).

Evidence at Hearing: Taking of additional evidence by District Court on appeal from Board of Adjustment's denial of zoning variance was not abuse of discretion even though Board did not present any additional evidence. Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969).

Attorney General's Opinions

Local Government Subject to State Zoning Laws — Ordinance Creating Appeal Prohibited: Section 7-1-114 prohibits a local legislative body from providing for an optional appeal of decisions from the local zoning Board of Adjustment to the legislative body since 76-2-327 provides that appeal may only be to a court of record. This section authorizes the local legislative body to act instead of the Board of Adjustment in certain cases, not in addition to the Board. 38 A.G. Op. 98 (1980).

Collateral References

Zoning and Planning *key* 561 through 760.

101A C.J.S. Zoning and Land Planning §§265 through 333.

83 Am. Jur. 2d Zoning and Planning §§1019, 1026 through 1043, 1046 through 1061.

Standing of zoning board of appeals or similar body to appeal reversal of its decision. 13 ALR 4th 1130.

Standing of civic or property owners' association to challenge zoning board decision (as aggrieved party). 8 ALR 4th 1087.

Protest or petition by property owners, validity and construction of provisions of zoning statute or ordinance respecting. 7 ALR 4th 732.

Boundaries: necessary or proper parties to suit or proceeding to establish private boundary line. 73 ALR 3d 948.

Standing owner: standing of owner of property adjacent to zoned property, but not within territory of zoning authority, to attack zoning. 69 ALR 3d 805.

Mandamus to compel zoning officials to cancel permit granted in violation of zoning regulation. 68 ALR 3d 166.

New application: zoning board's grant of new application for zoning change, variance, or special exception after denial of previous application covering same property or part thereof. 52 ALR 3d 494.

Standing municipality: standing of municipal corporation or other governmental body to attack zoning of land lying outside its borders. 49 ALR 3d 1126.

Sale of property: zoning or other public restrictions on the use of property as affecting rights and remedies of parties to contract for the sale thereof. 39 ALR 3d 362.

Notice: construction and application of statute or ordinance requiring notice as prerequisite to granting variance or exception to zoning requirement. 38 ALR 3d 167.

Cross-examination: right to cross-examination of witnesses in hearings before administrative zoning authorities. 27 ALR 3d 1304.

Sale of property: purchaser of real property as precluded from attacking validity of zoning regulation existing at the time of the purchase and affecting the purchased property. 17 ALR 3d 743.

Disqualification for bias or interest of administrative officer sitting in zoning proceeding. 10 ALR 3d 694.

Eminent domain: zoning as a factor in determination of damages in eminent domain. 9 ALR 3d 291.

Notice: inclusion or exclusion of first and last days in computing time for giving notice of zoning hearing which must be given a certain number of days before a known future date. 98 ALR 2d 1394.

Notice: validity and construction of statutory notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation. 96 ALR 2d 449.

Judgment denying permit for use of premises under zoning regulations as bar to subsequent application. 71 ALR 2d 1362.

Motives: inquiry, upon review of zoning regulation, into motive of members of municipal authority approving or adopting it. 71 ALR 2d 568.

Intervention in court review of zoning proceeding, right as to. 46 ALR 2d 1059.

Remedies to compel municipal officials to enforce zoning regulations. 35 ALR 2d 1135.

Civil rights: right of real property owner to relief under Federal Civil Rights Acts against amendment of zoning ordinance increasing minimum lot requirements. 25 ALR Fed. 850.

Part 4
Application to Governmental Agencies
Group and Foster Homes

Part Law Review Articles

The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study, Steinman, 19 Urb. Law. 1 (1987).

76-2-402. Local zoning regulations — application to agencies.

Case Notes

Notice at Public Hearing of Planned Water Storage Facility Sufficient: The fact that the public was allowed the opportunity at a public hearing to present opinions and objections to the building of a water tower on municipal land in violation of city zoning regulations constituted sufficient notice under this section, regardless of the fact that the tower was already under construction at the time of hearing. Hagfeldt v. Bozeman, 231 M 417, 757 P2d 753, 45 St. Rep. 728 (1988).

Collateral References

Applicability of zoning regulations to governmental projects or activities. 53 ALR 5th 1.

76-2-411. Definition of community residential facility.

Compiler's Comments

1995 Amendments: Chapter 418 in (3) substituted "department of public health" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Chapter 546 in (3) substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: In (1) substituted "severely disabled" for "physically disabled".

1985 Amendment: In (1) substituted language defining community residential facility as a community group home for: "a group, foster, or other home specifically provided as a place of residence for developmentally disabled or handicapped persons who do not require nursing care"; and in (2) inserted "youth foster home or".

1983 Amendment: In (2), substituted "a youth group home as defined in 41-3-1102" for "a district youth guidance home established pursuant to 41-5-903".

Case Notes

Legislative Power Paramount to City Zoning Regulations: When the Legislature determines that the constitutional rights of developmentally disabled are to live and develop within community structure as a family unit rather than be segregated in isolated institutions, city zoning regulations should be revised to meet legislative requirements, as a city has no power except as conferred by legislative grants, which the legislative branch may modify or withdraw at its pleasure. State ex rel. Thelen v. Missoula, 168 M 375, 543 P2d 173 (1975).

Collateral References

Youth Services Proposal for Reorganization, Legislative Council, 1982.

76-2-412. Relationship of foster homes, youth group homes, community residential facilities, and day-care homes to zoning.

Compiler's Comments

1995 Amendments: Chapter 418 in (4), in first sentence, substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (2) substituted "department of public health and human services" for "department of family services"; in (3), in second sentence, substituted "department of public health and human services" for "department"; in (4), in first sentence, substituted "department of public health and human services" for "department of health and environmental sciences and the department of family services" and at end of second sentence substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: Inserted (2) designating a family day-care home or group day-care home registered by Department as a residential use of property for zoning purposes; at beginning of (3) substituted "facilities listed in subsections (1) and (2)" for "homes"; at end of (3) inserted "or a day-care home serving 12 or fewer children"; and in (4) substituted reference to subsection (1) for "this section" and inserted second sentence prohibiting a city or county from requiring a conditional use permit to maintain a day-care home registered by Department of Family Services.

Function Transfer: Pursuant to sec. 117, Ch. 609, L. 1987, the Governor by executive order transferred the function and authority contained in this section from the Department of Social and Rehabilitation Services to the Department of Family Services.

1983 Amendment: In (1), changed "boarding home" to "youth group home".

Case Notes

Frivolous Resistance to Group Homes and Facilities: There is absolutely no question that under Montana law a group home for eight or fewer people is a residence and may be located in any area in the state zoned residential. The Supreme Court will not require community residential facilities to repeatedly defend their well-established right to locate in any residential area. The city's appeal from a lower court order upholding this principle is dismissed as frivolous, with costs of $500 assessed against the city in favor of the regional mental health center seeking a conditional use permit to locate a group home for eight or fewer mentally disabled adults in a residential area. Mahrt v. Kalispell, 213 M 96, 690 P2d 418, 41 St. Rep. 1979 (1984).

Effect of Restrictive Covenant on Use of Residence as Home for Developmentally Disabled Children: Restrictive covenants are to be strictly construed, and where residence for developmentally disabled children was structured as single housekeeping unit and was to all outside appearances a usual, stable, and permanent family unit, it was within the ambit and intent of subdivision restrictive covenant limiting use of property to single-family dwellings. State ex rel. Region II Child & Family Serv., Inc. v. District Court, 187 M 126, 609 P2d 245 (1980).

Constitutionality: This section is constitutional within purview of 1972 Montana Constitution and supersedes city ordinances that restrict use of residential areas to one-family dwellings only. State ex rel. Thelen v. Missoula, 168 M 375, 543 P2d 173 (1975).

Attorney General's Opinions

Certain Community Residential Facilities Excluded From Building Code Compliance: Subsection (3) of this section excludes from state building code compliance community residential facilities serving 8 or fewer persons and day-care homes serving 12 or fewer persons. 45 A.G. Op. 3 (1993).

Law Review Articles

The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study, Steinman, 19 Urb. Law. 1 (1987).

A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes, Hopperton, 19 Urb. L. Ann. 47 (1980).

Overcoming Zoning Restrictions on Community Homes for Retarded Persons, Lippincott, 31 Stanford L. Rev. 767 (1979).

Collateral References

Applicability and application of zoning regulations to single residences employed for group living of mentally retarded persons. 32 ALR 4th 1018.

Youth Services Proposal for Reorganization, Legislative Council, 1982.

Part 9
Agricultural Activities

Part Compiler's Comments

Saving Clause: Section 5, Ch. 309, L. 1995, was a saving clause.

Severability: Section 6, Ch. 309, L. 1995, was a severability clause.

CHAPTER 3
LOCAL REGULATION OF SUBDIVISIONS

Chapter Compiler's Comments

Severability Clause: Section 19, Ch. 500, L. 1973, was a severability clause.

Validation Clause Not Codified: Subsection (2) and part of subsection (4) of section 11-3870, R.C.M. 1947, validating clauses, were not codified. The sections were not repealed and are still valid law. Citation may be made to sec. 12, Ch. 500, L. 1973, as amended by sec. 8, Ch. 334, L. 1974.

Chapter Administrative Rules

ARM 36.15.204 Local flood plain regulations — requirements.

Chapter Case Notes

Subdivision and Platting Act Constitutional — Permissible Delegation of Legislative Authority: Plaintiff challenged the constitutionality of the Montana Subdivision and Platting Act on the grounds that the statutory preamble to the Act's exemptions amounted to an unconstitutional delegation or usurpation of legislative authority on the basis that the Act contains insufficient guidelines. The Supreme Court distinguished this case from cases relating to a legislative grant of rulemaking authority to administrative agencies based on differences in nature between agencies and local governments. The delegation of authority by the Legislature was not impermissible, and rules adopted by the county pursuant to the Act are constitutional when the rules are not inconsistent with or contradictory to the Act and when they give notice to the property owner as to what the county will look at in making a determination. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

County Not Acting as State's Agent in Denial of Disposal Permit — Mandamus Erroneously Granted: Where the plaintiff applied to the county health department for a disposal permit but was not informed for a period of 6 years whether the permit would be granted, the District Court erred in holding that the Department of Health and Environmental Sciences (now Department of Environmental Quality) was estopped from denying the permit by the county's failure to act. There were no statutes or decisions that made the county the agent of the Department at the time of the 1971 permit application. Under the rationale of St. v. District Court, 170 M 15, 550 P2d 382 (1976), the record and statutes show that the county did not act as an agent for the state in the denial of the 1971 application. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

Chapter Attorney General's Opinions

Subsequent Sale of Parcel Originally Used as Lien Security — State and Local Regulation Inapplicable: The provisions of Title 76 relating to local and state regulation of subdivisions do not apply to the subsequent sale of an undivided parcel that was originally used as security for a construction lien pursuant to 76-3-201, and nothing in the Montana Subdivision and Platting Act requires that the parcel be reviewed or surveyed upon subsequent sale. 42 A.G. Op. 101 (1988).

Conveyance of Land From Private Owner to U.S.D.A. — Transaction Exempt From Regulation: In the case of land conveyed from a private owner to the U.S. Department of Agriculture pursuant to 16 U.S.C. §485, since the land was subject to condemnation by the U.S. in the absence of agreement and because the term "law of eminent domain", as defined in 76-3-201, includes federal condemnation proceedings, the transaction was exempted from regulation under the Montana Subdivision and Platting Act. Further, the Department is immune from direct enforcement of the Act because of general sovereignty principles. 42 A.G. Op. 36 (1987).

Exemption of U.S. From Filing and Enforcement Provisions: The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. §1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

Violation of Statute — Contracts Voidable: Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act are voidable. The effect of the voidability of such an illegal contract or deed varies depending on the circumstances of the case. 38 A.G. Op. 106 (1980).

Curing Defect: Violations of the Montana Subdivision and Platting Act may be corrected by the parties to the transaction by voiding the prior improper conveyance and conveying the land in accordance with the Act. 38 A.G. Op. 106 (1980).

Subdivision Remainders: The Department of Health and Environmental Sciences (now Department of Environmental Quality) may require that plats show the remainder of land less

than 20 acres left after the segregation of subdivided parcels and has authority to review such remainders under Title 76, ch. 4. 37 A.G. Op. 74 (1977).

Affidavit of Good Faith Not to Circumvent Act — When Required: A transaction involving a contract for deed which allows the purchaser to acquire title to a portion of the land is subject to 76-3-101, et seq., if the transaction is undertaken for the purpose of evading the act, and a local governing body may require a person claiming the 76-3-201 exemption to file an affidavit of good faith without intent to circumvent. 37 A.G. Op. 41 (1977).

Contracts or Deeds: Contracts to convey land or deeds executed after July 1, 1973, in violation of the Montana Subdivision and Platting Act are void. 35 A.G. Op. 65 (1974).

Effect on Prior Contracts: Montana Subdivision and Platting Act does not govern the recording of deeds prepared and executed under contracts for deed prior to July 1, 1973, but not presented for recording until after June 30, 1973. 35 A.G. Op. 55 (1973).

Chapter Law Review Articles

Running With the Land in Montana, Natelson, 51 Mont. L. Rev. 17 (1990).

The Occasional Sale Exemption of the Montana Subdivision and Platting Act, Lanning, 49 Mont. L. Rev. 333 (1988).

Judicial Expansion of the Montana Subdivision and Platting Act in Florence-Carlton, Wilcox, 41 Mont. L. Rev. 113 (1980).

The Environmental Policy Acts (relationship to subdivisions), Tobias & McLean, 41 Mont. L. Rev. 177 (1980).

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Land Use Planning and the Montana Legislature: An Overview for 1973, Lundberg, 35 Mont. L. Rev. 38 (1974).

City-County Planning in Montana, Keefer, 25 Mont. L. Rev. 185 (1964).

Privatizing the Neighborhood: A Proposal to Replace Zoning With Private Collective Property Rights to Existing Neighborhoods, Nelson, 7 Geo. Mason L. Rev. 827 (1999).

Privatizing Urban Land Use Regulation: The Problem of Consent, Eagle, 7 Geo. Mason L. Rev. 905 (1999).

Overview of Land Use Regulation, Ziegler, 1995 Rocky Mtn. Min. L. Found. 1 (1995).

Recent Developments in Land Use Law, Kramer, Inst. on Plan. Zoning & Eminent Domain 1-1(70) (1991).

Subdividers Given Reprieve From Economic Performance Rules, Klein, 18 J. Real Est. Tax'n 391 (1991).

Estimated Costs of Future Improvements to Subdivisions: Possible Legislative Relief From Economic Performance Rules, 31 Tax Mgmt. Memorandum 355 (1990).

Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion, Reynolds, 24 Ga. L. Rev. 525 (1990).

Site Condominiums as Alternatives to Conventional Subdivision Platting, Beale & Kohls, 68 Mich. B.J. 1188(5) (1989).

Sensing Leave for One's Takings: Interim Damages and Land Use Regulation, Cooperstein, 7 Stan. Envtl. L.J. 49 (1988).

The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action, Shultz & Groy, 1988 Utah L. Rev. 569 (1988).

Chapter Collateral References

Our Montana Environment...Where Do We Stand?, Environmental Quality Council, 1996.

Summary Proceedings, Montana Ground Water Conference, "Planning a Ground Water Strategy", Environmental Quality Council, 1982.

Annexation Laws, Legislative Council, 1980.

Montana's Greenbelt Law, Legislative Council, 1980.

Montana's Subdivision Laws: Problems and Prospects, Legislative Council, 1978.

Preservation of Agricultural Lands: Alternative Approaches, Legislative Council, 1976.

Part 1
General Provisions

Part Case Notes

Regulatory Powers Regarding Subdivision Control: The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory

functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

Part Attorney General's Opinions

State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area: The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

76-3-101. Short title.

Case Notes

Approval of Preliminary Plat Not Appealable: Kalispell argued that the issuing of a preliminary plat approval by the city-county planning board was illegal because it did not conform with the master zoning plan adopted by the city and county. The Supreme Court followed the precedent of its decision in Sourdough v. Bd. of County Comm'rs, 253 M 325, 833 P2d 207 (1992), holding that there is no statutory appeal process from the approval of a preliminary plat. Kalispell v. Flathead County, 260 M 258, 859 P2d 458, 50 St. Rep. 1033 (1993).

76-3-102. Statement of purpose.

Compiler's Comments

2001 Amendment: Chapter 348 inserted (6) regarding preservation of open space; inserted (7) regarding promotion of cluster development approaches minimizing costs to citizens and promotion of effective and efficient public service; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

1995 Amendment: Chapter 468 inserted (6) concerning protection of rights of property owners; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

1993 Amendment: Chapter 272 after "natural environment" deleted "to require that whenever necessary, the appropriate approval of subdivisions be contingent upon a written finding of public interest by the governing body". Amendment effective April 6, 1993.

Applicability: Section 7(1), Ch. 272, L. 1993, provided that this section applies "to all subdivision applications filed after passage and approval of [this act]". Approved April 6, 1993.

Case Notes

Statute of Limitations Not to Begin to Run on Covenant Running With the Land Until Demand for Performance Made: The landowners did not request that the developer build a covented road until 16 years after they purchased the property. The Supreme Court determined that a covenant to dedicate is an affirmative, written covenant running with the land. It is meant to benefit a purchaser's property. The Supreme Court held that public policy demands that real estate developers be strictly held to their covenants and that the statute of limitations does not begin to run on an affirmative covenant until a demand for performance has been made. Scherpenseel v. Bitney, 263 M 68, 865 P2d 1145, 50 St. Rep. 1709 (1993), distinguished in Country Estates Homeowners Ass'n, Inc. v. McMillan, 276 M 100, 915 P2d 806, 53 St. Rep. 297 (1996).

Subdivision and Platting Act Constitutional — Permissible Delegation of Legislative Authority: Plaintiff challenged the constitutionality of the Montana Subdivision and Platting Act on the grounds that the statutory preamble to the Act's exemptions amounted to an unconstitutional delegation or usurpation of legislative authority on the basis that the Act contains insufficient guidelines. The Supreme Court distinguished this case from cases relating to a legislative grant of rulemaking authority to administrative agencies based on differences in nature between agencies and local governments. The delegation of authority by the Legislature was not impermissible, and rules adopted by the county pursuant to the Act are constitutional when the rules are not inconsistent with or contradictory to the Act and when they give notice to the property owner as to what the county will look at in making a determination. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

Dismissal of Appeal of Preliminary Subdivision Plat Approval Upheld: The Sourdough Protective Association petitioned the District Court for a writ of mandamus and moved to stay the Board of County Commissioners from further proceedings concerning a subdivision project for which it had granted preliminary approval. The Supreme Court held that the association had no basis to support its petition because the Board was not subject to the Montana Administrative Procedure Act and the Legislature had not created an appeal process for cases involving conditional approval of preliminary plats. Sourdough Protective Ass'n, Inc. v. Bd. of County Comm'rs of Gallatin County, 253 M 325, 833 P2d 207, 49 St. Rep. 563 (1992).

Attorney General's Opinions

Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations: Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

Original Property Boundary Established by United States Government Survey — Parcels Not Exempt From Subdivision and Platting Act: The sole fact that a parcel of land was described by references to boundaries established by a United States government survey does not exempt the parcel from the requirements of the Montana Subdivision and Platting Act. Federal survey laws that were adopted to facilitate the conveyance of land in the public domain into private ownership are distinct from Montana subdivision laws that generally regulate divisions of land and conveyances of property among private landowners. Therefore, a property owner may not convey, without complying with Montana subdivision laws, component aliquot parts of sections and government lots that are described and identified in a deed on file with a County Clerk and Recorder and that are less than 160 acres in size. 47 A.G. Op. 10 (1997), clarifying 38 A.G. Op. 66 (1980).

Strong Public Interest in Compliance: The purpose of the Montana Subdivision and Platting Act contained in 76-3-102 is in accord with the inalienable right of all Montanans to "a clean and healthful environment" (Art. II, sec. 3, Mont. Const.). The unauthorized approval of the Board of County Commissioners of a certificate of survey cannot, by itself, overcome the strong public interest (see 1993 amendment) in compliance with the provisions of the subdivision and platting law. 38 A.G. Op. 106 (1980).

Collateral References

83 Am. Jur. 2d Zoning and Planning §§518, 519.

76-3-103. Definitions.

Compiler's Comments

2001 Amendment: Chapter 348 inserted definition of cluster development; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

1997 Amendment: Chapter 503 in definition of division of land inserted second sentence concerning exclusions from definition; inserted definition of immediate family; in definition of tract of record, before "parcel of land", inserted "an individual" and inserted (b) and (c) concerning individual tract of record and instrument of conveyance; and made minor changes in style. Amendment effective May 1, 1997.

Severability: Section 4, Ch. 503, L. 1997, was a severability clause.

Effective Date — Retroactive Applicability: Section 5, Ch. 503, L. 1997, provided: "[This act] [76-3-103, 76-3-201, and 76-3-507] is effective on passage and approval [approved May 1, 1997], and [section 1] [76-3-103] applies retroactively, within the meaning of 1-2-109, to tracts filed before [the effective date of this act]." Effective May 1, 1997.

1993 Amendment: Chapter 272 deleted definition of occasional sale; in definition of subdivision substituted "parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section" for "parcels containing less than 20 acres"; inserted definition of tract of record; and made minor changes in style. Amendment effective April 6, 1993.

Applicability: Section 7(1), Ch. 272, L. 1993, provided that this section applies "to all subdivision applications filed after passage and approval of [this act]". Approved April 6, 1993.

1987 Amendment: In (12) and (13), after "conformance with", deleted "the Montana Professional Engineers' Registration Act" and deleted parentheses around "Title 37, chapter 67".

Case Notes

Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant: The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else.

A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review: A county has no affirmative duty to analyze or investigate an exemption claimed under 76-3-207 beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

Sale of Lot Presumptively Including Access: It is a presumption, albeit disputable, that the complete use and enjoyment of a parcel of land includes access to that parcel. To overcome the presumption, the seller must offer evidence or some legal basis that would controvert the buyer's reliance on the presumption. Here, the Kester's sold the Erkers a house in Big Sky for approximately $310,000. The Kesters' attorney later discovered through the title company that a portion of the driveway, which provided sole access to the house, had not been conveyed by the deed to the lot and requested additional money for the deed to the driveway. There was no indication at the time of sale that any parcel was separate and distinct from the lot, nor did the Kesters reveal any intention to reserve the driveway from the purchase of the lot. Although the Erkers were charged with constructive notice of the contents of properly recorded instruments describing prior conveyances of the property, under Montana subdivision laws, the driveway was not an individual parcel of land at the time of purchase, so the Erkers could be charged only with knowledge that the purchase of the lot described in the common metes and bounds description included the driveway. Absent evidence to the contrary, the Erkers were entitled to the presumption that purchase of the lot included access to it and to summary judgment as a matter of law. Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), following Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930).

Local Board of Health Not Considered Governing Body Despite Interlocal Agreement: Despite the fact that a county board of health was created by interlocal agreement, the District Court erred in concluding that a local board of health is considered a governing body by definition under this section. The Montana Subdivision and Platting Act does not, under 76-3-501 and 76-3-504, authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. The authority of a local board of health to regulate subdivisions derives from 50-2-116, not from the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

Review, Not Regulatory, Function Applicable to Local Board of Health Control of Minor Subdivision: Section 50-2-106, when read in conjunction with 76-4-104, does not authorize a local board of health to regulate sanitation in minor subdivisions containing five or fewer parcels. By its plain language, 76-4-104 delegates to local boards of health the power to review select subdivisions but not the power to promulgate regulations. As a reviewing authority, the board's function is limited to reviewing the proposed water supply, sewage, and solid waste disposal facilities and advising the Department of Environmental Quality of its recommendation for approval or disapproval of the subdivision. However, 50-2-116 explicitly authorizes a local board of health to regulate sewage control and disposal that is not regulated by the Montana Subdivision and Platting Act. The Act limits state sanitation regulation to subdivisions containing parcels of fewer than 20 acres each and precludes regulation of subdivisions in which each parcel of land contains more than 20 acres. Thus, the regulation of sanitation in subdivisions containing parcels of more than 20 acres each is clearly the responsibility of local boards of health. Nevertheless, 76-4-122 requires both state and local approval before filing a subdivision plat with the County Clerk and Recorder, and to hold that approval by the local board of health is a ministerial, nondiscretionary act would render 76-4-122 inoperative. Giving effect to the purpose of all the applicable statutes

and examining the legislative history of 50-2-116, the Supreme Court held that the 1991 enactment of 50-2-116(1)(i) revealed a legislative intent to expand, rather than diminish, the authority of local boards of health to regulate subdivision sanitation. Thus, local boards of health have discretionary statutory authority to regulate all subdivisions, regardless of size, notwithstanding the state's authority to regulate certain subdivisions under the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

Certificate of Survey Filed Before Monuments Set Not Properly Filed Within Meaning of Subdivision Act: Stanchfield Cattle Company sought to subdivide land by dividing it into 20-acre parcels and having it surveyed. After completion of the survey, the surveyor had the certificate of survey filed, with a note on the face of the certificate stating that the monuments had not been set because of winter conditions but would be set before July 1. NFC, which held a right of first refusal on the property, sued to prevent the transfer of any property to prospective buyers, claiming that the certificate of survey had not been filed in accordance with the Montana Subdivision and Platting Act. The Supreme Court reversed the District Court decision, holding that despite whatever practices might be common among surveyors, 76-3-404(3) and an administrative rule of the Department of Commerce (now Department of Labor and Industry), ARM 8.94.3002, require that the monuments be set at the time that the certificate of survey is filed. The Supreme Court noted that it could not change the requirements of the Act and the Department rule. NFC Partners v. Stanchfield Cattle Co., 274 M 46, 905 P2d 1106, 52 St. Rep. 1115 (1995).

Certificate of Survey — May Meet Definition of Plat: Owens argued that the incorporation by reference of the certificate of survey into a sales agreement for real property could not establish an easement because under the statute, the easement would have to be created by reference to the plat describing the property being transferred. The Supreme Court held that identifying the establishing document as a plat pursuant to the statute is not a critical element in the creation of an easement and that a certificate of survey could meet the definition of a plat as set out in the statute. The certificate must do more than establish boundaries and do more than provide a property description of a single parcel of land. The certificate must establish the division of land into two parcels and show a right-of-way for a private roadway and public utility easement. Bache v. Owens, 267 M 279, 883 P2d 817, 51 St. Rep. 1001 (1994), distinguishing Swart v. Stucky, 167 M 171, 536 P2d 762 (1975). Bache v. Owens was followed in Ruana v. Grigonis, 275 M 441, 913 P2d 1247, 53 St. Rep. 216 (1996). See also Bache v. Owens, 280 M 106, 929 P2d 217, 53 St. Rep. 1320 (1996).

Division of Land by Deed in Which Grantor and Grantee Same Party — No Transfer of Title: A transfer of land requires a conveyance of title from one person to another. If the persons are the same, no transfer occurs. If there is no transfer, there is no division of land. Therefore, a landowner cannot divide a large parcel of land into smaller parcels by executing a deed in which the grantor and the grantee are the same party. Rocky Mtn. Timberlands, Inc. v. Lund, 265 M 463, 877 P2d 1018, 51 St. Rep. 653 (1994), followed in Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131, 54 St. Rep. 293 (1997).

Condominiums as Subdivision — Unreasonable Reliance by Developers on County Opinion as to Review Requirements: The District Court awarded damages against the county in an action by condominium developers who claimed they reasonably relied to their detriment on the county's opinion that the condominiums would not be subject to subdivision review. The Supreme Court reversed after finding that the County Attorney's office maintained no confidential or professional relationship with the developers—therefore, the developers' reliance on the county's opinion was unreasonable in light of: (1) the state's determination that review would be necessary; (2) the fact that developers were represented by their own counsel; (3) the inclusion of condominiums in the definitions of "subdivision" in 76-4-102 and this section; and (4) the actual opposition to the lack of subdivision review expressed by opponents of the project, who ultimately filed suit. Young v. Flathead County, 232 M 274, 757 P2d 772, 45 St. Rep. 1047 (1988).

Subdivision Review of Four-Plex Apartments Unnecessary: Appellants brought an action to stop construction of an apartment building for failure of its builders to comply with subdivision review. The lower court granted the county's summary judgment motion based on the fact that 40 A.G. Op. 57 (1984) was rendered after construction began. During the pendency of the action, 76-3-204 was amended to clarify that new apartment buildings are exempt from subdivision review. Since an appellate court must apply the law in effect at the time it renders its decision, the Supreme Court upheld the lower court decision because the law as amended makes subdivision review unnecessary for the respondents' four-plex apartment building. Lee v. Flathead County, 217 M 370, 704 P2d 1060, 42 St. Rep. 1258 (1985).

"Dedication": An action was filed to quiet title to a county road that had been established as a public road in 1909. The certificate of dedication of the 1909 plat stated that the streets therein were "granted and dedicated to the use of the public forever". In 1944, pursuant to section 1635, R.C.M. 1935, a petition for county road closure was filed. That same year the petition was granted by the County Commissioners. After 1944, neither the plaintiffs nor their predecessors in interest paid any taxes on the roadway and no portion of the roadway was fenced into the lands now belonging to the plaintiffs until 1980. The court quieted title in the plaintiffs, ruling that the 1909 plat dedication was the equivalent of a right-of-way deed under which the public acquired only the right-of-way and the incidents necessary to its enjoyment and that upon abandonment the fee in the street reverted to the abutting landowners, with each abutting landowner taking fee from the edge of his property to the center of the street. Bailey v. Ravalli Co., 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), followed in Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992).

Definition of "Plat" — Applicability: Whenever the meaning of a word or phrase is defined in any part of the code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears. The definition of "plat" found in this section of the Montana Subdivision and Platting Act is clearly applicable to Title 76, ch. 4, part 1, on sanitation in subdivisions. The Department of Health and Environmental Sciences' (now Department of Environmental Quality) contention that it has broad authority in defining the term "plat" by virtue of the lack of a statutory definition under the sanitation in subdivisions law is without merit. (Case considered under pre-1977 law.) State ex rel. Dept. of Health and Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

State Agency Review Under Sanitation in Subdivision Law Not Applicable to Certificate of Survey: Where after a series of real estate transactions, each denominated an "occasional sale" and evidenced by a certificate of survey, one 14-acre parcel of land became 13 separate and distinct parcels reconveyed to the original owner, the Department of Health and Environmental Sciences (now Department of Environmental Quality) had no authority under the sanitation in subdivisions law to review the certificates of survey. That act provides for Department review only of subdivision plats, and Department regulation which included certificate of survey within definition of plat was held void. (Case considered under pre-1977 law; see 1993 amendments.) State ex rel. Dept. of Health and Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

Agency Regulation Conflicting With Occasional Sale Exemption: Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 and 1993 amendments) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), followed in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988), with Leach distinguished in State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

Certificate of Survey Distinguished From Plat: A document entitled "A Certificate of Survey . . .", which established boundaries and property description for deed on entire single parcel and did not contain representations of a subdivision of the parcel or otherwise conform to requirements of "plat" set forth in subsection (9) of this section, was a "certificate of survey". State ex rel. Swart v. Stucky, 167 M 171, 536 P2d 762 (1975), distinguished in Bache v. Owens, 267 M 279, 883 P2d 817, 51 St. Rep. 1001 (1994).

Attorney General's Opinions

Original Property Boundary Established by United States Government Survey — Parcels Not Exempt From Subdivision and Platting Act: The sole fact that a parcel of land was described by references to boundaries established by a United States government survey does not exempt the parcel from the requirements of the Montana Subdivision and Platting Act. Federal survey laws that were adopted to facilitate the conveyance of land in the public domain into private ownership are distinct from Montana subdivision laws that generally regulate divisions of land and conveyances of property among private landowners. Therefore, a property owner may not convey, without complying with Montana subdivision laws, component aliquot parts of sections and government lots that are described and identified in a deed on file with a County Clerk and Recorder and that are less than 160 acres in size. 47 A.G. Op. 10 (1997), clarifying 38 A.G. Op. 66 (1980).

Condominiums Not Exempt From Provisions of Subdivision and Platting Act: Condominiums are subdivisions that are not exempted under 76-3-204 from the provisions of the Montana Subdivision and Platting Act. 45 A.G. Op. 12 (1993).

Occasional Sale by Division Into Two Parcels — Restriction on Sale of Second Parcel: If a parcel of land is divided into two parcels, each under 20 acres in size, and one of the parcels is sold as an occasional sale, the remaining parcel may not, in the absence of another legitimately claimed exemption, be sold without subdivision review within 12 months following the sale of the first parcel. (See 1993 amendments.) 41 A.G. Op. 40 (1986).

Application of "Occasional Sale" Exception: When a 600-acre parcel of land was divided into parcels of 20 or more acres and sold to new owners who, on the same day, filed certificates of survey to divide their 20-acre parcels into two 10-acre parcels, the new owners were entitled to use the "occasional sale" exception in the Montana Subdivision and Platting Act because the initial division of the 600-acre parcel into 20-acre parcels was not a "subdivision". (See 1993 amendments.) 41 A.G. Op. 21 (1985).

Duplex, Office Building, Second Dwelling for Family Member, and Motel Room as Subdivisions: Construction of a duplex for rental or sale purposes nominally falls within the scope of a subdivision because a legally enforceable possessory interest in a portion of a formerly integrated parcel of land will be conveyed. However, the duplex project may, under certain circumstances, be excepted from subdivision status or subjected to less stringent surveying and filing requirements under 76-3-207 and 76-3-208. The availability of exception from some or all of this chapter's requirements must be determined by a careful analysis of the particular facts. The construction of an office building for rental purposes will, for similar reasons, constitute a subdivision. An exemption from full compliance with the Montana Subdivision and Platting Act may nonetheless exist under 76-3-207 and 76-3-208. The existence of a legally enforceable possessory interest determines if the construction of a second dwelling for a family member constitutes a division of land. Whether such a possessory interest exists must be resolved with reference to the involved facts. Again, an exception to subdivision status and to full compliance with the Subdivision and Platting Act may arise under 76-3-207 and 76-3-208 even if a division of land has occurred. Summary review procedures under 76-3-505 applicable to minor subdivisions may be available as to each of these projects. Rental of hotel rooms will not, however, constitute a subdivision. Although a hotel or motel guest has a form of possessory right in his room, the involved transaction is actually the sale of a product or service which is temporary lodging. The guest is a licensee. 41 A.G. Op. 3 (1985). (Opinion rendered prior to 1985 amendment of 76-3-204.)

Tract of Four-Plexes Considered a Subdivision: A developer's construction of 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer is a "subdivision" subject to local review under the Montana Subdivision and Platting Act. Each dwelling unit constitutes a parcel and will be segregated from the larger tract by transference of possession. Since the units will be newly constructed, the exemption in 76-3-204 does not apply. 40 A.G. Op. 57 (1984). (Opinion rendered prior to 1985 amendment of 76-3-204.)

Commencement of Time Limitation for Occasional Sale: The filing of a certificate of survey merely creates a parcel for purposes of the Montana Subdivision and Platting Act. The filing of the certificate is not subject to time restrictions. It is the actual sale that is restricted by 76-3-207(1)(d). The 12-month limitation period on occasional sales of land commences with the actual transfer of interest in the parcel of land from the grantor to the grantee. (See 1993 amendments.) 38 A.G. Op. 117 (1980).

Platted City Not a Platted Subdivision: A platted city does not constitute a platted subdivision for purposes of applying 76-3-207. Therefore, dividing a city lot into two parcels does not need to be reviewed as a subdivision. 38 A.G. Op. 108 (1980).

Division of Land by Deed Description: A segregation of one or more parcels of land from a larger tract held in single or undivided ownership constitutes a division of land regardless of whether the deed describes the larger tract in relation to aliquot parts of a U.S. Government survey. 38 A.G. Op. 66 (1980).

Collateral References

62 C.J.S. Municipal Corporations §83.

83 Am. Jur. 2d Zoning and Planning §§521 through 528.

76-3-104. What constitutes subdivision.

Compiler's Comments

1993 Amendment: Chapter 272 in first sentence changed description of subdivision from "parcels less than 20 acres" to "parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section"; and made minor changes in style. Amendment effective April 6, 1993.

Applicability: Section 7(1), Ch. 272, L. 1993, provided that this section applies "to all subdivision applications filed after passage and approval of [this act]". Approved April 6, 1993.

Case Notes

Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws: As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under 76-3-201 and that the security provision was an enforceable construction lien because of Canton's contractual obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in Title 71, ch. 3, part 5, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under 71-3-101, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under 76-3-302, and failed to qualify for an exemption under 76-3-201, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

Agency Regulation Conflicting With Occasional Sale Exemption: Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), followed in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988).

Attorney General's Opinions

Application of "Occasional Sale" Exception: When a 600-acre parcel of land was divided into parcels of 20 or more acres and sold to new owners who, on the same day, filed certificates of survey to divide their 20-acre parcels into two 10-acre parcels, the new owners were entitled to use the "occasional sale" exception in the Montana Subdivision and Platting Act because the initial division of the 600-acre parcel into 20-acre parcels was not a "subdivision". (See 1993 amendments.) 41 A.G. Op. 21 (1985).

Portion of Lot Sold to Satisfy Delinquent Assessment: Where only a portion of a lot is included in a rural special improvement district and a sale of that portion is made to satisfy a delinquent assessment, a division of property "by operation of law" has occurred, thereby exempting the sale from the operation of this chapter. 39 A.G. Op. 48 (1982).

Collateral References

83 Am. Jur. 2d Zoning and Planning §§521 through 528.

76-3-105. Violations.

Case Notes

Improper Property Development — Right of Access: Defendants developed a subdivision. Plaintiff, an adjoining landowner, sold parcels of his land to his brother and another party. The subdivision developers objected to plaintiff and his successors using the subdivision for access to their tracts. The parties could not agree on conditions of usage, and the developers attempted various methods of blocking plaintiffs' access through the subdivision. Plaintiffs sought damages from blocked access and a prescriptive easement. Defendant contended plaintiffs had intentionally violated state and local subdivision laws in the land transfers and that allowing them access would sanction the alleged illegal action. Defendant contended the trial court should not have excluded evidence of the alleged violation of subdivision laws. On appeal, the Supreme Court found nothing in Montana subdivision law which prevents an individual who has developed his property contrary to law from pursuing a claim against an adjoining subdivision for right of access. Public authorities must deal with any improprieties in development. The evidence was properly excluded as irrelevant. Smith v. Moran, 215 M 31, 693 P2d 1246, 42 St. Rep. 152 (1985).

Attorney General's Opinions

Exemption of U.S. From Filing and Enforcement Provisions: The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. §1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

Part 2
Miscellaneous Exemptions

Part Case Notes

Agency Regulation Conflicting With Occasional Sale Exemption: Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), followed in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988).

Part Attorney General's Opinions

State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area: The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

76-3-201. Exemption for certain divisions of land.

Compiler's Comments

2001 Amendment: Chapter 340 inserted (1)(g) providing that land division requirements are inapplicable to land division in location where state has no jurisdiction unless method of disposition is adopted to evade requirements; and made minor changes in style. Amendment April 21, 2001.

1997 Amendment: Chapter 503 inserted (2) concerning notice to governing body in case of division of land under subsection (1)(a); and made minor changes in style. Amendment effective May 1, 1997.

Severability: Section 4, Ch. 503, L. 1997, was a severability clause.

Administrative Rules

ARM 17.36.605 Exclusions.

Case Notes

Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws: As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under this section and that the security provision was an enforceable construction lien because of Canton's contractual obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in Title 71, ch. 3, part 5, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under 71-3-101, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract

to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under 76-3-302, and failed to qualify for an exemption under this section, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

Attorney General's Opinions

Survey Requirements for Remainder Created When Highway Right-of-Way Obtained by State: A County Clerk and Recorder may not require a survey or plat for the recordation of an instrument transferring title to a remainder that was created when the state obtained property for a highway right-of-way. 44 A.G. Op. 25 (1992).

Subsequent Sale of Parcel Originally Used as Lien Security — State and Local Regulation Inapplicable: The provisions of Title 76 relating to local and state regulation of subdivisions do not apply to the subsequent sale of an undivided parcel that was originally used as security for a construction lien pursuant to this section, and nothing in the Montana Subdivision and Platting Act requires that the parcel be reviewed or surveyed upon subsequent sale. 42 A.G. Op. 101 (1988).

Conveyance of Land From Private Owner to U.S.D.A. — Transaction Exempt From Regulation: In the case of land conveyed from a private owner to the U.S. Department of Agriculture pursuant to 16 U.S.C. §485, since the land was subject to condemnation by the U.S. in the absence of agreement and because the term "law of eminent domain", as defined in 76-3-201, includes federal condemnation proceedings, the transaction was exempted from regulation under the Montana Subdivision and Platting Act. Further, the Department is immune from direct enforcement of the Act because of general sovereignty principles. 42 A.G. Op. 36 (1987).

Exemption of U.S. From Filing and Enforcement Provisions: The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. §1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

Reference Intended Only to Designate Law Governing State Condemnation: The parenthetical reference to Title 70, chapter 30, in 76-3-201 does not limit the term "law of eminent domain" to proceedings under the state statute. The reference was intended only to designate that provision of Montana law which largely governs condemnation matters and was not designed to foreclose applicability of the exemption to agreements providing for divisions of land which could have been effected through federal condemnation proceedings. 42 A.G. Op. 36 (1987).

Portion of Lot Sold to Satisfy Delinquent Assessment: Where only a portion of a lot is included in a rural special improvement district and a sale of that portion is made to satisfy a delinquent assessment, a division of property "by operation of law" has occurred, thereby exempting the sale from the operation of this chapter. 39 A.G. Op. 48 (1982).

Review of Certificate of Survey: The Department of Health and Environmental Sciences (now Department of Environmental Quality) has authority under Title 76, ch. 4, part 1, to review certificates of survey. 38 A.G. Op. 81 (1980).

Affidavit of Good Faith Not to Circumvent Act — When Required: A transaction involving a contract for deed which allows the purchaser to acquire title to a portion of the land is subject to 76-3-101, et seq., if the transaction is undertaken for the purpose of evading the act, and a local governing body may require a person claiming the 76-3-201 exemption to file an affidavit of good faith without intent to circumvent. 37 A.G. Op. 41 (1977).

76-3-202. Exemption for structures on complying subdivided lands.

Attorney General's Opinions

Duplex, Office Building, Second Dwelling for Family Member, and Motel Room as Subdivisions: Construction of a duplex for rental or sale purposes nominally falls within the scope of a subdivision because a legally enforceable possessory interest in a portion of a formerly integrated parcel of land will be conveyed. However, the duplex project may, under certain circumstances, be excepted from subdivision status or subjected to less stringent surveying and filing requirements under 76-3-207 and 76-3-208. The availability of exception from some or all of this chapter's requirements must be determined by a careful analysis of the particular facts. The construction of an office building for rental purposes will, for similar reasons, constitute a subdivision. An exemption from full compliance with the Montana Subdivision and Platting Act may nonetheless exist under 76-3-207 and 76-3-208. The existence of a legally enforceable possessory interest determines if the construction of a second dwelling for a family member constitutes a division of land. Whether such a possessory interest exists must be resolved with reference to the involved facts. Again, an exception to subdivision status and to full compliance with the Subdivision and Platting Act may arise under 76-3-207 and 76-3-208 even if a division of land has occurred. Summary review procedures under 76-3-505 applicable to minor subdivisions

may be available as to each of these projects. Rental of hotel rooms will not, however, constitute a subdivision. Although a hotel or motel guest has a form of possessory right in his room, the involved transaction is actually the sale of a product or service which is temporary lodging. The guest is a licensee. 41 A.G. Op. 3 (1985). (Opinion rendered prior to 1985 amendment of 76-3-204.)

76-3-203. Exemption for certain condominiums.

Compiler's Comments

2001 Amendment: Chapter 534 inserted (1) providing a compliance exemption for condominiums that are expressly contemplated in the original division of land and that meet park dedication requirements; inserted (2) providing a compliance exemption for condominiums that are in conformance with applicable local zoning regulations; and made minor changes in style. Amendment effective October 1, 2001.

Attorney General's Opinions

Condominiums Not Exempt From Provisions of Subdivision and Platting Act: Condominiums are subdivisions that are not exempted under 76-3-204 from the provisions of the Montana Subdivision and Platting Act. 45 A.G. Op. 12 (1993).

76-3-204. Exemption for conveyances of one or more parts of a structure or improvement.

Compiler's Comments

1985 Amendment: Substituted "whether existing or proposed" for "situated on one or more parcels of land".

Administrative Rules

ARM 17.36.605 Exclusions.

Case Notes

Subdivision Review of Four-Plex Apartments Unnecessary: Appellants brought an action to stop construction of an apartment building for failure of its builders to comply with subdivision review. The lower court granted the county's summary judgment motion based on the fact that 40 A.G. Op. 57 (1984) was rendered after construction began. During the pendency of the action, 76-3-204 was amended to clarify that new apartment buildings are exempt from subdivision review. Since an appellate court must apply the law in effect at the time it renders its decision, the Supreme Court upheld the lower court decision because the law as amended makes subdivision review unnecessary for the respondents' four-plex apartment building. Lee v. Flathead County, 217 M 370, 704 P2d 1060, 42 St. Rep. 1258 (1985), affirmed as law of the case in Paulson v. Lee, 229 M 164, 745 P2d 359, 44 St. Rep. 1864 (1987).

Attorney General's Opinions

Condominiums Not Exempt From Provisions of Subdivision and Platting Act: Condominiums are subdivisions that are not exempted under this section from the provisions of the Montana Subdivision and Platting Act. 45 A.G. Op. 12 (1993).

Duplex, Office Building, Second Dwelling for Family Member, and Motel Room as Subdivisions: Construction of a duplex for rental or sale purposes nominally falls within the scope of a subdivision because a legally enforceable possessory interest in a portion of a formerly integrated parcel of land will be conveyed. However, the duplex project may, under certain circumstances, be excepted from subdivision status or subjected to less stringent surveying and filing requirements under 76-3-207 and 76-3-208. The availability of exception from some or all of this chapter's requirements must be determined by a careful analysis of the particular facts. The construction of an office building for rental purposes will, for similar reasons, constitute a subdivision. An exemption from full compliance with the Montana Subdivision and Platting Act may nonetheless exist under 76-3-207 and 76-3-208. The existence of a legally enforceable possessory interest determines if the construction of a second dwelling for a family member constitutes a division of land. Whether such a possessory interest exists must be resolved with reference to the involved facts. Again, an exception to subdivision status and to full compliance with the Subdivision and Platting Act may arise under 76-3-207 and 76-3-208 even if a division of land has occurred. Summary review procedures under 76-3-505 applicable to minor subdivisions may be available as to each of these projects. Rental of hotel rooms will not, however, constitute a subdivision. Although a hotel or motel guest has a form of possessory right in his room, the involved transaction is actually the sale of a product or service which is temporary lodging. The guest is a licensee. 41 A.G. Op. 3 (1985). (Opinion rendered prior to 1985 amendment of 76-3-204.)

Tract of Four-Plexes Considered a Subdivision: A developer's construction of 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer is a "subdivision" subject to local review under the Montana Subdivision and Platting Act. Each dwelling unit constitutes a parcel and will be segregated from the larger tract by transference of possession. Since the units will be newly constructed, the exemption in 76-3-204 does not apply. 40 A.G. Op. 57 (1984). (Opinion rendered prior to 1985 amendment of 76-3-204.)

Sale of Existing Building to Condominium Unit Buyers: An owner's sale of an existing office or apartment building to individual condominium owners is exempted from the requirements of this chapter by this section. However, the sale is subject to the general prohibition of this chapter that it not be simply the final step in a scheme to evade application of this chapter. 39 A.G. Op. 74 (1982).

Condominiums as Subdivisions: The phrase "regardless of size, which provides permanent multiple space for recreational camping vehicles or mobile homes" only applies to the antecedent "area" and not to "condominiums". Condominium is an independent class expressly included in the definition of subdivision whether or not constructed on a parcel of land containing 20 acres or more. Therefore, condominiums are subject to review by the Department of Health and Environmental Sciences (now Department of Environmental Quality) under the provisions of this chapter. The clause "sale, rent, lease, or other conveyance of one or more parts of a building" in 76-3-204 refers to something other than condominiums and thus does not provide an exemption for condominiums. 39 A.G. Op. 28 (1981).

76-3-205. Exemption for airport land and state-owned lands — exception.

Compiler's Comments

1999 Amendment: Chapter 548 inserted (1) regarding exemption for airport land; and made minor changes in style. Amendment effective October 1, 1999.

Attorney General's Opinions

State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area: The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the subdivision review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

76-3-206. Exemption for conveyances executed prior to July 1, 1974.

Attorney General's Opinions

Original Property Boundary Established by United States Government Survey — Parcels Not Exempt From Subdivision and Platting Act: The sole fact that a parcel of land was described by references to boundaries established by a United States government survey does not exempt the parcel from the requirements of the Montana Subdivision and Platting Act. Federal survey laws that were adopted to facilitate the conveyance of land in the public domain into private ownership are distinct from Montana subdivision laws that generally regulate divisions of land and conveyances of property among private landowners. Therefore, a property owner may not convey, without complying with Montana subdivision laws, component aliquot parts of sections and government lots that are described and identified in a deed on file with a County Clerk and Recorder and that are less than 160 acres in size. 47 A.G. Op. 10 (1997), clarifying 38 A.G. Op. 66 (1980).

76-3-207. Subdivisions exempted from review but subject to survey requirements — exceptions.

Compiler's Comments

1995 Amendment: Chapter 468 in (1)(c), near beginning, inserted "gift"; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

1993 Amendments: Chapter 272 in (1)(b) substituted "a single gift or sale in each county to each member" for "a gift or sale to any member"; deleted former (1)(d) that read: "(d) a single division of a parcel outside of platted subdivisions when the transaction is an occasional sale"; and made minor changes in style. Amendment effective April 6, 1993.

Chapter 366 in (3) substituted "certified that all real property taxes and special assessments assessed and levied on the land to be divided have been paid" for "certified that no real property taxes assessed and levied on the land to be divided are delinquent"; and made minor changes in style.

Applicability: Section 7(1), Ch. 272, L. 1993, provided that this section applies "to all subdivision applications filed after passage and approval of [this act]". Approved April 6, 1993.

1989 Amendment: Inserted (1)(f) relating to relocation of common boundary between lot within platted subdivision and adjoining land outside the subdivision; and made minor change in phraseology.

1985 Amendment: Inserted (3) prohibiting division of land unless County Treasurer has certified that property taxes are not delinquent.

Administrative Rules

ARM 17.36.105 Montana Subdivision and Platting Act exclusions subject to Department review.

ARM 17.36.605 Exclusions.

Case Notes

Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant: The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else. A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review: A county has no affirmative duty to analyze or investigate an exemption claimed under this section beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

Sale of Lot Presumptively Including Access: It is a presumption, albeit disputable, that the complete use and enjoyment of a parcel of land includes access to that parcel. To overcome the presumption, the seller must offer evidence or some legal basis that would controvert the buyer's reliance on the presumption. Here, the Kester's sold the Erkers a house in Big Sky for approximately $310,000. The Kesters' attorney later discovered through the title company that a portion of the driveway, which provided sole access to the house, had not been conveyed by the deed to the lot and requested additional money for the deed to the driveway. There was no indication at the time of sale that any parcel was separate and distinct from the lot, nor did the Kesters reveal any intention to reserve the driveway from the purchase of the lot. Although the Erkers were charged with constructive notice of the contents of properly recorded instruments describing prior conveyances of the property, under Montana subdivision laws, the driveway was not an individual parcel of land at the time of purchase, so the Erkers could be charged only with knowledge that the purchase of the lot described in the common metes and bounds description included the driveway. Absent evidence to the contrary, the Erkers were entitled to the presumption that purchase of the lot included access to it and to summary judgment as a matter of law. Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), following Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930).

Clerk Under No Clear Duty to Record Deed — Mandamus Erroneously Granted: Where the plaintiff attempted to record a deed to a 5-acre parcel of land without the removal or approval of sanitary restrictions by the county health department (which the court held was estopped from withholding its approval of a disposal permit) but was refused by the Clerk and Recorder, the District Court erred in granting a Writ of Mandamus ordering the Clerk to file a certificate of survey and record the warranty deed. The Clerk and Recorder was statutorily required to refuse to file the survey and record the deed and lacked any discretion to accept a survey absent compliance with the requirements of 76-4-122. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

State Agency Review Under Sanitation in Subdivision Law Not Applicable to Certificate of Survey: Where after a series of real estate transactions, each denominated an "occasional sale" and evidenced by a certificate of survey, one 14-acre parcel of land became 13 separate and distinct parcels reconveyed to the original owner, the Department of Health and Environmental Sciences (now Department of Environmental Quality) had no authority under the sanitation in subdivisions law to review the certificates of survey. That act provides for Department review only of subdivision plats, and Department regulation which included certificate of survey within definition of plat was held void. (Case considered under pre-1977 law; see 1993 amendments.) State ex rel. Dept. of Health & Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

Administrative Regulation Proscribing Occasional Sale in Resubdivision Void: Administrative regulation under this section (prior to 1977 and 1993 amendments) requiring all resubdivisions or redesigns of previously filed subdivisions to be approved by local governing body and requiring approved amended plat to be filed was held void as proscribing the statutory exemption for occasional sales. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), followed in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988).

Attorney General's Opinions

Occasional Sale by Division Into Two Parcels — Restriction on Sale of Second Parcel: If a parcel of land is divided into two parcels, each under 20 acres in size, and one of the parcels is sold as an occasional sale, the remaining parcel may not, in the absence of another legitimately claimed exemption, be sold without subdivision review within 12 months following the sale of the first parcel. (See 1993 amendments.) 41 A.G. Op. 40 (1986).

Application of "Occasional Sale" Exception: When a 600-acre parcel of land was divided into parcels of 20 or more acres and sold to new owners who, on the same day, filed certificates of survey to divide their 20-acre parcels into two 10-acre parcels, the new owners were entitled to use the "occasional sale" exception in the Montana Subdivision and Platting Act because the initial division of the 600-acre parcel into 20-acre parcels was not a "subdivision". (See 1993 amendments.) 41 A.G. Op. 21 (1985).

Duplex, Office Building, Second Dwelling for Family Member, and Motel Room as Subdivisions: Construction of a duplex for rental or sale purposes nominally falls within the scope of a subdivision because a legally enforceable possessory interest in a portion of a formerly integrated parcel of land will be conveyed. However, the duplex project may, under certain circumstances, be excepted from subdivision status or subjected to less stringent surveying and filing requirements under 76-3-207 and 76-3-208. The availability of exception from some or all of this chapter's requirements must be determined by a careful analysis of the particular facts. The construction of an office building for rental purposes will, for similar reasons, constitute a subdivision. An exemption from full compliance with the Montana Subdivision and Platting Act may nonetheless exist under 76-3-207 and 76-3-208. The existence of a legally enforceable possessory interest determines if the construction of a second dwelling for a family member constitutes a division of land. Whether such a possessory interest exists must be resolved with reference to the involved facts. Again, an exception to subdivision status and to full compliance with the Subdivision and Platting Act may arise under 76-3-207 and 76-3-208 even if a division of land has occurred. Summary review procedures under 76-3-505 applicable to minor subdivisions may be available as to each of these projects. Rental of hotel rooms will not, however, constitute a subdivision. Although a hotel or motel guest has a form of possessory right in his room, the involved transaction is actually the sale of a product or service which is temporary lodging. The guest is a licensee. 41 A.G. Op. 3 (1985). (Opinion rendered prior to 1985 amendment of 76-3-204.)

Exemption Requests — Hearing and Decision: Whether a particular exemption granted by this section is claimed "for the purpose of evading this chapter" is manifestly a question of fact and directed to the discretion of the local government. The Attorney General will not answer the question. However, to assist local government in analyzing the issue, the following observations are made: (1) since it promotes the public health and welfare, the chapter must be liberally construed to effectuate its objects and its exemptions must be narrowly applied; (2) local government may properly require one claiming an exemption to make an evidentiary showing that the exemption is justified and may establish by rule a procedure for a hearing and decision; (3) the local government should evaluate all relevant circumstances in assessing claimant's intent, including the nature of claimant's business, the prior history of the land in question and whether claimant has engaged in prior exempt transactions involving the land, and the proposed configuration of the land after the allegedly exempt transactions would be completed; and (4) a claimant who attempts to use a pattern of exempt transactions that will result in a subdivision which is not reviewed should be denied exemption. 40 A.G. Op. 16 (1983).

Occasional Sale Exemption — Number of Lots Certificate of Survey May Include: A single certificate of survey may not reflect the creation of more than one lot to be conveyed under this section's provision that a single division of a parcel outside of platted subdivisions is not a subdivision under this chapter if the transaction is an occasional sale. (See 1993 amendments.) 40 A.G. Op. 16 (1983).

Commencement of Time Limitation for Occasional Sale: The filing of a certificate of survey merely creates a parcel for purposes of the Montana Subdivision and Platting Act. The filing of the certificate is not subject to time restrictions. It is the actual sale that is restricted by subsection (1)(d) of this section. The 12-month limitation period on occasional sales of land commences with the actual transfer of interest in the parcel of land from the grantor to the grantee. (See 1993 amendments.) 38 A.G. Op. 117 (1980).

Platted City Not a Platted Subdivision: A platted city does not constitute a platted subdivision for purposes of applying this section. Therefore, dividing a city lot into two parcels does not need to be reviewed as a subdivision. 38 A.G. Op. 108 (1980).

Review of Certificate of Survey: The Department of Health and Environmental Sciences (now Department of Environmental Quality) has authority under Title 76, ch. 4, part 1, to review certificates of survey. 38 A.G. Op. 81 (1980).

"Immediate Family" Defined: The term "immediate family", as used in this section, means the spouse of the grantor and children of the grantor by blood or adoption. 35 A.G. Op. 70 (1974).

76-3-208. Subdivisions exempted from surveying and filing requirements but subject to review provisions.

Administrative Rules

ARM 17.36.105 Montana Subdivision and Platting Act exclusions subject to Department review.

Attorney General's Opinions

Duplex, Office Building, Second Dwelling for Family Member, and Motel Room as Subdivisions: Construction of a duplex for rental or sale purposes nominally falls within the scope of a subdivision because a legally enforceable possessory interest in a portion of a formerly integrated parcel of land will be conveyed. However, the duplex project may, under certain circumstances, be excepted from subdivision status or subjected to less stringent surveying and filing requirements under 76-3-207 and 76-3-208. The availability of exception from some or all of this chapter's requirements must be determined by a careful analysis of the particular facts. The construction of an office building for rental purposes will, for similar reasons, constitute a subdivision. An exemption from full compliance with the Montana Subdivision and Platting Act may nonetheless exist under 76-3-207 and 76-3-208. The existence of a legally enforceable possessory interest determines if the construction of a second dwelling for a family member constitutes a division of land. Whether such a possessory interest exists must be resolved with reference to the involved facts. Again, an exception to subdivision status and to full compliance with the Subdivision and Platting Act may arise under 76-3-207 and 76-3-208 even if a division of land has occurred. Summary review procedures under 76-3-505 applicable to minor subdivisions may be available as to each of these projects. Rental of hotel rooms will not, however, constitute a subdivision. Although a hotel or motel guest has a form of possessory right in his room, the involved transaction is actually the sale of a product or service which is temporary lodging. The guest is a licensee. 41 A.G. Op. 3 (1985). (Opinion rendered prior to 1985 amendment of 76-3-204.)

Recording Prerequisites: Transfers of land that do not involve "divisions of land" or "subdivisions", as defined by the Montana Subdivision and Platting Act, do not require a certificate of survey or a plat before being recorded by the Clerk and Recorder. 37 A.G. Op. 88 (1977). See also 44 A.G. Op. 25 (1992).

76-3-209. Exemption from surveying and platting requirements for lands acquired for state highways.

Case Notes

Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant: The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else. A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against

them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review: A county has no affirmative duty to analyze or investigate an exemption claimed under 76-3-207 beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

76-3-210. Subdivisions exempted from requirement of an environmental assessment.

Compiler's Comments

1999 Amendment: Chapter 582 in (1) substituted "jurisdictional area that has adopted all of the following are considered to be in the public interest and are exempt from the requirement of an environmental assessment" for "master planning area"; in (1)(a) inserted "a growth policy"; in (1)(c) substituted "strategy for development, maintenance, and replacement of public infrastructure" for "long-range development program of public works projects" and after "76-1-601" deleted "have been adopted are deemed to be in the public interest and exempt from the requirement of an environmental assessment"; inserted (2)(a) authorizing planning board to exempt proposed subdivision within its jurisdiction from environmental assessment; in two places in (2)(a)(i) substituted "growth policy" for "master plan" or "plan"; in (2)(a)(ii) after "acres" deleted "a planning board established pursuant to chapter 1 and having jurisdiction over the area involved may exempt the subdivider from the completion of all or any portion of the environmental assessment"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Administrative Rules

ARM 17.36.105 Montana Subdivision and Platting Act exclusions subject to Department review.

Part 3
Land Transfers

Part Attorney General's Opinions

Exemption of U.S. From Filing and Enforcement Provisions: The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. §1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

When Conveyance of Land Void: Contracts to convey land made on or after July 1, 1973, in violation of the Montana Subdivision and Platting Act, are void. Deeds executed on or after July 1, 1973, are void if they convey land in violation of the Montana Subdivision and Platting Act. 35 A.G. Op. 65 (1974).

76-3-301. General restriction on transfer of title to subdivided lands.

Compiler's Comments

2001 Amendment: Chapter 340 in (1) at end of second sentence inserted "unless the plat is located in an area over which the state does not have jurisdiction"; and made minor changes in style. Amendment effective April 21, 2001.

Case Notes

Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws: As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under 76-3-201 and

that the security provision was an enforceable construction lien because of Canton's contractual obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in Title 71, ch. 3, part 5, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under 71-3-101, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under 76-3-302, and failed to qualify for an exemption under 76-3-201, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

Failure to File Plat — Deed Invalid: A warranty deed attempting to transfer 2 acres of a 12.63-acre tract was invalid because a subdivision plat was not filed before the transfer. The County Clerk and Recorder should not have recorded the deed. McDonald v. Jones, 258 M 211, 852 P2d 588, 50 St. Rep. 502 (1993). Following the ruling in this case, the District Court took judicial notice of the underlying case and granted summary judgment to Insured Titles, Inc., after determining that the exclusions of the insurance policy applied and that McDonald knowingly altered the legal description of the property, thus defeating coverage under the policy. The grant of summary judgment was affirmed in Insured Titles, Inc. v. McDonald, 275 M 111, 911 P2d 209, 53 St. Rep. 61 (1996).

Improper Property Development — Right of Access: Defendants developed a subdivision. Plaintiff, an adjoining landowner, sold parcels of his land to his brother and another party. The subdivision developers objected to plaintiff and his successors using the subdivision for access to their tracts. The parties could not agree on conditions of usage, and the developers attempted various methods of blocking plaintiffs' access through the subdivision. Plaintiffs sought damages from blocked access and a prescriptive easement. Defendant contended plaintiffs had intentionally violated state and local subdivision laws in the land transfers and that allowing them access would sanction the alleged illegal action. Defendant contended the trial court should not have excluded evidence of the alleged violation of subdivision laws. On appeal, the Supreme Court found nothing in Montana subdivision law which prevents an individual who has developed his property contrary to law from pursuing a claim against an adjoining subdivision for right of access. Public authorities must deal with any improprieties in development. The evidence was properly excluded as irrelevant. Smith v. Moran, 215 M 31, 693 P2d 1246, 42 St. Rep. 152 (1985).

Collateral References

Failure of vendor to comply with statute or ordinance requiring approval or recording of plat prior to conveyance of property as rendering sale void or voidable. 77 ALR 3d 1058.

76-3-302. Restrictions on recording instruments relating to land subject to surveying requirements.

Compiler's Comments

2001 Amendment: Chapter 340 inserted (2)(a) providing that recording instrument restrictions do not apply to proposed transfer of parcel or tract in location over which state has no jurisdiction; and made minor changes in style. Amendment effective April 21, 2001.

1987 Amendment: At beginning of (1) inserted exception clause; inserted (2) restricting surveying requirements to parcels or tracts proposed for transfer that were created after July 1, 1973; inserted (3) establishing that documents showing that parcel or tract existed before July 1, 1973, do not constitute and may not be substituted for a legal description of the property; and made minor changes in grammar.

Case Notes

Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws: As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under 76-3-201 and that the security provision was an enforceable construction lien because of Canton's contractual

obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in Title 71, ch. 3, part 5, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under 71-3-101, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under this section, and failed to qualify for an exemption under 76-3-201, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

No Duty of Clerk and Recorder to Record Invalid Deed — Writ of Mandamus Improper: Under 7-4-2617, a County Clerk and Recorder is obligated to record only an instrument, paper, or notice that is authorized by law to be recorded. Under this section, a County Clerk and Recorder has a mandatory duty not to accept and record an otherwise proper deed if it fails to comply with the applicable survey requirements. The District Court did not err in refusing to issue a writ of mandamus requiring recording of deeds when a landowner attempted to divide a large parcel of land into smaller parcels by executing a deed in which the landowner was both grantor and grantee, which is not authorized by law, and when the statutorily required plat was not filed. Rocky Mtn. Timberlands, Inc. v. Lund, 265 M 463, 877 P2d 1018, 51 St. Rep. 653 (1994).

Failure to File Plat — Deed Invalid: A warranty deed attempting to transfer 2 acres of a 12.63-acre tract was invalid because a subdivision plat was not filed before the transfer. The County Clerk and Recorder should not have recorded the deed. McDonald v. Jones, 258 M 211, 852 P2d 588, 50 St. Rep. 502 (1993). Following the ruling in this case, the District Court took judicial notice of the underlying case and granted summary judgment to Insured Titles, Inc., after determining that the exclusions of the insurance policy applied and that McDonald knowingly altered the legal description of the property, thus defeating coverage under the policy. The grant of summary judgment was affirmed in Insured Titles, Inc. v. McDonald, 275 M 111, 911 P2d 209, 53 St. Rep. 61 (1996).

Agency Regulation Conflicting With Occasional Sale Exemption: Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

Attorney General's Opinions

Survey Requirements for Remainder Created When Highway Right-of-Way Obtained by State: A County Clerk and Recorder may not require a survey or plat for the recordation of an instrument transferring title to a remainder that was created when the state obtained property for a highway right-of-way. 44 A.G. Op. 25 (1992).

Recording Prerequisites: Transfers of land that do not involve "divisions of land" or "subdivisions", as defined by the Montana Subdivision and Platting Act, do not require a certificate of survey or a plat before being recorded by the Clerk and Recorder. 37 A.G. Op. 88 (1977). See also 44 A.G. Op. 25 (1992).

Effect on Prior Contracts: Montana Subdivision and Platting Act does not govern the recording of deeds prepared and executed under contracts for deed prior to July 1, 1973, but not presented for recording until after June 30, 1973. 35 A.G. Op. 55 (1973).

Refusal to Record Deed: A County Clerk and Recorder may not refuse to record a deed that purports to convey subdivided land for which no approved certified plat has been filed. 35 A.G. Op. 25 (1973). (Opinion rendered prior to 1974 amendment.)

Collateral References

Failure of vendor to comply with statute or ordinance requiring approval or recording of plat prior to conveyance of property as rendering sale void or voidable. 77 ALR 3d 1058.

76-3-303. Contract for deed permitted if buyer protected.

Compiler's Comments

1985 Amendment: Inserted (4) authorizing subdivider to enter into contracts to sell subdivision lots upon condition that County Treasurer has certified property taxes are not delinquent.

76-3-304. Effect of recording complying plat.

Case Notes

Bridle Path Easement — Express Easement by Reservation Versus Implied Easement — Extrinsic Evidence Regarding Parties' Intent Inadmissible: Purchasers in a subdivision had language in their deeds creating an express easement for a bridle path in the subdivision. The bridle path was never built, and over the years, the easement was obstructed by improvements on the lots of several subdivision residents. Eventually, the subdivision association attempted to extinguish the easement at a meeting of the board of directors. Some residents asked the District Court to establish the validity of the easement and to restrain obstruction of the easement, and their request was granted by partial summary judgment. On appeal, the Supreme Court noted the difference between an implied easement, which is a creature of equity dependent on the intent of the parties, and an express easement by reservation, which is a creature of the documents of conveyance and the record. An express easement by reservation arises when the purchaser's deed refers to the plat where the easement is clearly depicted and labeled. In this case, the intent of the parties to create a bridle path easement was manifested through the language in the deeds and the plat, so under 28-2-905, extrinsic evidence regarding the intent of the parties was inadmissible. Further, the subdivision association was given oversight of the easement, but not ownership of it, and so lacked authority to extinguish the easement. The lower court's finding that a valid bridle path easement existed was affirmed. Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000), following Missoula v. Mix, 123 M 365, 214 P2d 212 (1950), Bache v. Owens, 267 M 279, 883 P2d 817 (1994), Halverson v. Turner, 268 M 168, 885 P2d 1285 (1994), and Tungsten Holdings, Inc. v. Parker, 282 M 387, 938 P2d 641, 54 St. Rep. 399 (1997), and distinguishing White v. Landerdahl, 191 M 554, 625 P2d 1145, 38 St. Rep. 412 (1981).

Conveyance Referencing Certificate of Survey Creates Express Easement Running With Land: Dahlia Halverson recorded a certificate of survey (COS) showing a 30-foot easement for a road upon her property in favor of adjoining property. Later, she conveyed the property subject to the easement by quitclaim deed to Shirley Turner and included a land description and a reference to the previously recorded COS. Her successor in interest claimed that the Turner property was subject to the easement originally created in the COS. Relying upon Benson v. Pyfer, 240 M 175, 783 P2d 923 (1989), and Bache v. Owens, 267 M 279, 883 P2d 817, 51 St. Rep. 1001 (1994), the Supreme Court held that the reference in the quitclaim deed to the previously filed COS that noted the creation of the easement was sufficient to create in the Turner property an express easement running with the land that was not personal to Dahlia Halverson and was therefore available to her successor in interest. Halverson v. Turner, 268 M 168, 885 P2d 1285, 51 St. Rep. 1233 (1994), followed in Ruana v. Grigonis, 275 M 441, 913 P2d 1247, 53 St. Rep. 216 (1996), and Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000). Ruana was followed in Reichle v. Anderson, 284 M 384, 943 P2d 1324, 54 St. Rep. 930 (1997). See also Bache v. Owens, 280 M 106, 929 P2d 217, 53 St. Rep. 1320 (1996).

No Implied Warranty of Habitability or Use Found: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of implied warranties in failing to originally construct and later repair construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, in accordance with applicable fire and building codes. The plaintiffs based their claim of implied warranty on case law that found an implied warranty of habitability and on cases that held that subdivision plats create an implied covenant between developers and subsequent purchasers to use space in the manner designated in the plat. The District Court granted the defendants' motion for summary judgment, dismissing Big Sky of Montana Realty, Inc. The Supreme Court held that the District Court correctly found that no implied warranties existed. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

Conclusionary Statements of Reliance on Plat Provisions Not Enough to Avoid Summary Judgment: The plaintiffs alleged that the provisions contained in the recorded plat constituted misrepresentations upon which they relied and entitled them to rescission of the contract. The defendants were granted summary judgment on the basis that the plaintiffs' statements were only conclusionary and did not allege sufficient facts to avoid summary judgment. Benson v. Pyfer, 240 M 175, 783 P2d 923, 46 St. Rep. 2033 (1989).

Use of Plats to Induce Purchasers: In order to sell lots, a subdivider prepared and recorded subdivision plat maps that designated common areas and roadways. The purchase and sale contracts did not state who would construct roads or common areas. The issue of whether purchasers of lots have any legally enforceable right to have roads constructed depends not on

their designation in the plats but on the subdividers use of the plats in inducing purchasers. The instruments in question do not comprise a promise, express or implied, to construct roads. The purchasers did acquire an easement for the designated use. The case was remanded to determine factual issues relating to the use of the plats in inducing purchasers. Majers v. Shining Mtns., 219 M 366, 711 P2d 1375, 43 St. Rep. 16 (1986).

76-3-305. Vacation of plats — utility easements.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), in first sentence, substituted "provided in this part" for "provided in this section". Amendment effective March 12, 1997.

1995 Amendment: Chapter 100 in second sentence of (1), after "vacation", inserted "the governing body or the district court, as provided in 7-5-2502, shall determine to which properties" and after "portions" deleted "to the center thereof", inserted third sentence that read: "The governing body or the district court, as provided in 7-5-2502, shall take into consideration the previous platting; the manner in which the right-of-way was originally dedicated, granted, or conveyed; the reasons stated in the petition requesting the vacation; the parties requesting the vacation; and any agreements between the adjacent property owners regarding the use of the vacated area", and at beginning of last sentence inserted "The title to the streets and alleys of the vacated portions may revert" and before "the owners" inserted "one or more of"; and made minor changes in style.

Case Notes

Boundary With and to Side of Street — Fee to Center of Street: A boundary to and with the side of a street carries the fee to the center of the street unless a contrary intent appears from the deed. Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992).

76-3-306. Covenants run with the land.

Case Notes

Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant: The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else. A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against

them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review: A county has no affirmative duty to analyze or investigate an exemption claimed under 76-3-207 beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

Use of Plats to Induce Purchasers: In order to sell lots, a subdivider prepared and recorded subdivision plat maps that designated common areas and roadways. The purchase and sale contracts did not state who would construct roads or common areas. The issue of whether purchasers of lots have any legally enforceable right to have roads constructed depends not on their designation in the plats but on the subdividers use of the plats in inducing purchasers. The instruments in question do not comprise a promise, express or implied, to construct roads. The purchasers did acquire an easement for the designated use. The case was remanded to determine factual issues relating to the use of the plats in inducing purchasers. Majers v. Shining Mtns., 219 M 366, 711 P2d 1375, 43 St. Rep. 16 (1986), distinguished in Scherpenseel v. Bitney, 263 M 68, 865 P2d 1145, 50 St. Rep. 1709 (1993).

Collateral References

Easement, servitude, or covenant as affected by sale for taxes. 7 ALR 5th 187.

Part 4
Survey Requirements

Part Attorney General's Opinions

Violation of Statute — Contracts and Deeds Voidable: The vendor of subdivided land violated the Montana Subdivision and Platting Act by filing a certificate of survey under Title 76, ch. 3, part 4, for divisions of land other than a subdivision, rather than filing an approved subdivision plat under the requirements of Title 76, ch. 3, part 6. The vendor obtained the approval of the certificate of survey from the Board of County Commissioners prior to filing the certificate, but the Board had no statutory authority to give approval. It is the opinion of the Attorney General that deeds and contracts which convey land in violation of the Montana Subdivision and Platting Act but with the unauthorized approval of the Board of County Commissioners are voidable. 38 A.G. Op. 106 (1980).

Part Law Review Articles

Law: Verifying Site Surveys (Cadral Corp. vs. Solomon, Cordell, Buenz & Associates Inc.), Coplan, 69 Progressive Architecture 61(2) (1988).

What Every Lawyer Should Know About Land Surveys, Williams & Onsrud, 2 Prob. & Prop. 12(5) (1988).

Basic Elements of Land Surveys, Hubbard, 1 Prob. & Prop. 12(4) (1987).

76-3-401. Survey requirements for lands other than subdivisions.

Compiler's Comments

1993 Amendment: Chapter 136 inserted second sentence requiring surveys to comply with 76-3-406. Amendment effective March 19, 1993.

Case Notes

Aliquot Parts — Location in More Than One Government Lot: When the plaintiffs tried to convey land purchased from the defendants to a third party, the county refused to record the deed based on an unpublished 1981 Attorney General's opinion which had concluded that this section required that the 1/32 or larger aliquot parts of a United States government section or lot be contained in the same section or lot. The plaintiffs sued to rescind the contract for deed. A majority of the Supreme Court held that the requirement of this section can be satisfied even if the aliquot parts are located in more than one government section or lot; however, the court affirmed summary judgment for plaintiffs because it found the parcel in question, being 22 ½ acres, was not divisible as an aliquot part of any government sections or lots. (See 1993 amendments to 76-3-103 and 76-3-207.) McCarthy v. Timberland Resources, Inc., 219 M 278, 712 P2d 1292, 42 St. Rep. 2016 (1985).

County Directed to Accept and Record Deeds on Certain Parcels — No Survey Necessary on Resale: In a case in which the size of the parcels was 20 acres or more, the notice of purchaser's

interest for the parcel was accepted and recorded, and the parcel could be described with reference to U.S. government sections, the county was directed to accept and record deeds for the parcels in question. Since the description of the land had not changed since it was originally divided and quit claimed and since the quit claim deeds were duly recorded, a survey of those parcels on resale was not necessary in order for the resale deed to be recorded. (See 1993 amendments to 76-3-103 and 76-3-207.) Timberland Resources, Inc. v. Vaught, 227 M 247, 738 P2d 1277, 44 St. Rep. 1054 (1987), following McCarthy v. Timberland Resources, Inc., 219 M 278, 712 P2d 1292, 42 St. Rep. 2016 (1985).

Agency Regulation Conflicting With Occasional Sale Exemption: Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

Attorney General's Opinions

Survey Requirements: When a grantor proposes to transfer a quarter-section block of property (160 acres) that has within its boundaries two smaller parcels (10 and 15 acres in size) that the grantor does not own, a survey is not required. The two smaller tracts, being already created, are not a "division of land" requiring a survey under this section. A survey is required only when the transfer of title involves division of a tract of property. In such a situation, a grantor is not barred from using a quitclaim deed transferring the entire block, including the tracts the grantor does not own, but that action is inadvisable and subject to potential liability. 42 A.G. Op. 121 (1988).

Recording Prerequisites: Transfers of land that do not involve "divisions of land" or "subdivisions", as defined by the Montana Subdivision and Platting Act, do not require a certificate of survey or a plat before being recorded by the Clerk and Recorder. 37 A.G. Op. 88 (1977). See also 44 A.G. Op. 25 (1992).

Collateral References

11 Am. Jur. POF2d Surveyor's Failure to Exercise Due Care in Making Survey, pp. 397 through 421.

Surveyor's work as giving rise to right to mechanic's lien. 35 ALR 3d 1391.

Surveyor's liability for mistake in, or misrepresentation as to accuracy of, survey of real property. 35 ALR 3d 504.

Eminent domain: right to enter land for preliminary survey or examination. 29 ALR 3d 1104.

76-3-402. Survey and platting requirements for subdivided lands.

Compiler's Comments

1993 Amendment: Chapter 136 near middle of (1), after "chapter", inserted "including the requirements of 76-3-406"; and made minor changes in style. Amendment effective March 19, 1993.

Case Notes

Agency Regulation Conflicting With Occasional Sale Exemption: Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

Collateral References

11 Am. Jur. POF2d Surveyor's Failure to Exercise Due Care in Making Survey, pp. 397 through 421.

Surveyor's work as giving rise to right to mechanic's lien. 35 ALR 3d 1391.

Surveyor's liability for mistake in, or misrepresentation as to accuracy of, survey of real property. 35 ALR 3d 504.

Eminent domain: right to enter land for preliminary survey or examination. 29 ALR 3d 1104.

76-3-403. Monumentation.

Compiler's Comments

2001 Amendment: Chapter 483 in (1) near beginning after "department of" substituted "labor and industry" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in (1).

Transfer of Function: Section 6, Ch. 274, L. 1981, provided in part: "(1) The department of community affairs is abolished.

(2) The following functions of the department of community affairs are transferred to the department of commerce: . . .

(f) prescribing standards for monumentation under 76-3-403; . . ."

Administrative Rules

ARM 8.94.3001 through 8.94.3003 Uniform standards for monumentation, certificates of survey, and final subdivision plats.

Case Notes

Effect of County Fee Requirement: Madison County ordinance requiring that final subdivision plats and certificates of survey be reviewed for errors and omissions by examining land surveyor and requiring a fee to be paid to examining land surveyor did not offend monumentation requirements of statutory sections. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100 (1981).

Agency Regulation Conflicting With Occasional Sale Exemption: Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

76-3-404. Certificate of survey.

Case Notes

Certificate of Survey Filed Before Monuments Set Not Properly Filed Within Meaning of Subdivision Act: Stanchfield Cattle Company sought to subdivide land by dividing it into 20-acre parcels and having it surveyed. After completion of the survey, the surveyor had the certificate of survey filed, with a note on the face of the certificate stating that the monuments had not been set because of winter conditions but would be set before July 1. NFC, which held a right of first refusal on the property, sued to prevent the transfer of any property to prospective buyers, claiming that the certificate of survey had not been filed in accordance with the Montana Subdivision and Platting Act. The Supreme Court reversed the District Court decision, holding that despite whatever practices might be common among surveyors, subsection (3) of this section and an administrative rule of the Department of Commerce (now Department of Labor and Industry), ARM 8.94.3002, require that the monuments be set at the time that the certificate of survey is filed. The Supreme Court noted that it could not change the requirements of the Act and the Department rule. NFC Partners v. Stanchfield Cattle Co., 274 M 46, 905 P2d 1106, 52 St. Rep. 1115 (1995).

Mandamus to Compel Filing: Where a document had as its purpose the establishment of boundaries and the description of property for a deed on a single parcel containing an area greater than the amount regulated by the Montana Subdivision and Platting Act, and the document contained no representation of a subdivision, the document was a "certificate of survey" and the Clerk and Recorder had a legal duty under this section to accept the document for filing since it contained no evidence to bring it within the definition of a subdivision. State ex rel. Swart v. Stucky, 167 M 171, 536 P2d 762 (1975).

76-3-406. Surveys affecting irrigation districts — additional survey requirements.

Compiler's Comments

Effective Date: Section 6, Ch. 136, L. 1993, provided: "[This act] is effective on passage and approval." Approved March 19, 1993.

Part 5
Local Regulations

Part Case Notes

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

Agency Regulation Conflicting With Occasional Sale Exemption: Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

Part Attorney General's Opinions

Authority of Self-Governing Local Government to Enforce Master Plan (now Growth Policy): A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan (now growth policy) prohibits divisions of land of such size. A local government that has adopted a master plan (now growth policy) to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan. 42 A.G. Op. 16 (1987).

76-3-501. Local subdivision regulations.

Compiler's Comments

1995 Amendment: Chapter 471 in (1), near middle after "drainage", inserted "subject to the provisions of 76-3-511"; and made minor changes in style. Amendment effective April 14, 1995.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1985 Amendment: Inserted (2) authorizing review of approval or disapproval of subdivision only under regulations in effect at time of application for approval or extension of preliminary plat.

Statement of Intent: The statement of intent attached to Ch. 378, L. 1985, provided: "It is the intent of the legislature that a subdivision be reviewed under the rules in effect at the time an application for approval of the subdivision is submitted. Neither a local governing body (under the provisions of the Montana Subdivision and Platting Act) nor the department of health and environmental sciences [now department of environmental quality] (under Title 76, chapter 4, part 1) may modify its subdivision rules and apply the modified rules to a subdivision submitted for review when previously existing rules were in effect."

Case Notes

Local Governing Body Failure to Follow Local Regulations on Criteria for Approval of Subdivision: This section requires the local governing body to review and approve or disapprove a proposed subdivision under the local regulations in effect at the time that an application for approval of a preliminary plat is submitted to the local governing body. The governing body may not ignore its own local regulations and apply only the criteria that 76-3-608 requires to be considered. In this case, the local regulations contained the five criteria provided in 76-3-608 but, in addition, still contained three criteria that had been amended out of that section. The local governing body conditionally approved a subdivision without considering those three criteria. This chapter's mandate that a local governing body assert local control and develop its own subdivision regulations, as well as other provisions of this chapter, clearly contemplates that the local government entity is free to promulgate regulations, in addition to those in this chapter, that do not necessarily conform exactly to this chapter, so long as the regulations do not conflict with this chapter. This chapter establishes minimum requirements that the local governing body must follow. The additional three criteria in the local governing body's regulations do not conflict with this chapter, and findings on those criteria were mandated. In addition, the local governing body failed to follow its local regulation stating that findings on the criteria that the local regulation required to be applied must show that the subdivision will be in the public interest. The District Court therefore properly set aside the local governing body's conditional approval of the

subdivision. Burnt Fork Citizens Coalition v. Bd. of County Comm'rs of Ravalli County, 287 M 43, 951 P2d 1020, 54 St. Rep. 1490 (1997).

Local Board of Health Not Considered Governing Body Despite Interlocal Agreement: Despite the fact that a county board of health was created by interlocal agreement, the District Court erred in concluding that a local board of health is considered a governing body by definition under 76-3-103. The Montana Subdivision and Platting Act does not, under 76-3-504 and this section, authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. The authority of a local board of health to regulate subdivisions derives from 50-2-116, not from the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

No Mandatory Application of Wastewater Treatment Regulation by Local Board of Health: Under this section, review and approval or disapproval of a subdivision under the Montana Subdivision and Platting Act may occur only under regulations in effect at the time that an application is submitted to the governing body. The Lewis and Clark County Commission approved the Green Acres subdivision in July 1990, at which time the Lewis and Clark County Board of Health's onsite wastewater treatment regulations mandated shallow standard treatment systems, rather than the present regulation requiring intermittent sand filters. Skinner Enterprises, Inc., argued that the 1990 regulation should be applied pursuant to this section. However, local boards of health derive authority to regulate subdivisions from 50-2-116, not from the Montana Subdivision and Platting Act. Therefore, the local board's own onsite wastewater treatment regulations did not obligate the local board to apply the 1990 regulation. Further, 50-2-130 allows local boards of health to promulgate regulations that are more stringent than comparable state regulations, notwithstanding the provisions of 7-1-113 prohibiting a local government from exercising any power inconsistent with state law or administrative regulations. The facts regarding whether shallow-capped drainfields or intermittent sand filters are considered more stringent were not the subject of the present appeal. The discretionary authority of the local board of health to regulate subdivision sanitation by requiring intermittent sand filters was affirmed. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

Review, Not Regulatory, Function Applicable to Local Board of Health Control of Minor Subdivision: Section 50-2-106, when read in conjunction with 76-4-104, does not authorize a local board of health to regulate sanitation in minor subdivisions containing five or fewer parcels. By its plain language, 76-4-104 delegates to local boards of health the power to review select subdivisions but not the power to promulgate regulations. As a reviewing authority, the board's function is limited to reviewing the proposed water supply, sewage, and solid waste disposal facilities and advising the Department of Environmental Quality of its recommendation for approval or disapproval of the subdivision. However, 50-2-116 explicitly authorizes a local board of health to regulate sewage control and disposal that is not regulated by the Montana Subdivision and Platting Act. The Act limits state sanitation regulation to subdivisions containing parcels of fewer than 20 acres each and precludes regulation of subdivisions in which each parcel of land contains more than 20 acres. Thus, the regulation of sanitation in subdivisions containing parcels of more than 20 acres each is clearly the responsibility of local boards of health. Nevertheless, 76-4-122 requires both state and local approval before filing a subdivision plat with the County Clerk and Recorder, and to hold that approval by the local board of health is a ministerial, nondiscretionary act would render 76-4-122 inoperative. Giving effect to the purpose of all the applicable statutes and examining the legislative history of 50-2-116, the Supreme Court held that the 1991 enactment of 50-2-116(1)(i) revealed a legislative intent to expand, rather than diminish, the authority of local boards of health to regulate subdivision sanitation. Thus, local boards of health have discretionary statutory authority to regulate all subdivisions, regardless of size, notwithstanding the state's authority to regulate certain subdivisions under the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

Local Government Regulations — Rebuttable Presumption Permissible: County subdivision regulations that contained a rebuttable presumption of evasion did not violate the due process rights of appellant. Because exemptions of statutes pertaining to health, safety, and welfare of the public should be narrowly construed, a party claiming the exemption should have the burden of proving entitlement to the exemption. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

Local Government Regulations — Retroactive Use of Prior Valid Conveyances: When plain language of local regulations does not have retroactive application, it is not improper for local government officials to examine the prior history of the developers and tract in question in order

to make an informed decision regarding whether an applicant is evading the Montana Subdivision and Platting Act. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

Subdivision and Platting Act Constitutional — Permissible Delegation of Legislative Authority: Plaintiff challenged the constitutionality of the Montana Subdivision and Platting Act on the grounds that the statutory preamble to the Act's exemptions amounted to an unconstitutional delegation or usurpation of legislative authority on the basis that the Act contains insufficient guidelines. The Supreme Court distinguished this case from cases relating to a legislative grant of rulemaking authority to administrative agencies based on differences in nature between agencies and local governments. The delegation of authority by the Legislature was not impermissible, and rules adopted by the county pursuant to the Act are constitutional when the rules are not inconsistent with or contradictory to the Act and when they give notice to the property owner as to what the county will look at in making a determination. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

No Writ of Mandamus — Refusal to Record Deeds in Violation of County Subdivision Law: In an action to compel county officers to accept for recording a deed and certificate of survey, the trial court properly denied a Writ of Mandamus. The county officers' refusal was based on a belief that appellant was attempting to evade county subdivision regulations. When the act sought to be compelled is discretionary, as in this case, a Writ of Mandamus will be issued only if the failure to act is such an abuse of discretion that it amounts to no exercise of discretion at all. The evidence in this case indicates no abuse of discretion. Withers v. Beaverhead County, 218 M 447, 710 P2d 1339, 42 St. Rep. 1730 (1985), distinguished in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988).

Attorney General's Opinions

Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations: Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area: The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

Local Sanitary Regulations: County Commissioners may adopt reasonably stricter sanitation regulations for subdivisions than those adopted by the Department of Health and Environmental Sciences (now Department of Environmental Quality). 35 A.G. Op. 39 (1973).

Collateral References

State and local regulation of private landowner's disposal of solid waste on own property. 37 ALR 4th 635.

Failure of vendor to comply with statute or ordinance requiring approval or recording of plat prior to conveyance of property as rendering sale void or voidable. 77 ALR 3d 1058.

Validity and construction of statute or ordinance requiring land developer to dedicate portion of land for recreational purposes, or to make payments in lieu thereof. 43 ALR 3d 862.

Validity and construction of regulations as to subdivision maps or plats. 11 ALR 2d 524.

76-3-503. Hearing on proposed regulations.

Compiler's Comments

2001 Amendment: Chapter 348 inserted reference to 76-3-509; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

76-3-504. Subdivision regulations — contents.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 348 in (1)(a) inserted reference to 76-3-509; inserted (2) authorizing regulations adopted to include provisions consistent with promotion of cluster development; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 527 inserted (1)(l) requiring subdivision regulations to be made in accordance with the goals and objectives in growth policy within 1 year of adoption of policy by a governing body. Amendment effective October 1, 2001.

Chapter 564 inserted (1)(i) requiring a subdivider, for parcels with lot sizes averaging less than 5 acres, to reserve and sever appropriation water rights and surface water rights and establish a landowner's water use agreement; in (1)(j) at beginning of first sentence inserted exception clause and at end after "subdivision lots" inserted "are a sufficient distance from the centerline of the ditch to allow for construction, repair, maintenance, and inspection of the ditch; and prohibit the placement of structures or the planting of vegetation other than grass within the ditch easement without the written permission of the ditch owner"; inserted (1)(m) requiring the subdivider to describe, dimension, and show utility easements in the subdivision on the final plat; and made minor changes in style. Amendment effective October 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Preamble: The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

Preamble: The preamble attached to Ch. 527, L. 2001, provided: "WHEREAS, section 76-1-606, MCA, allows local governments to require subdivision plats to conform to the provisions of adopted growth policies; and

WHEREAS, section 76-3-604, MCA, has been interpreted to allow local governments to deny or condition the approval of subdivision plats based on the growth policy; and

WHEREAS, many adopted growth policies contain ambiguous and subjective provisions that cannot be applied to subdivisions in an objective manner; and

WHEREAS, it is inconsistent with accepted precepts of planning to authorize a local government to enforce a growth policy without properly adopted land use controls; and

WHEREAS, the Legislature intends to clarify that growth policies should be implemented through the proper adoption of land use controls; and

WHEREAS, a statutory procedure is in place that allows local governments to implement growth policies through properly adopted land use controls; and

WHEREAS, this land use control adoption procedure incorporates the due process and other constitutional protections that are not included under section 76-1-606, MCA."

Transition — Applicability: Section 5, Ch. 527, L. 2001, provided: "[This act] applies to jurisdictions that adopted a growth policy pursuant to Title 76, chapter 1, before October 1, 2001, beginning October 1, 2002."

1999 Amendments — Composite Section: Chapter 201 inserted (9) requiring subdivider to establish ditch easements and providing exceptions; inserted (10) requiring subdivider to file and record ditch easements and providing exceptions; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 582 at beginning of (1) inserted exception clause; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1995 Amendments: Chapter 418 in (6)(c) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 471 in (6)(c), at beginning, inserted "subject to the provisions of 76-3-511"; and made minor changes in style. Amendment effective April 14, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1981 Amendments — Composite Section: Chapter 236 deleted all of the language and replaced it with an introduction and (1) through (8) describing minimum requirements for subdivision regulations (see 1981 Session Law for text). The prior language read: "(1) Not later than December 31, 1973, the department of community affairs, through its division of planning, shall, in conformance with the Montana Administrative Procedure Act, prescribe reasonable minimum requirements for subdivision regulations adopted pursuant to this chapter.

(2) The minimum requirements shall include detailed criteria for the content of the environmental assessment required by this chapter. In prescribing the minimum contents of the subdivision regulations, the department of community affairs, through its division of planning, shall require the submission by the subdivider to the governing body of an environmental assessment.

(3) The department shall provide for the review of preliminary plats by those agencies of state and local government and affected public utilities having a substantial interest in a proposed subdivision. Such agency or utility review shall not delay the governing body's action on the plat beyond the time limit specified herein, and the failure of any agency to complete a review of a plat shall not be a basis for rejection of the plat by the governing body."

Chapter 274 substituted "department of commerce" for "department of community affairs, through its division of planning" in (1) and (2).

In preparing the composite of Ch. 236 and Ch. 274, which both amended 76-3-504, the Code Commissioner did not include the amendatory language in Chapter 274 pertaining to the transfer of functions of the department of community affairs to the department of commerce. The reason for this is that Ch. 236 entirely deleted the subsections containing these functions and instead established minimum subdivision regulation requirements for local governments.

Case Notes

Local Board of Health Not Considered Governing Body Despite Interlocal Agreement: Despite the fact that a county board of health was created by interlocal agreement, the District Court erred in concluding that a local board of health is considered a governing body by definition under 76-3-103. The Montana Subdivision and Platting Act does not, under 76-3-501 and this section, authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. The authority of a local board of health to regulate subdivisions

derives from 50-2-116, not from the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

Review, Not Regulatory, Function Applicable to Local Board of Health Control of Minor Subdivision: Section 50-2-106, when read in conjunction with 76-4-104, does not authorize a local board of health to regulate sanitation in minor subdivisions containing five or fewer parcels. By its plain language, 76-4-104 delegates to local boards of health the power to review select subdivisions but not the power to promulgate regulations. As a reviewing authority, the board's function is limited to reviewing the proposed water supply, sewage, and solid waste disposal facilities and advising the Department of Environmental Quality of its recommendation for approval or disapproval of the subdivision. However, 50-2-116 explicitly authorizes a local board of health to regulate sewage control and disposal that is not regulated by the Montana Subdivision and Platting Act. The Act limits state sanitation regulation to subdivisions containing parcels of fewer than 20 acres each and precludes regulation of subdivisions in which each parcel of land contains more than 20 acres. Thus, the regulation of sanitation in subdivisions containing parcels of more than 20 acres each is clearly the responsibility of local boards of health. Nevertheless, 76-4-122 requires both state and local approval before filing a subdivision plat with the County Clerk and Recorder, and to hold that approval by the local board of health is a ministerial, nondiscretionary act would render 76-4-122 inoperative. Giving effect to the purpose of all the applicable statutes and examining the legislative history of 50-2-116, the Supreme Court held that the 1991 enactment of 50-2-116(1)(i) revealed a legislative intent to expand, rather than diminish, the authority of local boards of health to regulate subdivision sanitation. Thus, local boards of health have discretionary statutory authority to regulate all subdivisions, regardless of size, notwithstanding the state's authority to regulate certain subdivisions under the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

Public Hearing on Minor Subdivision: Unless local regulations require a public hearing on minor subdivision, as provided by 76-3-505, no such hearing is necessary or required, prior to summary approval. Young v. Stillwater County Comm'rs, 177 M 488, 582 P2d 353 (1978).

Attorney General's Opinions

Compliance Review of Local Subdivision Rules Required at Preliminary Plat Stage: The review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage. Once a preliminary plat is approved, additional conditions for compliance may not be imposed, so compliance review at the final plat stage would render review meaningless. 49 A.G. Op. 7 (2001).

Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations: Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

Exemption of U.S. From Filing and Enforcement Provisions: The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. §1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

Collateral References

State and local regulation of private landowner's disposal of solid waste on own property. 37 ALR 4th 635.

76-3-505. Provision for summary review of minor subdivisions.

Compiler's Comments

1999 Amendment: Chapter 582 inserted (2) providing that local subdivisions located in area covered by growth policy are exempt from hearing on preliminary plat and certain review by governing body and requiring governing body to approve, conditionally approve, or disapprove proposed subdivision eligible for review within 35 days of application submission; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1995 Amendment: Chapter 418 near end of first clause substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: Deleted former (2) that read: "(2) Local subdivision regulations must include procedures for review of those divisions of land consisting exclusively of parcels 20 acres or larger subject to this chapter. Rules governing review of these divisions of land shall be limited to a written determination of whether appropriate access and easements are properly provided."

1985 Amendment: Inserted (2) (see 1987 amendment note for text).

Case Notes

Public Hearing on Minor Subdivision: Unless local regulations require a public hearing on minor subdivision, as provided by this section, no such hearing is necessary or required, prior to summary approval. Young v. Stillwater County Comm'rs, 177 M 488, 582 P2d 353 (1978).

Attorney General's Opinions

Size Parcel Prohibited by Master Plan (now Growth Policy) — Certificate Filing Required — Conditional Issuance of Permit: A local government unit with self-governing powers may not refuse to file a certificate of survey simply because the parcel encompasses less than 40 but equal to or greater than 20 acres, even if its master plan (now growth policy) prohibits divisions of land of such size. However, the local government may condition issuance of permits for construction, alteration, or enlargement of structures upon compliance with the master plan (now growth policy). 42 A.G. Op. 16 (1987).

Suitability for Access — Landowner May Declare Unsuitability: If a landowner elects on his application to accept a written determination that access and easements are not suitable for the purposes of providing services to the divided parcels, the local governing body may attach this notation to the instrument of transference prior to the recordation and forego any review of access suitability. 41 A.G. Op. 43 (1986).

Suitability for Access Review Mandatory: In divisions of land consisting exclusively of parcels 20 acres or larger, the landowner must apply to the local governing body for a determination of whether appropriate access and easements are properly provided. 41 A.G. Op. 43 (1986).

State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area: The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

Minor Subdivisions Not Exempt From Dedication: Minor subdivisions are not exempted from the requirements regarding dedicating land to the public for parks and playgrounds or alternative requirements provided therefor by law. 37 A.G. Op. 1 (1977).

Law Review Articles

Judicial Expansion of the Montana Subdivision and Platting Act in Florence-Carlton, Wilcox, 41 Mont. L. Rev. 113 (1980).

76-3-507. Provision for bonding requirements to ensure construction of public improvements.

Compiler's Comments

1997 Amendment: Chapter 503 in (2)(a), in first sentence near beginning, inserted "the governing body shall at the subdivider's option allow"; and made minor changes in style. Amendment effective May 1, 1997.

Severability: Section 4, Ch. 503, L. 1997, was a severability clause.

1995 Amendment: Chapter 468 inserted (1) concerning completion of required improvements; at beginning of first sentence of (2)(a) deleted "Local regulations may provide that" and after "final plat" substituted "the subdivider shall provide or cause to be provided" for "the governing body shall require" and inserted second sentence concerning reduction of bond requirements; inserted (2)(b) concerning incremental payment or guarantee plan; inserted (3) concerning legislative immunity; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

76-3-509. Local option cluster development regulations and exemptions authorized.

Compiler's Comments

Preamble: The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

Effective Date: Section 11(1), Ch. 348, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] is effective October 1, 2001."

76-3-510. Payment for extension of capital facilities.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

76-3-511. Local regulations no more stringent than state regulations or guidelines.

Compiler's Comments

1997 Amendment: Chapter 42 at beginning of first sentence of (1) deleted "After April 14, 1995"; in (1), in first sentence, and in (2), near beginning, substituted "76-3-504(6)(c)" for "76-3-504(5)(c)"; and made minor changes in style. Amendment effective March 12, 1997.

Preamble: The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

1995 Statement of Intent: The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

Effective Date: Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

Applicability: Section 22(2) and (3), Ch. 471, L. 1995, provided: "(2) [Sections 4 and 5] [50-2-130 and 76-3-511] apply to local units of government when they attempt to regulate the control and disposal of sewage from private and public buildings.

(3) [This act] does not apply to the establishment of fees or public participation requirements."

Attorney General's Opinions

Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations: Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

Part 6
Local Review Procedure

Part Case Notes

No Writ of Mandate — Appropriation of In-Lieu Funds: When the County Commission appropriated in-lieu park funds to a project not specifically authorized in the county outdoor recreation and open space plan, a Writ of Mandate did not lie because the appropriation of the in-lieu funds is a discretionary act. Burgess v. Gallatin County Comm'n, 215 M 503, 698 P2d 862, 42 St. Rep. 585 (1985).

Writ of Certiorari Not Available — Appropriation of In-Lieu Funds: When the County Commission appropriated in-lieu park funds to a project not specifically authorized in the county outdoor recreation and open space plan, a Writ of Certiorari did not lie because the Commission, in appropriating money, was acting in a legislative, not judicial, capacity. There is no action more clearly legislative than that of appropriation of public funds. Burgess v. Gallatin County Comm'n, 215 M 503, 698 P2d 862, 42 St. Rep. 585 (1985).

"Dedication": An action was filed to quiet title to a county road that had been established as a public road in 1909. The certificate of dedication of the 1909 plat stated that the streets therein were "granted and dedicated to the use of the public forever". In 1944, pursuant to section 1635, R.C.M. 1935, a petition for county road closure was filed. That same year the petition was granted by the County Commissioners. After 1944, neither the plaintiffs nor their predecessors in interest paid any taxes on the roadway and no portion of the roadway was fenced into the lands now belonging to the plaintiffs until 1980. The court quieted title in the plaintiffs, ruling that the 1909 plat dedication was the equivalent of a right-of-way deed under which the public acquired only the right-of-way and the incidents necessary to its enjoyment and that upon abandonment the fee in the street reverted to the abutting landowners, with each abutting landowner taking fee from the edge of his property to the center of the street. Bailey v. Ravalli Co., 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), followed in Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992).

Regulatory Powers Regarding Subdivision Control: The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

Part Attorney General's Opinions

Use of Cash Donations to Fund Restroom Construction on Daly Mansion Grounds: The Marcus Daly Mansion is a significant historical and architectural resource preserved for the future enjoyment of visitors and, as such, is considered a park, notwithstanding the fact that the property is owned by a state agency. The provision of facilities not previously in existence, as part of a long-term plan to improve the park, falls within the definition of "initial development" as used in 76-3-606 (now repealed). Therefore, cash donations received by Ravalli County in lieu of park land dedication may be used by the County Park Board to fund restroom construction on the mansion grounds. 44 A.G. Op. 13 (1991).

Exemption of U.S. From Filing and Enforcement Provisions: The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. §1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

Authority of Self-Governing Local Government to Enforce Master Plan (now Growth Policy): A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan (now growth policy) prohibits divisions of land of such size. A local government that has adopted a master plan (now growth policy) to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan. 42 A.G. Op. 16 (1987).

Dedication of Lands Within Municipality to Use of Public Forever — Municipal Election Required for Sale: Park dedication language in a subdivision plat located within a municipality dedicating certain lands "to the use of the public forever" creates a trust for a specific purpose. Under the terms of 7-8-4201, a municipal election must be held before the city can dispose of the property. 41 A.G. Op. 42 (1986).

Park Board Partly Funded by County General Fund: The funding for the county park board's obligations is derived from the county general fund as well as from other specific sources as enumerated by 7-16-2324, 7-16-2328, and 76-3-606 (now repealed). Since a specific separate tax levy is not authorized for the park fund, additional money must be appropriated from the county general fund authorized by 7-6-2501 if the revenue from sources other than taxation is insufficient to meet the necessary expenditures. 40 A.G. Op. 49 (1984).

Restriction on Use of Revenues Received From Sale of Park Lands and Donations: Revenues raised from sale of park lands and from cash donations in lieu of dedication of land for park purposes pursuant to 7-16-2324 and 76-3-606 (now repealed) are restricted in use to the purposes of purchase of additional lands or the initial development of parks and playgrounds. While these revenues are part of the park fund, they should be separated from unrestricted park fund revenues. 40 A.G. Op. 49 (1984).

Violation of Statute — Contracts and Deeds Voidable: The vendor of subdivided land violated the Montana Subdivision and Platting Act by filing a certificate of survey under Title 76, ch. 3, part 4, for divisions of land other than a subdivision, rather than filing an approved subdivision plat under the requirements of Title 76, ch. 3, part 6. The vendor obtained the approval of the certificate of survey from the Board of County Commissioners prior to filing the certificate, but the Board had no statutory authority to give approval. It is the opinion of the Attorney General that

deeds and contracts which convey land in violation of the Montana Subdivision and Platting Act but with the unauthorized approval of the Board of County Commissioners are voidable. 38 A.G. Op. 106 (1980).

Unwritten Blanket Policy Invalid: A local governing body's unwritten blanket policy or practice of accepting cash donations in lieu of public park and playground dedication with respect to subdivisions of five or fewer parcels is invalid. Minor subdivisions may be exempted from public park and playground dedication requirements only on a case-by-case basis and only if they meet one of the criteria for exemption under 76-3-606(2) (now repealed). A cash donation under such provision must be based upon the fair market value of the unimproved, unsubdivided land that is to be subdivided. Fair market value is the amount a willing buyer would pay and a willing seller would accept for the land when neither is under duress. 37 A.G. Op. 169 (1978).

Meaning of "Exclusive of All Other Dedications": The phrase "exclusive of all other dedications" in 76-3-606 (now repealed) includes only dedications for purposes other than public parks and playgrounds. 37 A.G. Op. 38 (1977).

Minor Subdivisions Not Exempt From Dedication: Minor subdivisions are not exempted from the requirements regarding dedicating land to the public for parks and playgrounds or alternative requirements provided therefor by law. 37 A.G. Op. 1 (1977).

Part Collateral References

Validity and construction of regulations as to subdivision maps or plats. 11 ALR 2d 524.

76-3-601. Submission of preliminary plat for review.

Compiler's Comments

2001 Amendment: Chapter 7 in (1) near beginning of first sentence substituted "summary review" for "expedited review". Amendment effective October 1, 2001.

1999 Amendment: Chapter 582 in first sentence in (1) substituted "expedited review pursuant to 76-3-505" for "summary approval"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1995 Amendment: Chapter 506 in (2)(b) inserted third sentence regarding a county governing body providing an informational copy of a preliminary subdivision plat to school district trustees; and made minor changes in style. Amendment effective April 15, 1995.

1981 Amendment: Inserted (2)(d) requiring municipality to coordinate whenever possible subdivision review and annexation procedures to minimize duplication of hearings, reports, and other requirements when subdivision is proposed for annexation to municipality.

Interim Study Committee Bill: Chapter 89, L. 1981 (SB 35), was introduced at the request of the interim Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Severability Clause: Section 4, Ch. 498, L. 1975, was a severability clause.

Case Notes

Authority of Board of County Commissioners to Approve Subdivisions Within Three-Mile Area Outside Corporate Limits: The city of Bozeman sought a reversal of 43 A.G. Op. 26 (1989), in which the Attorney General held that the Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. Bozeman asserted that 76-2-312 was not a limitation on the authority of commission-manager governments but rather an acknowledgement by the Legislature that such municipal governments already had extraterritorial subdivision authority under 7-3-4444 and that 76-2-312 exempted cities with a commission-manager form of government from procedural requirements that other forms of municipal government have to follow in order to exercise their extraterritorial subdivision authority. However, 7-3-4444 does not refer to the city commission, but instead clearly provides that the authority granted is to the city director of public services to ensure that the involved plat complies with platting regulations. If the plat complies, the director must approve it. The District Court properly found that 76-2-312 took away the extraterritorial subdivision authority over subdivisions that Bozeman, as a commission-manager form of government, would otherwise have had under 76-2-310 and 76-2-311. Bozeman v. Racicot, 253 M 204, 832 P2d 767, 49 St. Rep. 435 (1992).

Public Hearing on Minor Subdivision: Unless local regulations require a public hearing on minor subdivision, as provided by 76-3-505, no such hearing is necessary or required, prior to summary approval. Young v. Stillwater County Comm'rs, 177 M 488, 582 P2d 353 (1978).

Application: A certificate of survey is not subject to review under this section. State ex rel. Swart v. Stucky, 167 M 171, 536 P2d 762 (1975).

Attorney General's Opinions

Compliance Review of Local Subdivision Rules Required at Preliminary Plat Stage: The review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage. Once a preliminary plat is approved, additional conditions for compliance may not be imposed, so compliance review at the final plat stage would render review meaningless. 49 A.G. Op. 7 (2001).

Condominiums Not Exempt From Provisions of Subdivision and Platting Act: Condominiums are subdivisions that are not exempted under 76-3-204 from the provisions of the Montana Subdivision and Platting Act. 45 A.G. Op. 12 (1993).

Authority of County Commissioners to Approve Subdivisions Under Commission-Manager Government: The Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. 43 A.G. Op. 26 (1989).

Tract of Four-Plexes Considered a Subdivision: A developer's construction of 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer is a "subdivision" subject to local review under the Montana Subdivision and Platting Act. Each dwelling unit constitutes a parcel and will be segregated from the larger tract by transference of possession. Since the units will be newly constructed, the exemption in 76-3-204 does not apply. 40 A.G. Op. 57 (1984). (Opinion rendered prior to 1985 amendment of 76-3-204.)

State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area: The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

76-3-602. Fees.

Case Notes

Certificate of Survey: A certificate of survey was not subject to a reviewing fee. State ex rel. Swart v. Stucky, 167 M 171, 536 P2d 762 (1975).

76-3-603. Contents of environmental assessment.

Compiler's Comments

1995 Amendment: Chapter 468 inserted (1) concerning major subdivision; substituted (1)(b) concerning summary of probable impacts for former text that read: "maps and tables showing soil types in the several parts of the proposed subdivision and their suitability for any proposed developments in those several parts"; in (1)(d), after "information", inserted "related to the applicable regulatory criteria adopted under 76-3-501"; inserted (2) concerning minor subdivision; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

1981 Amendment: Substituted "governing body" for "department through its division of planning" at the end of (4).

76-3-604. Review of preliminary plat.

Compiler's Comments

2001 Amendment: Chapter 527 in (1) after "conforms" deleted "to the local growth policy if one has been adopted pursuant to chapter 1"; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 527, L. 2001, provided: "WHEREAS, section 76-1-606, MCA, allows local governments to require subdivision plats to conform to the provisions of adopted growth policies; and

WHEREAS, section 76-3-604, MCA, has been interpreted to allow local governments to deny or condition the approval of subdivision plats based on the growth policy; and

WHEREAS, many adopted growth policies contain ambiguous and subjective provisions that cannot be applied to subdivisions in an objective manner; and

WHEREAS, it is inconsistent with accepted precepts of planning to authorize a local government to enforce a growth policy without properly adopted land use controls; and

WHEREAS, the Legislature intends to clarify that growth policies should be implemented through the proper adoption of land use controls; and

WHEREAS, a statutory procedure is in place that allows local governments to implement growth policies through properly adopted land use controls; and

WHEREAS, this land use control adoption procedure incorporates the due process and other constitutional protections that are not included under section 76-1-606, MCA."

Transition — Applicability: Section 5, Ch. 527, L. 2001, provided: "[This act] applies to jurisdictions that adopted a growth policy pursuant to Title 76, chapter 1, before October 1, 2001, beginning October 1, 2002."

1999 Amendments — Composite Section: Chapter 236 in (2) substituted "within 60 working days" for "within 60 days"; and made minor changes in style. Amendment effective April 5, 1999.

Chapter 582 throughout section substituted reference to disapprove for reference to reject; in (1) substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 4, Ch. 236, L. 1999, provided: "[This act] does not apply to subdivision proposals submitted to a governing body prior to [the effective date of this act]." Effective April 5, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Case Notes

Standard of Review — Denial of Preliminary Subdivision Application Not Arbitrary, Capricious, or Unlawful: A preliminary plat of a proposed subdivision is subject to the review of the governing body to determine whether the plat conforms to the master growth plan (now growth policy) adopted for the area and the plat's effect on the public health, safety, and welfare. The standard of review applied as to whether the review was conducted correctly is whether the record establishes that the governing body acted arbitrarily, capriciously, or unlawfully. Here, the record established that the Ennis Town Council heard evidence that a proposed recreational vehicle park did not conform to the goals of the Ennis comprehensive plan (now growth policy) and that the proposed park posed a threat to the health, safety, and welfare of the townspeople of Ennis. The decision to deny the preliminary subdivision application was not arbitrary, capricious, or unlawful and was properly affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000). See also N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

Extension Within Reasonable Time of Expiration of Period: In October 1981, the Flathead County Commissioners gave preliminary 1-year approval to a subdivision plat. In December 1982, the developer requested an extension to the preliminary approval. On January 14, 1983, the Commissioners approved the extension. Plaintiff filed a complaint alleging 76-3-610 precluded the Commissioners from granting an extension to the preliminary approval after the original time period had run. The District Court dismissed the action. Plaintiff appealed, contending that the phrase "At the end of" in the statute meant by or before the period in question expires and not after the expiration. The Supreme Court held that the plain meaning of the statute was evident in the language used. The statute permits County Commissioners to grant an extension to a

preliminary plat approval within a reasonable time of the expiration of that period. Oldenburg v. Flathead County, 208 M 128, 676 P2d 778, 41 St. Rep. 217 (1984).

Standing to Compel Review of Subdivision: Where petitioner, an engineering group seeking a Writ of Mandamus ordering County Commissioners to act on five minor subdivisions, had no legal interest in any of the land subject to this action, it has no standing to bring an action. State ex rel. Professional Consultants, Inc. v. Bd. of County Comm'rs, 181 M 177, 592 P2d 945, 36 St. Rep. 613 (1979). (Dissent by Chief Justice Haswell.)

Attorney General's Opinions

Compliance Review of Local Subdivision Rules Required at Preliminary Plat Stage: The review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage. Once a preliminary plat is approved, additional conditions for compliance may not be imposed, so compliance review at the final plat stage would render review meaningless. 49 A.G. Op. 7 (2001).

No Delegation of Approval or Rejection of Plat to Planning Board or Staff: While this section allows for review of a preliminary plat by a governing body or its designated agent or agency, the approval, conditional approval, or rejection of the preliminary plat must be an action of the governing body itself and may not be delegated by a county commission to a planning board or to an administrative officer on the planning board staff. 41 A.G. Op. 64 (1986).

76-3-605. Hearing on preliminary plat.

Compiler's Comments

1999 Amendment: Chapter 582 at beginning of (1) inserted exception clause and after "assessment" inserted "if required"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1983 Amendment: In (3), after "owner of record" inserted "and each purchaser under contract for deed of property".

1981 Amendment: Inserted (2) requiring municipality to hold joint hearings whenever possible on preliminary plat and annexation when subdivision is proposed for annexation to municipality.

Interim Study Committee Bill: Chapter 89, L. 1981 (SB 35), was introduced at the request of the interim Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Standard of Review — Denial of Preliminary Subdivision Application Not Arbitrary, Capricious, or Unlawful: A preliminary plat of a proposed subdivision is subject to the review of the governing body to determine whether the plat conforms to the master growth plan (now growth policy) adopted for the area and the plat's effect on the public health, safety, and welfare. The standard of review applied as to whether the review was conducted correctly is whether the record establishes that the governing body acted arbitrarily, capriciously, or unlawfully. Here, the record established that the Ennis Town Council heard evidence that a proposed recreational vehicle park did not conform to the goals of the Ennis comprehensive plan (now growth policy) and that the proposed park posed a threat to the health, safety, and welfare of the townspeople of Ennis. The decision to deny the preliminary subdivision application was not arbitrary, capricious, or unlawful and was properly affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000). See also N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

76-3-608. Criteria for local government review.

Compiler's Comments

2001 Amendment: Chapter 348 in (3)(a) inserted reference to 76-3-509; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

1999 Amendment: Chapter 582 throughout section substituted "growth policy" for "master plan" or "plan"; in (3)(a) inserted exception clause; at end of (6)(b) substituted "meet the requirements of 76-1-601" for former language that read: "(i) housing, transportation, and land use elements sufficient for the governing body to protect public health, safety, and welfare; and

(ii) a discussion of physical constraints on development that exist within the area encompassed by the proposed subdivision"; inserted (7) authorizing governing body to exempt subdivisions entirely within designated geographic boundaries from review criteria and outlining criteria for exemption; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1995 Amendment: Chapter 468 in (1) inserted second sentence concerning impacts on educational services; in (3)(a) inserted "agricultural water user facilities"; inserted (4) concerning design to minimize potentially significant adverse impacts; inserted (5) concerning not unreasonably restricting development and consultation with subdivider; and inserted (6) exempting certain minor subdivisions from review criteria.

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

1993 Amendment: Chapter 272 in (1), before "environmental assessment", inserted "applicable" and at end substituted "meets the requirements of this chapter" for "would be in the public interest. The governing body shall disapprove any subdivision which it finds not to be in the public interest"; in (2), at beginning, deleted "To determine whether the proposed subdivision would be in the public interest" and at end substituted reference to the criteria in subsection (3) for specific criteria relating to the basis of the need for the subdivision, public opinion, and effects on agriculture, local services, taxes, the environment, wildlife and its habitat, and public health and safety; inserted (3) stating criteria that a subdivision proposal must be reviewed for; and made minor changes in style. Amendment effective April 6, 1993.

Applicability: Section 7(2), Ch. 272, L. 1993, provided that this section "applies to all subdivision applications filed after September 30, 1993".

Case Notes

Local Governing Body Failure to Follow Local Regulations on Criteria for Approval of Subdivision: Section 76-3-501 requires the local governing body to review and approve or disapprove a proposed subdivision under the local regulations in effect at the time that an application for approval of a preliminary plat is submitted to the local governing body. The governing body may not ignore its own local regulations and apply only the criteria that this section requires to be considered. In this case, the local regulations contained the five criteria provided in this section but, in addition, still contained three criteria that had been amended out of that section. The local governing body conditionally approved a subdivision without considering those three criteria. This chapter's mandate that a local governing body assert local control and develop its own subdivision regulations, as well as other provisions of this chapter, clearly contemplates that the local government entity is free to promulgate regulations, in addition to those in this chapter, that do not necessarily conform exactly to this chapter, so long as the

regulations do not conflict with this chapter. This chapter establishes minimum requirements that the local governing body must follow. The additional three criteria in the local governing body's regulations do not conflict with this chapter, and findings on those criteria were mandated. In addition, the local governing body failed to follow its local regulation stating that findings on the criteria that the local regulation required to be applied must show that the subdivision will be in the public interest. The District Court therefore properly set aside the local governing body's conditional approval of the subdivision. Burnt Fork Citizens Coalition v. Bd. of County Comm'rs of Ravalli County, 287 M 43, 951 P2d 1020, 54 St. Rep. 1490 (1997).

Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper: It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals: Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Denial of Application Not Abuse of Discretion: The County Commissioners denied an application for further development of a subdivision until existing drainage problems were remedied by the developer. The Supreme Court held that the Commissioners' decision was based on sufficient evidence that further development could constitute a threat to the public's health and was not an abuse of discretion. Christianson v. Gasvoda, 242 M 212, 789 P2d 1234, 47 St. Rep. 696 (1990).

Public Interest Finding — Application: The public interest finding mandated by this section applies to "minor" subdivisions which qualify for review under 76-3-609. (See 1993 amendments.) State ex rel. Florence-Carlton School District v. Bd. of County Comm'rs, 180 M 285, 590 P2d 602 (1978).

Attorney General's Opinions

Compliance Review of Local Subdivision Rules Required at Preliminary Plat Stage: The review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage. Once a preliminary plat is approved, additional conditions for compliance may not be imposed, so compliance review at the final plat stage would render review meaningless. 49 A.G. Op. 7 (2001).

76-3-609. Review procedure for minor subdivisions.

Compiler's Comments

1999 Amendment: Chapter 236 in (1) substituted "within 35 working days" for "within 35 days"; and made minor changes in style. Amendment effective April 5, 1999.

Applicability: Section 4, Ch. 236, L. 1999, provided: "[This act] does not apply to subdivision proposals submitted to a governing body prior to [the effective date of this act]." Effective April 5, 1999.

1995 Amendment: Chapter 468 in (1) and (3) substituted "minor subdivision" for "such subdivision"; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

1987 Amendment: Deleted former (2) that read: "(2) (a) For divisions of land consisting exclusively of parcels 20 acres and larger, the governing body shall review the division of land within 35 days of the submission of an application for review. The governing body's review must be limited to a written determination that appropriate access and easements are properly provided. The review shall provide either:

(i) that the access and easements are suitable for the purposes of providing appropriate services to the land; or

(ii) that the access and easements are not suitable for the purposes of providing appropriate services to the land, in which case the county, the school district or districts, and other authorities and districts in which the land is located will not provide services that involve use of the unsuitable access and easements. Such services include:

(A) fire protection;

(B) school busing;

(C) ambulance;

(D) snow removal; and

(E) similar services as determined by the governing body.

(b) The governing body shall deliver a copy of the determination of the review to the county clerk and recorder to be reflected on the certificate of survey or deed of conveyance of the land that was subject to review.

(c) The governing body may, upon application by a landowner, redetermine the suitability of access and easements. If the governing body determines that there has been a material change regarding access or easements and the change provides for suitable access and easements for services, it may determine that such land is now suitable as provided in subsection (2)(a)(i) and shall deliver a copy of such determination to the county clerk and recorder to be reflected on the certificate of survey or deed of conveyance.

(d) Requirements for holding a public hearing, preparing an environmental assessment, and finding that the division of land is in the public interest do not apply."

1985 Amendment: Inserted (2) (see 1987 amendment note for text).

Case Notes

Standing for Mandamus: Petitioner, an engineering survey group seeking a Writ of Mandamus to compel County Commissioners to act on five minor subdivisions, has no stated legal interest in any of the subdivisions. Some form of ownership in the land is necessary to impart standing to bring a mandamus action. State ex rel. Professional Consultants, Inc. v. Bd. of County Comm'rs, 181 M 177, 592 P2d 945, 36 St. Rep. 613 (1979).

Public Interest Finding — Application: The public interest finding mandated by 76-3-608 applies to "minor" subdivisions which qualify for review under this section. State ex rel. Florence-Carlton School District v. Bd. of County Comm'rs, 180 M 285, 590 P2d 602 (1978).

Attorney General's Opinions

Original Property Boundary Established by United States Government Survey — Parcels Not Exempt From Subdivision and Platting Act: The sole fact that a parcel of land was described by references to boundaries established by a United States government survey does not exempt the parcel from the requirements of the Montana Subdivision and Platting Act. Federal survey laws that were adopted to facilitate the conveyance of land in the public domain into private ownership are distinct from Montana subdivision laws that generally regulate divisions of land and conveyances of property among private landowners. Therefore, a property owner may not convey, without complying with Montana subdivision laws, component aliquot parts of sections and government lots that are described and identified in a deed on file with a County Clerk and Recorder and that are less than 160 acres in size. 47 A.G. Op. 10 (1997), clarifying 38 A.G. Op. 66 (1980).

Size Parcel Prohibited by Master Plan (now Growth Policy) — Certificate Filing Required — Conditional Issuance of Permit: A local government unit with self-governing powers may not refuse to file a certificate of survey simply because the parcel encompasses less than 40 but equal to or greater than 20 acres, even if its master plan (now growth policy) prohibits divisions of land of such size. However, the local government may condition issuance of permits for construction,

alteration, or enlargement of structures upon compliance with the master plan (now growth policy). 42 A.G. Op. 16 (1987).

Effect of Nonsuitability Determination on Services — Taxation: A nonsuitability determination with respect to access prohibits any political subdivision from providing those services specified by the governing body as inappropriate. In appropriate circumstances, the governing body may include certain services provided by sheriff's or police departments as "similar services" which will not be provided to a parcel of land with a nonsuitability determination. The owner of real property affected by a nonsuitability determination is not relieved of his obligation to tender all taxes required of property owners, including those which support governmental services he is prohibited from receiving by the nonsuitability determination. 41 A.G. Op. 86 (1986).

Nonsuitability Determination — Provision of Services — Tax Obligations: The provisions of this section relating to nonsuitability determinations (deleted, sec. 2, Ch. 256, L. 1987), with respect to an access or casement, prohibited any political subdivision from providing those services specified by the governing body as inappropriate and included, under appropriate circumstances, certain services provided by Sheriff's or police departments. An owner of real property affected by a nonsuitability determination was not relieved of his obligation to pay all taxes otherwise required of property owners, including taxes that supported governmental services prohibited by the determination. 41 A.G. Op. 86 (1986).

Suitability for Access — Landowner May Declare Unsuitability: If a landowner elects on his application to accept a written determination that access and easements are not suitable for the purposes of providing services to the divided parcels, the local governing body may attach this notation to the instrument of transference prior to the recordation and forego any review of access suitability. 41 A.G. Op. 43 (1986).

Suitability for Access Review Mandatory: In divisions of land consisting exclusively of parcels 20 acres or larger, the landowner must apply to the local governing body for a determination of whether appropriate access and easements are properly provided. 41 A.G. Op. 43 (1986).

Law Review Articles

Judicial Expansion of the Montana Subdivision and Platting Act in Florence-Carlton, Wilcox, 41 Mont. L. Rev. 113 (1980).

76-3-610. Effect of approval of preliminary plat.

Compiler's Comments

1983 Amendment: In (1), changed the period of effectiveness of approval of a preliminary plat from not more than 1 calendar year to not more than 3 calendar years or less than 1 calendar year.

1981 Amendment: Added the exception for approval extension at the end of (1) following "for no more than 1 calendar year"; added "the original or extended approval period as provided in subsection (1)" at the end of (2).

Case Notes

Extension Within Reasonable Time of Expiration of Period: In October 1981, the Flathead County Commissioners gave preliminary 1-year approval to a subdivision plat. In December 1982, the developer requested an extension to the preliminary approval. On January 14, 1983, the Commissioners approved the extension. Plaintiff filed a complaint alleging 76-3-610 precluded the Commissioners from granting an extension to the preliminary approval after the original time period had run. The District Court dismissed the action. Plaintiff appealed, contending that the phrase "At the end of" in the statute meant by or before the period in question expires and not after the expiration. The Supreme Court held that the plain meaning of the statute was evident in the language used. The statute permits County Commissioners to grant an extension to a preliminary plat approval within a reasonable time of the expiration of that period. Oldenburg v. Flathead County, 208 M 128, 676 P2d 778, 41 St. Rep. 217 (1984).

76-3-611. Review of final plat.

Compiler's Comments

1995 Amendment: Chapter 293 in (1)(b), after "taxes", inserted "and special assessments"; and made minor changes in style.

1981 Amendment: Added (1)(b) requiring governing body to approve final subdivision plat only when County Treasurer has certified no property taxes are delinquent.

Case Notes

Examining Surveyor's Fee — County With Charter Government: A county with a charter form of local government is not prohibited from establishing a fee for the examination of a plat or certificate of survey by the examining surveyor if the standards of the review are not inconsistent with this section under 7-1-113, because this section is silent in regard to fees and a charter form of government under Art. XI, sec. 6, Mont. Const., and 7-1-103 may exercise any power not expressly prohibited. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100, 38 St. Rep. 71 (1981).

Attorney General's Opinions

Subdivision Remainders: The Department of Health and Environmental Sciences (now Department of Environmental Quality) may require that plats show the remainder of land less than 20 acres left after the segregation of subdivided parcels and has authority to review such remainders under Title 76, ch. 4, part 1. 37 A.G. Op. 74 (1977).

76-3-612. Abstract of title required for review process.

Compiler's Comments

1981 Amendment: Deleted "licensed" before "title abstracter" in (1).

Attorney General's Opinions

Title Insurance Insufficient to Satisfy Certificate of Title Requirement: A title insurance policy does not satisfy the certificate of title requirement of 76-3-612. The purpose of the certificate of title requirement is to inform the governing body of the status of the title. Title insurance is inadequate for this purpose since it does not purport to detail the status of the title but merely constitutes an agreement to defend title if defects should be alleged in the future. 38 A.G. Op. 48 (1979).

Section Impliedly Amended — Effect of Sunsetting of Board of Abstracters: The sunsetting of the Board of Abstracters does not relieve a subdivider of his duty to provide a certificate of title. However, by allowing the Board to "sunset", the Legislature impliedly amended this section, removing the requirement that the certificate be prepared by a "licensed" title abstracter (the term "licensed" was removed by express amendment in 1981). 38 A.G. Op. 48 (1979).

Licensed Abstracter Certificate Not Required Unless Dedication: Abstract examination and certificate from licensed abstracter are not required when lands outside city are surveyed and certificate of survey or plot is prepared for one or more tracts with no dedication for streets, alleys, playgrounds, or other purposes ("licensed" deleted by 1981 amendment). 35 A.G. Op. 35 (1973).

76-3-620. Review requirements — written statement.

Case Notes

Showing of Irrevocably Closed Mind as Proof of Prejudice by Administrative Decisionmaker: Madison River R.V. Ltd. (RV) sought to build a recreational vehicle park in Ennis. Prior to a hearing before the Ennis Town Council, RV requested in writing that one of the council members recuse himself, based on his alleged bias against the project. The request was denied without objection by the other council members, and RV's application for the park was also denied. On appeal, RV contended that the council member's participation in the council's deliberations was error, citing the principle that one who makes decisions in a judicial or quasi-judicial capacity must be free from bias. However, no authority was cited that the principle applies to elected members of a city council. Pursuant to Fed. Trade Comm'n v. Cement Institute, 333 US 683, 92 L Ed 1010, 68 S Ct 793 (1948), in order to prevail on a claim of prejudice or bias against an administrative decisionmaker, the petitioner must show that the decisionmaker had an irrevocably closed mind on the subject under investigation or adjudication. Here, RV failed to establish that the council member's mind was irrevocable closed. The District Court's determination that the town council was not required to disqualify the member from voting and that the council's decision should not be vacated because of its failure to disqualify the member in question was affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

Town Council's Findings Timely Filed and Properly Part of Record for Court Review: Madison River R.V. Ltd. (RV) applied to build a recreational vehicle park in Ennis, but the application was denied by the Ennis Town Council. RV appealed to the District Court, but the council's findings were filed 15 days after RV filed the appeal, which RV contended was not timely. Under this section, a decision to deny a subdivision application must include a written statement giving the reason for the denial, but the 30 days allowed for appeal under 76-3-625 do not begin to run until the council members sign the written findings. The fact that RV's notice of appeal was filed prematurely did not render untimely the written statements of reasons for denial of the

application for plat approval. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

76-3-621. Park dedication requirement.

Compiler's Comments

2001 Amendment: Chapter 348 in (1) in exception clause inserted reference to 76-3-509; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

1999 Amendment: Chapter 582 in two places in (2) substituted "growth policy" for "master plan" or "plans"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

76-3-625. Violations — actions against governing body.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

Case Notes

Reversal of Denial of Preliminary Injunction — Consideration of Underlying Issues Precluded: On appeal of the merits of a preliminary injunction, plaintiff requested that the Supreme Court provide substantive guidance by addressing several underlying issues regarding interaction between injunction laws and subdivision statutes, as well as the likelihood of plaintiff to prevail on issues still pending in District Court. In determining the merits of a preliminary injunction on appeal, it is not the province of either the District Court or the Supreme Court to make final determinations on matters that might arise upon a trial on the merits. The request for substantive guidance was declined. Sweet Grass Farms, Ltd. v. Bd. of County Commr's, 2000 MT 147, 300 M 66, 2 P3d 825, 57 St. Rep. 576 (2000). See also Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 193 M 95, 630 P2d 226 (1981).

Showing of Irrevocably Closed Mind as Proof of Prejudice by Administrative Decisionmaker: Madison River R.V. Ltd. (RV) sought to build a recreational vehicle park in Ennis. Prior to a hearing before the Ennis Town Council, RV requested in writing that one of the council members recuse himself, based on his alleged bias against the project. The request was denied without objection by the other council members, and RV's application for the park was also denied. On appeal, RV contended that the council member's participation in the council's deliberations was error, citing the principle that one who makes decisions in a judicial or quasi-judicial capacity must be free from bias. However, no authority was cited that the principle applies to elected members of a city council. Pursuant to Fed. Trade Comm'n v. Cement Institute, 333 US 683, 92 L Ed 1010, 68 S Ct 793 (1948), in order to prevail on a claim of prejudice or bias against an administrative decisionmaker, the petitioner must show that the decisionmaker had an irrevocably closed mind on the subject under investigation or adjudication. Here, RV failed to establish that the council member's mind was irrevocable closed. The District Court's determination that the town council was not required to disqualify the member from voting and that the council's decision should not be vacated because of its failure to disqualify the member in question was affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

Standard of Review — Denial of Preliminary Subdivision Application Not Arbitrary, Capricious, or Unlawful: A preliminary plat of a proposed subdivision is subject to the review of the governing body to determine whether the plat conforms to the master growth plan (now growth policy) adopted for the area and the plat's effect on the public health, safety, and welfare. The standard of review applied as to whether the review was conducted correctly is whether the record establishes that the governing body acted arbitrarily, capriciously, or unlawfully. Here, the record established that the Ennis Town Council heard evidence that a proposed recreational vehicle park did not conform to the goals of the Ennis comprehensive plan (now growth policy) and that the proposed park posed a threat to the health, safety, and welfare of the townspeople of Ennis. The decision to deny the preliminary subdivision application was not arbitrary, capricious, or unlawful and was properly affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000). See also N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

Town Council's Findings Timely Filed and Properly Part of Record for Court Review: Madison River R.V. Ltd. (RV) applied to build a recreational vehicle park in Ennis, but the application was denied by the Ennis Town Council. RV appealed to the District Court, but the council's findings were filed 15 days after RV filed the appeal, which RV contended was not timely. Under 76-3-620, a decision to deny a subdivision application must include a written statement giving the reason for the denial, but the 30 days allowed for appeal under this section do not begin to run until the council members sign the written findings. The fact that RV's notice of appeal was filed prematurely did not render untimely the written statements of reasons for denial of the application for plat approval. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

CHAPTER 4
STATE REGULATION OF SUBDIVISIONS

Chapter Administrative Rules

Title 17, chapter 36, ARM Subdivisions — on-site subsurface wastewater treatment.

Chapter Case Notes

Unenforceability of Buy-Sell Agreement on Grounds of Impossibility or Impracticality of Performance — Requiring Performance of Contract With Potential for Environmental Degradation Unconstitutional: Cape-France Enterprises (Cape-France) entered a buy-sell agreement with Peed (now deceased) and Moore to purchase some property near Bozeman for a subdivision. Before the subdivision could be completed, water needed to be procured for the site. According to the agreement, as buyers, Peed and Moore were responsible to bring water to the property, but because city water was not available, a well needed to be drilled. However, the presence of a pollution plume was discovered near the land. After the subdivision process was commenced, the Department of Environmental Quality notified Cape-France that: (1) the plume may have advanced under the property; (2) a subdivision would not be approved unless a well was drilled and tested; (3) a well could be drilled, but if testing showed pollution in the water, treatment would be extensive; and (4) if drilling or pumping of the water caused expansion of the pollution, then

Cape-France, as owner of the property, would be held liable for cleanup costs. On cross-motions for summary judgment, the District Court held that the buy-sell agreement could be rescinded on the basis of mutual mistake of fact and impossibility or impracticality of performance and that specific performance would not be granted. The Supreme Court affirmed. A court may determine that an act is impossible in legal contemplation when it is not practicable, when the act can be done only at an excessive, unreasonable, and unbargained-for cost. The doctrine of impossibility or impracticability is applied when, aside from the object of a contract being unlawful, the public policy underlying the strict performance of the contract is outweighed by the senselessness of requiring performance. The doctrine is not limited to cases of literal impossibility but may also be applied in cases that present a potential for substantial and unbargained-for damages. In this case, requiring Cape-France to go forward with the performance of the contract when there was a very real possibility of substantial environmental degradation and resultant financial liability for cleanup was not in the public interest or in the interests of the contracting parties and was not in accord with the guarantee of a clean and healthful environment in Art. II, sec. 3, Mont. Const., or the mandate to maintain and improve a clean and healthful environment for present and future generations in Art. IX, sec. 1, Mont. Const. Thus, rescission of the contract was proper. Cape-France Enterprises v. Estate of Peed, 2001 MT 139, 305 M 513, 29 P3d 1011 (2001). See also Smith v. Zepp, 173 M 358, 567 P2d 923 (1977), and Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236 (1999).

Chapter Attorney General's Opinions

Subsequent Sale of Parcel Originally Used as Lien Security — State and Local Regulation Inapplicable: The provisions of Title 76 relating to local and state regulation of subdivisions do not apply to the subsequent sale of an undivided parcel that was originally used as security for a construction lien pursuant to 76-3-201, and nothing in the Montana Subdivision and Platting Act requires that the parcel be reviewed or surveyed upon subsequent sale. 42 A.G. Op. 101 (1988).

Chapter Collateral References

Our Montana Environment...Where Do We Stand?, Environmental Quality Council, 1996.

Summary Proceedings, Montana Ground Water Conference, "Planning a Ground Water Strategy", Environmental Quality Council, 1982.

Part 1
Sanitation in Subdivisions

Part Administrative Rules

ARM 17.36.101 Definitions.

ARM 17.36.605 Exclusions.

Part Case Notes

Clerk Under No Clear Duty to Record Deed — Mandamus Erroneously Granted: Where the plaintiff attempted to record a deed to a 5-acre parcel of land without the removal or approval of sanitary restrictions by the county health department (which the court held was estopped from withholding its approval of a disposal permit) but was refused by the Clerk and Recorder, the District Court erred in granting a Writ of Mandamus ordering the Clerk to file a certificate of survey and record the warranty deed. The Clerk and Recorder was statutorily required to refuse to file the survey and record the deed and lacked any discretion to accept a survey absent compliance with the requirements of 76-4-122. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

Department Under No Clear Legal Duty to Approve Subdivision — Mandamus Erroneously Granted: Where the plaintiff applied to the county health department for a disposal permit and was not informed by the county for a period of 6 years whether the permit would be issued, the District Court erred in granting a Writ of Mandamus directing the Department of Health and Environmental Sciences (now Department of Environmental Quality) to certify that the deeded property was not subject to sanitary restrictions. No application for such certification had ever been submitted to the Department, and it therefore had no official knowledge of the plaintiff's disposal system. Absent an appropriate application to the Department, there is no factual or statutory basis for holding that the Department had violated a clear legal duty. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

Regulatory Powers Regarding Subdivision Control: The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory

functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

Part Attorney General's Opinions

Review of Certificate of Survey: The Department of Health and Environmental Sciences (now Department of Environmental Quality) has authority under Title 76, ch. 4, part 1, to review certificates of survey. 38 A.G. Op. 81 (1980).

Subdivision Remainders: The Department of Health and Environmental Sciences (now Department of Environmental Quality) may require that plats show the remainder of land less than 20 acres left after the segregation of subdivided parcels and has authority to review such remainders under Title 76, ch. 4, part 1. 37 A.G. Op. 74 (1977).

Local Sanitary Regulations: County Commissioners may adopt reasonably stricter sanitation regulations for subdivisions than those adopted by the Department of Health and Environmental Sciences (now Department of Environmental Quality). 35 A.G. Op. 39 (1973).

Part Law Review Articles

Municipal Solid Waste: The Endless Disposal of American Municipalities Meets the CERCLA Strict Liability Dragon (Growth Management and the Environment in the 1990s), Dupont, 24 Loy. L.A.L. Rev. 1183 (1991).

Municipal Solid Waste Management: The States Must Pick Up Where Congress Left Off, Thompson, 23 Akron L. Rev. 587 (1990).

Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem, Lanza, 10 Fordham Urb. L.J. 215 (1982).

The Siting of Sanitary Landfills and Other Waste Management Facilities—The Legislature Acts, Houlihan & Flynn, 70 Ill. B.J. 434 (1982).

Part Collateral References

Validity, construction, and application of state hazardous waste regulations. 86 ALR 4th 401.

Summary Proceedings, Montana Ground Water Conference, "Planning a Ground Water Strategy", Environmental Quality Council, 1982.

76-4-101. Public policy.

Compiler's Comments

Severability Clause: Section 9, Ch. 509, L. 1973, was a severability clause.

Case Notes

Regulatory Powers Regarding Subdivision Control: The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n, v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

Attorney General's Opinions

Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations: Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

Review When Intended Use Changes — Condominiums: The Department's authority to review condominiums includes condominiums to be built on parcels of land previously approved by the Department for uses not including condominiums. 39 A.G. Op. 28 (1981).

Condominiums as Subdivisions: The phrase "regardless of size, which provides permanent multiple space for recreational camping vehicles or mobile homes" only applies to the antecedent "area" and not "condominiums". Condominium is an independent class expressly included in the definition of subdivision whether or not constructed on a parcel of land containing 20 acres or more. Therefore, condominiums are subject to review by the Department of Health and Environmental Sciences (now Department of Environmental Quality) under the provisions of this chapter. The clause "sale, rent, lease, or other conveyance of one or more parts of a building" in 76-3-204 refers to something other than condominiums and thus does not provide an exemption for condominiums. 39 A.G. Op. 28 (1981).

76-4-102. Definitions.

Compiler's Comments

2001 Amendment: Chapter 280 inserted definitions of adequate municipal facilities, mixing zone, and public sewage system or public sewage disposal system; substituted extension of a public sewage system for extension of public sewage disposal system as defined term; in definition of public water supply system at beginning substituted "has the meaning provided in 75-6-102" for "or "public sewage disposal system" means, respectively, a water supply or sewage disposal system that serves 10 or more families or 25 or more persons for at least 60 days out of the calendar year"; in definition of sewer service line at end substituted "public sewage system or to an extension of a public sewage system" for "public sewer system or extension of a system"; substituted definition of solid waste for former definition that read: ""Solid wastes" means all putrescible and nonputrescible solid wastes (except body wastes), including garbage, rubbish, street cleanings, dead animals, yard clippings, and solid market and solid industrial wastes"; in definition of water service line at end substituted "public water supply system or to an extension of a public water supply system" for "public water system or extension of a system"; and made minor changes in style. Amendment effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

1995 Amendment: Chapter 418 in definition of Board substituted "board of environmental review" for "board of health and environmental sciences"; in definition of Department substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendments: Chapter 490 inserted definitions of registered professional engineer, registered sanitarian, and reviewing authority.

Chapter 592 inserted definitions of extension of public sewage disposal system, extension of public water supply system, sewer service line, and water service line.

Case Notes

Condominiums as Subdivision — Unreasonable Reliance by Developers on County Opinion as to Review Requirements: The District Court awarded damages against the county in an action by condominium developers who claimed they reasonably relied to their detriment on the county's opinion that the condominiums would not be subject to subdivision review. The Supreme Court reversed after finding that the County Attorney's office maintained no confidential or professional relationship with the developers—therefore, the developers' reliance on the county's opinion was unreasonable in light of: (1) the state's determination that review would be necessary; (2) the fact that developers were represented by their own counsel; (3) the inclusion of condominiums in the definitions of "subdivision" in 76-3-103 and this section; and (4) the actual opposition to the lack of subdivision review expressed by opponents of the project, who ultimately filed suit. Young v. Flathead County, 232 M 274, 757 P2d 772, 45 St. Rep. 1047 (1988).

Clerk Under No Clear Duty to Record Deed — Mandamus Erroneously Granted: Where the plaintiff attempted to record a deed to a 5-acre parcel of land without the removal or approval of sanitary restrictions by the county health department (which the court held was estopped from withholding its approval of a disposal permit) but was refused by the Clerk and Recorder, the District Court erred in granting a Writ of Mandamus ordering the Clerk to file a certificate of survey and record the warranty deed. The Clerk and Recorder was statutorily required to refuse to file the survey and record the deed and lacked any discretion to accept a survey absent compliance with the requirements of 76-4-122. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

Definition of "Plat" — Applicability: Whenever the meaning of a word or phrase is defined in any part of the code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears. The definition of "plat" found in 76-3-103 of the Montana Subdivision and Platting Act is clearly applicable to Title 76, ch. 4, part 1, on sanitation in subdivisions. The Department of Health and Environmental Sciences' (now Department of Environmental Quality) contention that it has broad authority in defining the term "plat" by virtue of the lack of a statutory definition under the sanitation in subdivisions law is without

merit. (Case considered under pre-1977 law.) State ex rel. Dept. of Health & Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

Attorney General's Opinions

Review When Intended Use Changes — Condominiums: The Department's authority to review condominiums includes condominiums to be built on parcels of land previously approved by the Department for uses not including condominiums. 39 A.G. Op. 28 (1981).

Condominiums as Subdivisions: The phrase "regardless of size, which provides permanent multiple space for recreational camping vehicles or mobile homes" only applies to the antecedent "area" and not "condominiums". Condominium is an independent class expressly included in the definition of subdivision whether or not constructed on a parcel of land containing 20 acres or more. Therefore, condominiums are subject to review by the Department of Health and Environmental Sciences (now Department of Environmental Quality) under the provisions of this chapter. The clause "sale, rent, lease, or other conveyance of one or more parts of a building" in 76-3-204 refers to something other than condominiums and thus does not provide an exemption for condominiums. 39 A.G. Op. 28 (1981).

76-4-103. What constitutes subdivision.

Compiler's Comments

1985 Amendment: Inserted last sentence providing that rental or lease of parts of building, structure, or existing or proposed improvement is not a subdivision under state regulation.

Administrative Rules

ARM 17.36.101 Definitions.

76-4-104. Rules for administration and enforcement.

Compiler's Comments

2001 Amendment: Chapter 280 throughout section substituted references to subdivisions for references to divisions of land; in (2) near middle of first sentence substituted "subdivisions for various types of public and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal" for "subdivision plats for various types of water, sewage facilities, and solid waste disposal, both public and private"; at beginning of (3) inserted exception clause; deleted former (3)(a) that read: "(a) divisions of land containing five or fewer parcels, whenever each parcel will contain individual onsite water and sewage disposal facilities"; inserted (3)(b)(i) providing that a local department or board of health may review only certain public water supply systems, public sewage systems, or extensions of or connections to these systems; at beginning of (3)(b)(ii) inserted "A local department or board of health may be certified to review"; in (6)(a) after "copy of the plat" inserted "or certificate of survey subject to review under this part"; in (6)(a)(ii) after "dwelling units" inserted "and structures requiring facilities for water supply or sewage disposal"; in (6)(f) after "including soil" deleted "percolation" and after "testing" deleted "and required percolation rates"; inserted (6)(i) requiring that rules provide criteria for granting waivers and deviations from the standards and technical procedures; in (6)(j) near beginning after "public" substituted "water supply system or a public sewage system" for "sewage disposal system" and near middle after "methods of" inserted "water supply or"; inserted (6)(k) requiring that rules provide for evidence to demonstrate that appropriate easements, covenants, agreements, and management entities have been established; in (7) near beginning after "it shall" substituted "notify the department of its recommendation for approval or disapproval of the subdivision not later than 50 days from its receipt of the subdivision application. The department shall make a final decision on the subdivision within 10 days after receiving the recommendation of the local reviewing authority, but not later than 60 days after the submission of a complete application, as provided in 76-4-125" for "upon approval of a division of land under this part, notify the department of the approval and submit to the department a copy of the approval statement"; in (8) near middle after "rules in effect" substituted "when a complete application is submitted to the reviewing authority" for "at the time plans and specifications are submitted to the department"; in (9) in first sentence near beginning after "deny or condition a" substituted "certificate of subdivision approval" for "certification that a division of land is not subject to sanitary restrictions" and near end after "circumstances of the" deleted "certification"; and made minor changes in style. Amendment effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

1995 Amendments: Chapter 224 inserted (9) concerning denial or condition imposition for sanitary restrictions; and made minor changes in style.

Chapter 471 in (1), near beginning, inserted "subject to the provisions of 76-4-135". Amendment effective April 14, 1995.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1985 Amendments: Chapter 378 inserted (8) relating to rules used for review of certification or denial of certification of subdivision.

Chapter 490 inserted (3), (4), and (5) requiring review of specific divisions of land and requiring Department to adopt standards and procedures for certification and maintaining certification of subdivisions; in (6)(a) near beginning, changed "department" to "reviewing authority"; and inserted (7) requiring local department or board of health to notify and submit copy of subdivision approval to Department of Health and Environmental Sciences (now Department of Environmental Quality).

Statement of Intent: The statement of intent attached to Ch. 378, L. 1985, provided: "It is the intent of the legislature that a subdivision be reviewed under the rules in effect at the time an application for approval of the subdivision is submitted. Neither a local governing body (under the provisions of the Montana Subdivision and Platting Act) nor the department of health and environmental sciences [now department of environmental quality] (under Title 76, chapter 4, part 1) may modify its subdivision rules and apply the modified rules to a subdivision submitted for review when previously existing rules were in effect."

Statement of Intent: The statement of intent attached to Ch. 490, L. 1985, provided: "A statement of intent is needed for this bill because it delegates additional rulemaking authority to the department of health and environmental sciences [now department of environmental quality] in section 2 [76-4-104(3) and (4)]. Under the provisions of section 2 [76-4-104(3) and (4)], the department must adopt rules and standards for certifying and maintaining certification to ensure that local boards of health are competent to review those subdivisions described in section 2 [76-4-104(3)]. The rules must provide for department delegation to local boards of health of review of those subdivisions if the department certifies that the local reviewing authority is competent to undertake that review and if the local reviewing authority chooses to do the review."

Administrative Rules

Title 17, chapter 36, ARM Subdivisions — on-site subsurface wastewater treatment.
Title 17, chapter 36, subchapter 1, ARM Subdivison application and review.
ARM 17.36.102 Application — general.
ARM 17.36.103 Application forms.
ARM 17.36.104 Information submitted with application.
ARM 17.36.106 Review procedures.
ARM 17.36.108 Local review.
ARM 17.36.110 Certification of approval.
ARM 17.36.111 Mobile homes and recreational camping vehicles.
ARM 17.36.116 Certification of local department or board of health.
Title 17, chapter 36, subchapter 3, ARM Subdivison requirements.
ARM 17.36.301 Lot sizes.
ARM 17.36.302 Public water and sewer.
ARM 17.36.303 Individual water supply systems.
ARM 17.36.305 Multiple-user water supply systems.
ARM 17.36.309 Solid wastes.
ARM 17.36.310 Storm drainage.
ARM 17.36.312 Subdivisions adjacent to state waters.
ARM 17.36.320 Sewage systems — design.
ARM 17.36.321 Sewage systems — allowable new and replacement systems.
ARM 17.36.322 Sewage systems — siting.
ARM 17.36.323 Sewage systems — horizontal setbacks — waivers.
ARM 17.36.324 Sewage systems — floodplains.
ARM 17.36.325 Sewage systems — site evaluation.
ARM 17.36.326 Sewage systems — agreements and easements.
ARM 17.36.327 Sewage systems — existing systems.
ARM 17.36.345 Adoption by reference — Standards for On-Site Subsurface Sewage Treatment Systems — National Soil Survey Handbook — Soil Survey Manual.
Title 17, chapter 36, subchapter 6, ARM Subdivision waivers and exclusions.

Case Notes

Local Board of Health Not Considered Governing Body Despite Interlocal Agreement: Despite the fact that a county board of health was created by interlocal agreement, the District Court erred in concluding that a local board of health is considered a governing body by definition under 76-3-103. The Montana Subdivision and Platting Act does not, under 76-3-501 and 76-3-504, authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. The authority of a local board of health to regulate subdivisions derives from 50-2-116, not from the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

Review, Not Regulatory, Function Applicable to Local Board of Health Control of Minor Subdivision: Section 50-2-106, when read in conjunction with this section, does not authorize a local board of health to regulate sanitation in minor subdivisions containing five or fewer parcels. By its plain language, this section delegates to local boards of health the power to review select subdivisions but not the power to promulgate regulations. As a reviewing authority, the board's function is limited to reviewing the proposed water supply, sewage, and solid waste disposal facilities and advising the Department of Environmental Quality of its recommendation for approval or disapproval of the subdivision. However, 50-2-116 explicitly authorizes a local board of health to regulate sewage control and disposal that is not regulated by the Montana Subdivision and Platting Act. The Act limits state sanitation regulation to subdivisions containing parcels of fewer than 20 acres each and precludes regulation of subdivisions in which each parcel of land contains more than 20 acres. Thus, the regulation of sanitation in subdivisions containing parcels of more than 20 acres each is clearly the responsibility of local boards of health. Nevertheless, 76-4-122 requires both state and local approval before filing a subdivision plat with the County Clerk and Recorder, and to hold that approval by the local board of health is a ministerial, nondiscretionary act would render 76-4-122 inoperative. Giving effect to the purpose of all the applicable statutes and examining the legislative history of 50-2-116, the Supreme Court held that the 1991 enactment of 50-2-116(1)(i) revealed a legislative intent to expand, rather than diminish, the authority of local boards of health to regulate subdivision sanitation. Thus, local boards of health have discretionary statutory authority to regulate all subdivisions, regardless of size, notwithstanding the state's authority to regulate certain subdivisions under the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

County Not Acting as State's Agent in Denial of Disposal Permit — Mandamus Erroneously Granted: Where the plaintiff applied to the county health department for a disposal permit but was not informed for a period of 6 years whether the permit would be granted, the District Court erred in holding that the Department of Health and Environmental Sciences (now Department of Environmental Quality) was estopped from denying the permit by the county's failure to act. There were no statutes or decisions that made the county the agent of the Department at the time of the 1971 permit application. Under the rationale of St. v. District Court, 170 M 15, 550 P2d 382 (1976), the record and statutes show that the county did not act as an agent for the state in the denial of the 1971 application. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

Attorney General's Opinions

Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations: Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

County Commissioners Authorized to Impose Stricter Standards: County Commissioners may adopt reasonably stricter sanitation regulations for subdivisions than those adopted by the Department of Health and Environmental Sciences (now Department of Environmental Quality). 35 A.G. Op. 39 (1973).

76-4-105. Subdivision fees — subdivision program funding.

Compiler's Comments

2001 Amendment: Chapter 280 in (1) in first sentence of introductory clause after "actual costs" substituted "for reviewing plats and subdivisions, conducting inspections pursuant to

76-4-107, and conducting enforcement activities pursuant to 76-4-108" for "to the department in reviewing plats and subdivisions", in second sentence after "applicant" deleted "for plat or subdivision review", and after "department" deleted "for deposit in the state special revenue fund", and at end of third sentence inserted "conducting inspections pursuant to 76-4-107, and conducting enforcement activities pursuant to 76-4-108"; in (2) after "local" substituted "reviewing authority for reviews conducted pursuant to 76-4-104, inspections conducted pursuant to 76-4-107, and enforcement activities conducted pursuant to 76-4-108" for "governing body, as provided in 76-4-128"; deleted former (3) and (4) that read: "(3) A fee as described in this section is not required for the review of subdivisions in which divisions are made for the purpose of relocating common boundary lines unless the division will result in the installation of additional water supply or sewage disposal facilities.

(4) Fees collected by the department under this section must be deposited in the account in the state special revenue fund provided for in 76-4-132"; and made minor changes in style. Amendment effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

1993 Amendment: Chapter 514 in (1), in second sentence before "fund", substituted "special revenue" for "general"; in (2), after "fees", substituted "to" for "between" and after "body" deleted "and the state general fund" and deleted former second sentence that read: "When a subdivision is reviewed under the provisions of 76-4-124, the local governing body shall, within 20 days after receiving preliminary plat approval under the Montana Subdivision and Platting Act, distribute the lot fees according to the fee schedule adopted under this section"; deleted former (3) that read: "When a local department or board of health conducts a review under the provisions of 76-4-104, it shall submit to the department, along with its approval statement, a fee of $5 per reviewed lot, for purposes of offsetting costs incurred in providing certification to a local reviewing authority and other administrative costs"; inserted (4) requiring fees to be deposited in state special revenue fund; deleted (5) that read: "(5) Costs of implementing this part must be paid from the state general fund as provided by legislative appropriation"; and made minor changes in style. Amendment effective July 1, 1993.

Applicability: Section 4, Ch. 514, L. 1993, provided: "[This act] applies to all lot fees received by the department of health and environmental sciences [now department of environmental quality] on or after July 1, 1993."

1991 Amendment: In (1), in first sentence after "exceed", substituted "actual costs to the department in reviewing" for "$48 per parcel, for services rendered in the review of"; and made minor changes in style.

1991 Statement of Intent: The statement of intent attached to Ch. 645, L. 1991, provided: "A statement of intent is provided for this bill because rulemaking authority is delegated to the board of health and environmental sciences [now department of environmental quality] to prescribe procedures for administrative enforcement actions undertaken by the department of health and environmental sciences [now department of environmental quality] in administering the public water supply laws, as provided in Title 75, chapter 6, and to develop a fee schedule to enable the department to recover costs in administering these laws. Rulemaking authority is also delegated to the department to develop fees to pay for costs of reviewing plats and subdivisions under the laws related to sanitation in subdivisions, as provided in Title 76, chapter 4. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs.

The legislature anticipates that the department will expand its enforcement activity in order to address ongoing and increasing health problems with public water supply systems and public sewage systems in Montana. In undertaking this effort, the legislature expects that the department will have the option to pursue administrative enforcement as a means of expediting and encouraging compliance with Title 75, chapter 6. Nonetheless, it is the department's duty to clearly inform each violator of:

(1) the nature of the action taken against it;

(2) what the department requires to resolve the matter; and

(3) what legal avenues are available to the violator if he desires to contest the matter.

The legislature recognizes that an economic hardship may be imposed on a public water supply system in order for that system to be brought into compliance with state and federal public water supply laws and that this hardship may be further increased by the levying of administrative and civil penalties for noncompliance. It is the intention of the legislature that the department adopt rules that establish a procedure for the progressive enforcement of this act in which the levying of

administrative and civil penalties is a final action. The department may adopt rules that allow for the bypass of the enforcement procedures and the immediate assessment of penalties if specific circumstances warrant this action.

The rules also require the board of health and environmental sciences [now department of environmental quality] to develop fees for recovery of costs incurred by the department in delivering services to persons who own or operate or intend to own or operate a public water supply system or public sewage system. These costs include costs associated with review of engineering plans and specifications, inspections, and general assistance. To assist the board in developing these rules, the department shall prepare and submit to the board a detailed estimate of projected costs associated with these services for fiscal years 1992 and 1993. The board shall develop a fee schedule that will provide revenues that are commensurate with the projected costs. A similar approach should be used by the department in developing rules setting new fees for review of plats and subdivisions under 76-4-105."

1985 Amendments: Chapter 490 in (1) near middle of second sentence, after "state general fund", inserted remainder of sentence concerning deposit of lot fees in general fund of reviewing authority; in (2) near middle of first sentence, after "distribution of", deleted "lot" and in second sentence, near end after "lot fees", substituted remainder of sentence relating to adopted fee schedule for "as determined by this subsection"; and inserted (3) requiring local department or board of health conducting review to submit to Department of Health and Environmental Sciences (now Department of Environmental Quality) a $5-per-reviewed-lot fee to offset certification and administration costs.

Chapter 592 in (2) in second sentence, after "reviewed under the", deleted "master plan", and after "receiving", substituted "preliminary plat approval" for "an application".

Chapter 708 in (1) near beginning of first sentence, before "rules", deleted "reasonable", and at end of second sentence substituted "general fund" for "special revenue fund provided for in 17-2-102"; and in (2) in first sentence substituted "state general fund" for "department".

Subsection (5), requiring costs of implementing this part to be paid from state general fund, was enacted by Ch. 708, L. 1985, as a separate section but was codified as part of this section for logic and convenience.

Lot Fees Coordination Instruction: Section 19, Ch. 490, L. 1985, provided: "If House Bill No. 633 [Ch. 708, L. 1985], including the section of that bill that appropriates money to the department [Department of Health and Environmental Sciences (DHES)] (now Department of Environmental Quality) for subdivision review in fiscal years 1986 and 1987, is not passed and approved, section 3, subsection (3) [76-4-105(3)] of this act is amended to provide a fee of $10 per reviewed lot." As passed and approved, HB 633 (Ch. 708, L. 1985) included, in section 3, an appropriation to the DHES (now Department of Environmental Quality), but the appropriation was reduced from the amounts set forth in the introduced version of the bill as follows: for fiscal year 1986, from $202,595 to $136,787 and for fiscal year 1987, from $212,725 to $139,825. Because the conditions of sec. 19, Ch. 490, L. 1985, were not fulfilled in Ch. 708, the Code Commissioner did not amend 76-4-105(3) to increase the lot fee.

1983 Amendments: Chapter 281, in second sentence of (1), substituted "state special revenue fund" for "agency fund".

Chapter 696 changed fees in (1) from "$30" to "$48" per parcel.

1983 Saving Clause: Section 2, Ch. 696, L. 1983, was a saving clause.

1981 Amendment: Changed fees in (1) from "$25" to "$30" per parcel.

1981 Saving Clause: Section 3, Ch. 553, L. 1981, was a saving clause.

Nonseverability: Section 4, Ch. 553, L. 1981, provided: "It is the intent of the legislature that each part of this act is essentially dependent upon every other part; and if one part is held unconstitutional or invalid, all other parts are invalid."

Administrative Rules

ARM 17.36.101 Definitions.

ARM 17.36.116 Certification of local department or board of health.

Title 17, chapter 36, subchapter 8, ARM Subdivision review fees.

76-4-106. Cooperation with other governmental agencies.

Compiler's Comments

1985 Amendment: In (1) at beginning changed "department" to "reviewing authority"; in (2) near beginning after "county, and", changed "city" to "municipal" and near middle after "with the", changed "board and the department" to "reviewing authority"; and inserted (3) authorizing

local reviewing authority without registered sanitarian or registered professional engineer to conduct review by contracting with another local reviewing authority for such services.

Case Notes

Regulatory Powers Regarding Subdivision Control: The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

76-4-107. Authority to inspect and monitor — certification.

Compiler's Comments

1987 Amendment: Inserted (2) requiring reviewing authority to receive certification from registered engineer that public water supply or sewage disposal systems have been constructed according to approved specifications.

1985 Amendment: In lead-in, near middle after "development, the", changed "department or the board" to "reviewing authority" and after "whenever", changed "a public water supply or public sewage disposal system" to "any water supply or sewage disposal system"; in (1) near middle after "representative of the", changed "department" to "reviewing authority"; and in (2) deleted "public" before "sewage disposal" and before "water supply".

76-4-108. Enforcement.

Compiler's Comments

2001 Amendment: Chapter 79 in (1) in first sentence after "notice" inserted "and an order" and substituted "certified mail" for "mail to the last-known address of", deleted former third sentence that read: "For the purpose of this part, service by mail is complete on the date of mailing", in third sentence after "notice" inserted "and order", before "reviewing authority" inserted "local", after "authority" inserted "if it issued the notice of violation", and after "board" inserted "if the department issued the notice of violation", and inserted fourth sentence regarding a request for a hearing; in (5) substituted language regarding revocation of a certificate of approval for former language that read: "If a violation of this part is found to exist, a reviewing authority may revoke a certificate of approval and reimpose sanitary restrictions on a subdivision, following a hearing before the reviewing authority under this section"; inserted (6) applying the contested case provisions of the Montana Administrative Procedure Act to the hearing; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1985 Amendment: In (1) substituted language relating to service of notice of violation to alleged violator or agent for former language that read: "If a written complaint alleging violation is made to the department or if the department has reason to believe that a person has violated this part or any rule thereunder and if a violation is found to exist, the department shall issue notice and hold a hearing pursuant to the Montana Administrative Procedure Act"; in (2) changed "department" to "reviewing authority" and after "action", substituted "to compel compliance with" for "for injunction or for recovery of penalty as provided in"; inserted (3) relating to proper enforcement agency; and inserted (4) requiring local reviewing authority to accept legal responsibility for actions relating to subdivision sanitation.

76-4-109. Penalties.

Compiler's Comments

1985 Amendment: Inserted (2) authorizing civil penalty up to $1,000; and in (3) at beginning changed "Action" to "Penalties imposed" and after "subsection (1)", inserted "or (2)".

76-4-111. Exemption for certain condominiums.

Compiler's Comments

2001 Amendment: Chapter 280 in (2) at end substituted "extension of a public sewage system is required" for "a public sewage disposal system is required as defined in this part"; and deleted former (3) that read: "(3) Subdivisions located within jurisdictional areas that have adopted growth policies pursuant to chapter 1 and first- or second-class municipalities that will be provided with municipal facilities for the supply of water and disposal of sewage and solid waste are not subject to the provisions of this part; except that, if the municipal facilities for water supply or sewage disposal to serve the subdivision constitute either an extension of a public water supply system or a public sewage disposal system, the subdivision must be reviewed in accordance with the provisions of 76-4-105, 76-4-124, and 76-4-127." Amendment effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

1999 Amendment: Chapter 582 in (3) after "within" substituted "jurisdictional areas that have adopted growth policies pursuant to chapter 1" for "master planning areas". Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1985 Amendment: Inserted (2) providing that construction of same or fewer number of condominium units on parcel previously reviewed and approved is not subject to regulations if no new extension of public water supply system or public sewage disposal system is required.

Administrative Rules

ARM 17.36.313 Condominium conversions.

Attorney General's Opinions

Condominiums on Land Divided Prior to Act: The effect of this section is to remove the need for any subsequent review of parcels already approved for condominiums. However, this does not exempt from review condominiums to be built on such parcels after the effective date of this part. 39 A.G. Op. 28 (1981). (Opinion rendered prior to amendment of 76-4-111 by Ch. 592, L. 1985.)

76-4-112. Easements and restrictive covenants.

Compiler's Comments

Effective Date: Section 17, Ch. 280, L. 2001, provided that this section is effective April 20, 2001.

Applicability: Section 18(2), Ch. 280, L. 2001, provided that this section applies to subdivision applications submitted to the reviewing authority after the effective date of the rules implementing this section.

76-4-113. Notification to purchasers.

Compiler's Comments

Effective Date: Section 17, Ch. 280, L. 2001, provided that this section is effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

76-4-121. Restrictions on subdivision activities.

Compiler's Comments

2001 Amendment: Chapter 280 at beginning substituted "A person may not dispose of any lot" for "Until the local governing body has certified that a subdivision is to be provided with municipal facilities for a supply of water and disposal of sewage and solid waste or that the reviewing authority has indicated that the subdivision is subject to no restrictions, a person may not file a subdivision plat with a county clerk and recorder, make disposition of any lot" and at end inserted "until the subdivision plat or certificate of survey subject to review under this part has been accepted for filing by the county clerk and recorder in accordance with 76-4-122 and recorded pursuant to Title 70, chapter 21"; and made minor changes in style. Amendment effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

1985 Amendment: Near middle changed "department" to "reviewing authority".

Collateral References

Waters and Watercourses *key* 196.

94 C.J.S. Waters §§495 through 497.

25 Am. Jur. 2d Drains and Drainage Districts §§31 through 37.

State and local regulation of private landowner's disposal of solid waste on own property. 37 ALR 4th 635.

76-4-122. Filing or recording of noncomplying plat or certificate of survey prohibited.

Compiler's Comments

2001 Amendment: Chapter 280 in (1) after "record any" substituted "plat or certificate of survey subject to review under this part" for "map or plat"; in (2) in introductory clause after "plat" inserted "or certificate of survey subject to review under this part"; in (2)(a) at beginning deleted "whenever reviewing authority approval is necessary", after "plat" inserted "or certificate of survey", and near middle after "reviewing authority" substituted "and a certificate of subdivision approval has been issued pursuant to 76-4-125 indicating that the reviewing authority has approved the subdivision application" for "and the reviewing authority has indicated by stamp or certificate that it has approved the plat and plans and specifications"; in (2)(b) at beginning deleted "whenever reviewing authority approval is not necessary", after "plat" inserted "or certificate of survey", after "governing body" inserted "pursuant to 76-4-127", and after "jurisdictional area" substituted "that has adopted a growth policy pursuant to chapter 1 of this title or within a first-class or second-class municipality, as described in 7-1-4111, and will be provided with adequate municipal facilities and adequate storm water drainage" for "of a growth policy adopted pursuant to chapter 1 or a class 1 or class 2 municipality and will be provided with municipal facilities for the supply of water and disposal of sewage and solid waste"; inserted (2)(c) allowing acceptance of a subdivision plat if the person wishing to file the plat or certificate of survey has placed on the plat or certificate of survey an acknowledged certification that the subdivision is exempt from review; and made minor changes in style. Amendment effective April 20, 2001.

The amendments to this section made by sec. 4, Ch. 340, L. 2001, were rendered void by sec. 6, Ch. 340, L. 2001, a coordination instruction.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

1999 Amendment: Chapter 582 in (2)(b) substituted "the jurisdictional area of growth policy adopted pursuant to chapter 1" for "a master planning area"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1985 Amendments: Chapter 490 changed "department" to "reviewing authority" three times in (2)(a) and once in (2)(b).

Chapter 592 in (2)(b) inserted "or a class 1 or class 2 municipality".

Administrative Rules

ARM 17.36.101 Definitions.

Case Notes

Clerk Under No Clear Duty to Record Deed — Mandamus Erroneously Granted: Where the plaintiff attempted to record a deed to a 5-acre parcel of land without the removal or approval of sanitary restrictions by the county health department (which the court held was estopped from withholding its approval of a disposal permit) but was refused by the Clerk and Recorder, the District Court erred in granting a Writ of Mandamus ordering the Clerk to file a certificate of survey and record the warranty deed. The Clerk and Recorder was statutorily required to refuse to file the survey and record the deed and lacked any discretion to accept a survey absent compliance with the requirements of 76-4-122. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

76-4-125. Review of subdivision application — land divisions excluded from review.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 280 in (1) in first sentence of introductory clause substituted "Except as provided in subsection (2), an application for review of a subdivision must be submitted to the reviewing authority" for "Plans and specifications of a subdivision, as defined in this part, must be submitted to the reviewing authority, and the reviewing authority shall indicate by certificate that it has approved the plans and specifications and that the subdivision is not subject to a sanitary restriction" and at beginning of second sentence after "The" deleted "plan"; in (1)(a) in first sentence after "present" inserted "a subdivision application", at beginning of second sentence substituted "The application must include preliminary plans and specifications for the proposed development" for "a preliminary plan of the proposed development", and inserted third through fifth sentences requiring payment of fees and a preliminary site assessment to determine whether the site meets applicable requirements; in (1)(b) at beginning of first sentence substituted "The department shall make a final decision on the proposed subdivision within 60 days after the submission of a complete application and payment of fees to the reviewing authority" for "The reviewing authority shall give final action of the proposed plan within 60 days" and inserted second and third sentences precluding a request for further information to extend review time and regarding issuance of a certificate of approval; in (2)(b) near middle after "provided that" substituted "water or sewage disposal facilities may not be constructed" for "a dwelling or structure requiring water or sewage disposal may not be erected"; inserted (2)(d) providing that certain divisions located within jurisdictional areas that have adopted growth policies are not subject to review unless the exclusions are used to evade the provisions of this part; in (2)(e)(i) after "public or" substituted "multiple-user" for "multifamily"; in (3) near beginning after "prior to the" substituted "filing of a plat or a certificate of survey subject to review under this part for the parcel" for "transfer of the parcel"; and made minor changes in style. Amendment effective April 20, 2001.

Chapter 299 in (1)(b) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

1997 Amendment: Chapter 289 in (2), after "divisions", inserted "or parcels"; inserted (2)(d) exempting from development plan review a parcel served by multifamily sewage system or parcel 1 acre or larger that has an existing well and septic system; inserted (3) authorizing local health officer to require that parcel include acreage or features to accommodate replacement drainfield; and made minor changes in style.

1985 Amendment: In (1) at beginning deleted "When a subdivision as defined in this part is excluded from the provisions of 76-3-302 and 76-3-401 through 76-3-403, but not 76-3-201, and the subdivision is otherwise subject to the provisions of this part", and changed "department" to "reviewing authority" three times; in (1)(a) changed "department" to "reviewing authority" twice; in (1)(b) changed "department" to "reviewing authority"; in (2), near beginning and at end, after "review", deleted "by the department", and after "divisions", inserted "unless such exclusions are used to evade the provisions of this part"; and in (2)(b) at end after "parcel", inserted remainder of subsection regarding division that does not fall within previously platted or approved subdivision.

Administrative Rules

Title 17, chapter 36, subchapter 1, ARM Subdivison application and review.
ARM 17.36.102 Application — general.
ARM 17.36.103 Application forms.
ARM 17.36.104 Information submitted with application.
ARM 17.36.105 Subdivison and Platting Act exclusions subject to Department review.
ARM 17.36.106 Review procedures.
ARM 17.36.108 Local review.
ARM 17.36.110 Certification of approval.
ARM 17.36.111 Mobile homes and recreational camping vehicles.
Title 17, chapter 36, subchapter 3, ARM Subdivison requirements.
ARM 17.36.302 Public water and sewer.

ARM 17.36.303 Individual water supply systems.
ARM 17.36.305 Multiple-user water supply systems.
ARM 17.36.310 Storm drainage.
ARM 17.36.312 Subdivisions adjacent to state waters.
ARM 17.36.313 Condominium conversions.
Title 17, chapter 36, subchapter 6, ARM Subdivison waivers and exclusions.
ARM 17.36.601 Waivers — deviations.
ARM 17.36.602 Subdivisons in master planned area.
ARM 17.36.605 Exclusions.
ARM 17.36.606 Exclusions — compliance with public water supply act.

Case Notes

State Agency Review Under Sanitation in Subdivision Law Not Applicable to Certificate of Survey: Where after a series of real estate transactions, each denominated an "occasional sale" and evidenced by a certificate of survey, one 14-acre parcel of land became 13 separate and distinct parcels reconveyed to the original owner, the Department of Health and Environmental Sciences (now Department of Environmental Quality) had no authority under the sanitation in subdivisions law to review the certificates of survey. That act provides for Department review only of subdivision plats, and Department regulation which included certificate of survey within definition of plat was held void. (Case considered under pre-1977 law.) State ex rel. Dept. of Health & Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

Attorney General's Opinions

Review of Certificate of Survey: The Department of Health and Environmental Sciences (now Department of Environmental Quality) has authority under Title 76, ch. 4, part 1, to review certificates of survey. 38 A.G. Op. 81 (1980).

76-4-126. Right to hearing.

Compiler's Comments

2001 Amendment: Chapter 79 in (1) at end of first sentence after "board" deleted "or the reviewing authority", inserted second sentence requiring that a hearing be requested within 30 days of receipt of notice of denial, and in third sentence substituted language applying the contested case provisions of the Montana Administrative Procedure Act to the hearing for former sentence that read: "Such hearings will be held pursuant to the Montana Administrative Procedure Act"; inserted (2) regarding referral of local compliance issue to the appropriate local authority and incorporation of the local authority's determination into the board's final decision; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1985 Amendment: Near middle after "board", inserted "or the reviewing authority".

76-4-127. Notice of certification that adequate storm water drainage and adequate municipal facilities will be provided.

Compiler's Comments

2001 Amendment: Chapter 280 in (1) at beginning substituted "To qualify for the exemption from review set out in 76-4-125(2)(d), the governing body, as defined in 76-3-103, shall" for "When a subdivision is reviewed under the provisions of 76-4-124, the local governing body shall", after "20 days after" deleted "receiving", and near end before "will be provided" substituted "adequate storm water drainage and adequate municipal facilities" for "municipal facilities for the supply of water and disposal of sewage and solid waste"; in (2)(f) at beginning inserted "certification that

the subdivision is within a jurisdictional area that has adopted a growth policy pursuant to chapter 1 of this title or within a first-class or second-class municipality, as described in 7-1-4111, and"; inserted (2)(i) requiring that the notice of certification contain certification from the facility owners that adequate facilities are available if water supply, sewage disposal, or solid waste facilities are not municipally owned; inserted (2)(j) requiring certification that the governing body has reviewed and approved plans to ensure adequate storm water drainage; and made minor changes in style. Amendment effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

1999 Amendment: Chapter 582 in (2)(f) substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

1985 Amendments: Chapter 490 in (1) and (2)(f) changed "department" to "reviewing authority".

Chapter 592 near beginning of (1), after "reviewed under the", deleted "master plan", and after "receiving", substituted "preliminary plat approval" for "an application"; and in (2)(f) inserted "when applicable".

Administrative Rules

ARM 17.36.101 Definitions.

76-4-129. Joint application form and concurrent review.

Compiler's Comments

1981 Amendments — Composite: Chapter 236 deleted "and the department of community affairs" after "the department" near the beginning of (1).

Chapter 274 substituted "department of commerce" for "department of community affairs" in (1).

In preparing the composite of 1981 amendments to this section, the Code Commissioner did not include the change made by Ch. 274 because the deletion made by Ch. 236 is in the nature of a repealer (see 1-2-204).

Transfer of Function: Section 6, Ch. 274, L. 1981, provided in part: "(1) The department of community affairs is abolished.

(2) The following functions of the department of community affairs are transferred to the department of commerce: . . .

(g) establishing minimum subdivision review rules under 76-3-502 [repealed 1981] and 76-4-129; . . ."

76-4-130. Deviation from certificate of subdivision approval.

Compiler's Comments

2001 Amendment: Chapter 280 near middle after "deviates from the" substituted "certificate of subdivision approval" for "plans and specifications filed with the reviewing authority"; and made minor changes in style. Amendment effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

1985 Amendment: Changed "department" to "reviewing authority" twice.

76-4-131. Applicability of public water supply laws.

Compiler's Comments

2001 Amendment: Chapter 280 near beginning of first sentence after "76-4-121" substituted "76-4-122, and 76-4-125 do not" for "through 76-4-130 shall not" and inserted second sentence requiring review of an extension of a public water supply system or an extension of a public sewage system to serve a subdivision. Amendment effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

76-4-132. Special revenue account — deposit and use of fees.

Compiler's Comments

2001 Amendment: Chapter 280 in (1) at beginning after "All" deleted "lot", after "collected" inserted "by the department", and at end deleted "for implementation of the subdivision review program as provided in this part"; and in (2) after "only" substituted "as provided in 76-4-105" for "to pay department costs of implementation of the subdivision review program as provided in this part". Amendment effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

Applicability: Section 4, Ch. 514, L. 1993, provided: "[This act] applies to all lot fees received by the department of health and environmental sciences [now department of environmental quality] on or after July 1, 1993."

Effective Date: Section 5, Ch. 514, L. 1993, provided: "[This act] is effective July 1, 1993."

76-4-133. Installation inspection.

Compiler's Comments

Effective Date: Section 17, Ch. 280, L. 2001, provided that this section is effective April 20, 2001.

Applicability: Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

76-4-135. State regulations no more stringent than federal regulations or guidelines.

Compiler's Comments

Preamble: The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

1995 Statement of Intent: The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

Effective Date: Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

Applicability: Section 22(1) and (3), Ch. 471, L. 1995, provided: "(1) [Sections 1 through 3] are intended to apply to any rule that is in effect, adopted, or amended, and that regulates those resources or activities for which the state has been given primary authority to regulate by federal authority pursuant to Title 75, chapter 2; Title 75, chapter 3 [except for part 6, renumbered Title 50, chapter 79]; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10, as of [the effective date of this act] [April 14, 1995].

(3) [This act] does not apply to the establishment of fees or public participation requirements."

CHAPTER 5
FLOOD PLAIN AND FLOODWAY MANAGEMENT

Chapter Administrative Rules

Title 36, chapter 15, ARM Floodplain Management Engineering Bureau.

Chapter Law Review Articles

My View of the Missouri River, Mickelson, 36 S.D.L. Rev. 1 (1991).

Qualified Governmental Immunity Recognized in the Management of Flood Control (Recent Developments in Utah Law), Hart, 1991 Utah L. Rev. 160 (1991).

Various Aspects of Flood Plain Zoning, Hope, 11 Land Use and Env. L. Rev. 419 (1980).

From the Wool-Sack, Brauchli, 9 Colo. Law 267 (1980).

Chapter Collateral References

What is "flood" within exclusionary clause of property damage policy. 78 ALR 4th 817.

Wetlands: local use zoning of wetlands or flood plain as taking without compensation. 19 ALR 4th 756.

Interference: modern status of rules governing interference with drainage of surface waters. 93 ALR 3d 1193.

Part 1
General Provisions

76-5-101. Findings.

Compiler's Comments

Severability Clause: Section 16, Ch. 393, L. 1971, was a severability clause.

76-5-102. Policy and purposes.

Compiler's Comments

1995 Amendment: Chapter 418 made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-5-103. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302"; in definition of designated floodplain, in definition of designated floodway, and in definition of watercourse substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1981 Amendment: Added the exception for sheetflood areas which are considered zone B to the definition of floodplain in (11).

Administrative Rules

ARM 36.15.101 Definitions.

76-5-105. Authority to enter and investigate lands or waters.

Compiler's Comments

1985 Amendment: In (1) inserted last two sentences requiring Department or political subdivision to provide written notice of entry to owner, agent, or lessee if no written consent for entry is obtained and if persons listed are not available, to affix copy of notice conspicuously on property; in (2) in first sentence, after "department", inserted "or the responsible political subdivision", and inserted last sentence requiring Department or political subdivision to release names and addresses of those requesting investigation upon request of owner, agent, or lessee.

76-5-106. Exemption for small drainage area.

Compiler's Comments

1995 Amendment: Chapter 418 at end substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-5-109. Other legal remedies preserved — immunity.

Compiler's Comments

1995 Amendment: Chapter 418 in (3), after "given to the", deleted "board or the"; in (4), after "state", deleted "the board, a member of the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 2
Role of State Agencies

76-5-201. Program for delineation of flood plains and floodways.

Compiler's Comments

1995 Amendment: Chapter 418 at beginning of (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.15.501 through 36.15.504 Flood plain and floodway delineation.

76-5-202. Designation of flood plains and floodways.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) and (2) substituted "department" for "board"; in (4), after "floodways", deleted "established by the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: In (3) inserted second sentence establishing that designations made by federal emergency management agency based on reasonable hydrological certainty are presumed rebuttable.

Administrative Rules

ARM 36.15.501, 36.15.502 Flood plain and floodway delineation.

76-5-203. Alteration of flood plains or floodways.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.15.503 Public input on proposed designated floodplains or floodways.

76-5-204. What constitutes notice.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.15.505 Alteration of floodplains and floodways.

76-5-205. Furnishing of material to local governments.

Compiler's Comments

1995 Amendment: Chapter 418 in three places substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-5-206. Powers and duties of department relative to obstructions.

Compiler's Comments

1995 Amendment: Chapter 418 in (2), near beginning, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-5-208. Orders and rules.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), near beginning of first sentence, substituted "department" for "board" and in second sentence, after "rules", deleted "adopted by the board"; in (3), near middle of first sentence after "mailed", deleted "by the department"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.15.101 Definitions.

ARM 36.15.201 through 36.15.205 Local regulation and enforcement.

ARM 36.15.209 Department regulation and enforcement.

ARM 36.15.216 through 36.15.218 Permit requirements for obstruction — waiver — variances.

ARM 36.15.501 through 36.15.505 Flood plain and floodway delineation — alteration.

ARM 36.15.601 through 36.15.606 Designated floodway minimum standards.

ARM 36.15.701 through 36.15.703 Flood fringe minimum standards.

ARM 36.15.801 Permitted uses on designated flood plain which is not also designated floodway.

ARM 36.15.901 through 36.15.903 Flood proofing requirements.

76-5-209. Appeal from order.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 3
Role of Local Government

76-5-301. Land use regulations.

Compiler's Comments

1995 Amendment: Chapter 418 throughout section substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: In (1), inserted last sentence authorizing regulations to include, for floodplain management only, floodplain management regulations within sheetflood areas determined by federal emergency management agency.

Administrative Rules

ARM 36.15.209 Department regulation and enforcement.

Collateral References

Wetlands: local use zoning of wetlands or flood plain as taking without compensation. 19 ALR 4th 756.

Permit: liability of governmental entity for issuance of permit for construction which caused accelerated flooding. 62 ALR 3d 514.

Flood-protection measures, liability of municipality or other governmental subdivision in connection with. 5 ALR 2d 57.

76-5-302. Substitution of local control for state permit system.

Compiler's Comments

1995 Amendment: Chapter 418 throughout section substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.15.101 Definitions.

ARM 36.15.201 through 36.15.205 Local regulation and control.

Part 4
Use of Flood Plains and Floodways

Part Collateral References

What is "flood" within exclusionary clause of property damage policy. 78 ALR 4th 817.

Wetlands: local use zoning of wetlands or flood plain as taking without compensation. 19 ALR 4th 756.

76-5-401. Permissible open-space uses.

Compiler's Comments

2001 Amendment: Chapter 7 in (3) near middle after "natural areas" substituted "alternative livestock ranches" for "game farms"; and made minor changes in style. Amendment effective October 1, 2001.

Administrative Rules

ARM 36.15.601 Uses allowed without permit.

ARM 36.15.901 through 36.15.903 Flood proofing requirements.

Collateral References

Permit: liability of governmental entity for issuance of permit for construction which caused accelerated flooding. 62 ALR 3d 514.

What constitutes reasonably necessary use of the surface of the leasehold by a mineral owner, lessee, or driller under an oil and gas lease or drilling contract. 53 ALR 3d 16.

76-5-402. Permissible uses within flood plain but outside floodway.

Compiler's Comments

1995 Amendment: Chapter 418 in (2)(a) and (2)(c) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.15.701, 36.15.702 Flood fringe minimum standards.
ARM 36.15.801 Allowed uses where floodway not designated.
ARM 36.15.901 through 36.15.903 Flood proofing requirements.

Collateral References

Permit: liability of government entity for issuance of permit for construction which caused accelerated flooding. 62 ALR 3d 514.

76-5-403. Prohibited uses within floodway.

Administrative Rules

ARM 36.15.605 Prohibited uses within floodway.

Collateral References

Modern status of rules governing interference with drainage of surface waters. 93 ALR 3d 1193.

Conservation: validity, construction, and application of enactments restricting land development by dredging or filling. 46 ALR 3d 1422.

Obstruction: liability for damages from obstruction of stream by debris or waste. 29 ALR 2d 447.

76-5-404. Artificial obstructions and nonconforming uses.

Compiler's Comments

1995 Amendment: Chapter 418 in (3)(a) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.15.101 Definitions.
ARM 36.15.204 Local floodplain regulations — requirements.
ARM 36.15.602 through 36.15.604 Designated floodway minimum standards.
ARM 36.15.606 Permits for flood control works.
ARM 36.15.701 through 36.15.703 Flood fringe minimum standards.
ARM 36.15.801 Uses where floodway not designated.
ARM 36.15.901 through 36.15.903 Flood proofing requirements.

Attorney General's Opinions

Diversion Dike Construction — Permit or Plan Required: The construction of a diversion dike with heavy equipment requires either a "310 permit" or an approved operation plan under Title 75, ch. 7, part 1. When this work is performed within a designated floodplain or floodway, the construction additionally requires a permit from the responsible political subdivision. 42 A.G. Op. 106 (1988).

Collateral References

Punitive damages in actions based on nuisance. 31 ALR 3d 1346.

76-5-405. Variance for obstruction or nonconforming use.

Compiler's Comments

1995 Amendment: Chapter 418 in (2), in second sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.15.204 Local floodplain regulations — requirements.
ARM 36.15.209 Department regulation and enforcement.
ARM 36.15.216, 36.15.217 Permit requirements for obstruction — waiver.
ARM 36.15.218 Variances.
ARM 36.15.601 through 36.15.604 Designated floodway minimum standards.
ARM 36.15.606 Permits for flood control works.
ARM 36.15.701 through 36.15.703 Flood fringe minimum standards.
ARM 36.15.801 Uses where floodway not designated.
ARM 36.15.901 through 36.15.903 Flood proofing requirements.

76-5-406. Criteria to be considered in connection with variance request.

Compiler's Comments

1995 Amendment: Chapter 418 at end of introductory clause substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.15.204 Local flood plain regulations — requirements.
ARM 36.15.216, 36.15.217 Permit requirements for obstruction — waiver.
ARM 36.15.218 Variances.
ARM 36.15.601 through 36.15.603 Designated floodway minimum standards.
ARM 36.15.605, 36.15.606 Prohibited uses and permits for flood control works.
ARM 36.15.701 through 36.15.703 Flood fringe minimum standards.
ARM 36.15.801 Uses where floodway not designated.
ARM 36.15.901 through 36.15.903 Flood proofing requirements.

Part 11
Water Conservation and Flood Control Projects

76-5-1101. Water conservation and flood control projects authorized.

Compiler's Comments

Severability Clause: Section 15, Ch. 272, L. 1965, was a severability clause.

76-5-1108. Acquisition of property.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) inserted reference to Title 70, chapter 30; in (2) substituted "All applicable provisions of Title 70, chapter 30, apply to the condemnation of property under this section" for "All provisions of the laws of Montana relating to the condemnation of lands for public purposes shall apply to the provisions thereof insofar as applicable"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

76-5-1109. Contracts for use of railroads and highways.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

76-5-1111. Apportionment of costs.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

76-5-1116. Determination of fees and charges.

Compiler's Comments

1999 Amendment: Chapter 584 in (2) and (3) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

76-5-1117. Bonds authorized — procedure.

Compiler's Comments

1981 Amendment: Substituted "or" for "and" following "Title 7, chapter 12, parts 41 and 42" and added "or 76-5-1114(1)" in (1).

CHAPTER 6
OPEN SPACES

Chapter Compiler's Comments

Severability Clause Not Codified: The first paragraph of section 62-609, R.C.M. 1947, a severability clause, was not codified. The section has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 337, L. 1969.

Chapter Law Review Articles

Attorney's Guide to Montana Conservation Easements, Knight, Dye, 42 Mont. L. Rev. 21 (1981).

Open Space Procurement Under Colorado's Scenic Easement Law, Hoffman, 60 U. Colo. L. Rev. 383 (1989).

City Land Use Law Challenged in Test of Owners' Rights: Zoned Worthless?, Humo, 100 The Los Angles Daily Journal, June 4, 1987, p. 1.

Open-Space Zoning and the Taking-Clause: A Two-Part Test, Rohrs, 46 Mo. L. Rev. 868 (1981).

Open Space Taxation and State Constitutions, Myers, 33 Vand. L. Rev. 837 (1980).

Part 1
General Provisions

76-6-105. Construction of chapter.

Compiler's Comments

2001 Amendment: Chapter 125 in (2) in second sentence inserted reference to Title 70, chapter 30. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1997 Amendment: Chapter 42 in (2), at beginning, substituted "chapter" for "subsection"; and made minor changes in style. Amendment effective March 12, 1997.

Severability Clause Not Codified: The first paragraph of section 62-609, R.C.M. 1947, a severability clause, was not codified. The section has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 337, L. 1969.

76-6-109. Powers of public bodies.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 463 in (2)(c) after "state" inserted "subject to subsection (3)"; inserted (3) providing that property taxes levied to pay the principal and interest on general obligation bonds may not be levied against certain property; and made minor changes in style. Amendment effective April 30, 2001.

Chapter 574 at end of (2)(b) deleted "not to exceed 1 mill". Amendment effective July 1, 2001.

Applicability: Section 3, Ch. 463, L. 2001, provided: "[This act] [76-6-109] applies to mill levies assessed against property for the payment of interest and principal on open-space bonds issued after [the effective date of this act]." Effective April 30, 2001.

1999 Amendment: Chapter 584 in (2)(b) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Attorney General's Opinions

Use of Open-Space Bond Proceeds: A city may use proceeds from bonds issued pursuant to Title 76, ch. 6, the Open-Space Land and Voluntary Conservation Easement Act, for the maintenance of open-space land acquired with bond proceeds and to fund the development of a comprehensive plan (now growth policy) for purchase, use, development, and maintenance of open-space land. 47 A.G. Op. 8 (1997).

76-6-110. Authorization and funding for planning commission.

Attorney General's Opinions

Use of Open-Space Bond Proceeds: A city may use proceeds from bonds issued pursuant to Title 76, ch. 6, the Open-Space Land and Voluntary Conservation Easement Act, for the maintenance of open-space land acquired with bond proceeds and to fund the development of a comprehensive plan (now growth policy) for purchase, use, development, and maintenance of open-space land. 47 A.G. Op. 8 (1997).

Part 2
Conservation Easements

76-6-208. Taxation of property subject to conservation easement.

Law Review Articles

Open Space Taxation and State Constitutions, Myers, 33 Vand. L. Rev. 837 (May 1980).

An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses, Currier, 11 Land Use & Env. L. Rev. 443 (1980).

CHAPTER 7
ENVIRONMENTAL CONTROL EASEMENT ACT

Chapter Compiler's Comments

Effective Date: Section 22, Ch. 503, L. 1999, provided: "[This act] is effective July 1, 1999."

CHAPTER 9
SHOOTING RANGES

Chapter Collateral References

Liability for injury or death in shooting contest or target practice. 49 ALR 3d 762.

Gun club, or shooting gallery or range, as nuisance. 26 ALR 3d 661.

Part 1
Protection of Shooting Range Location and Investments

76-9-101. Policy.

Compiler's Comments

Applicability: Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

Severability: Section 11, Ch. 415, L. 1991, was a severability clause.

Effective Date: Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

76-9-102. Prohibitions.

Compiler's Comments

Applicability: Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

Severability: Section 11, Ch. 415, L. 1991, was a severability clause.

Effective Date: Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

76-9-103. Planning — effect on shooting ranges.

Compiler's Comments

Applicability: Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

Severability: Section 11, Ch. 415, L. 1991, was a severability clause.

Effective Date: Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

76-9-104. Zoning — effect on shooting ranges.

Compiler's Comments

1999 Amendment: Chapter 582 in introduction substituted "growth policy" for "master plan". Amendment effective October 1, 1999.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Applicability: Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

Severability: Section 11, Ch. 415, L. 1991, was a severability clause.

Effective Date: Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

76-9-105. Closure of shooting ranges — limitations — relocation cost.

Compiler's Comments

Applicability: Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

Severability: Section 11, Ch. 415, L. 1991, was a severability clause.

Effective Date: Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

CHAPTER 10
REGULATION OF WILDCRAFTING

Part 1
General Provisions

Part Compiler's Comments

Effective Date: Section 11, Ch. 282, L. 2001, provided that this part is effective on passage and approval. Approved April 20, 2001.

CHAPTER 11
NATURAL RESOURCES IN GENERAL

Chapter Law Review Articles

Federalism and Natural Resources, Goetz, 43 Mont. L. Rev. 155 (1982).

Recent Developments in Montana Natural Resources Law, Roberts & Stone, 38 Mont. L. Rev. 169 (1977).

Part 1
Protection From Fire

Part Compiler's Comments

Functions of Department of Natural Resources and Conservation Transferred to Department of State Lands (Now Abolished): Section 1, Ch. 529, L. 1981, provided: "(1) The functions of protecting natural resources from fire in Title 76, chapter 11, part 1; of protection of forest resources in Title 76, chapter 13; of appraising, protecting, and selling state timberlands in Title 77, chapter 5; and of recommending closing lands to hunting and fishing in fire danger areas under 87-3-106 are transferred from the department of natural resources and conservation to the department of state lands [department of state lands now abolished—functions were returned to department of natural resources and conservation].

(2) Unless inconsistent with this act, any reference to "department of natural resources and conservation" in those sections is changed to "department of state lands" [now abolished].

(3) Any corresponding internal references shall be changed by the code commissioner."

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

76-11-101. Protection of natural resources from fire.

Compiler's Comments

1997 Amendment: Chapter 27 near beginning, after "conservation", deleted "under rules adopted by the state board of land commissioners" and after "shall" inserted "adopt rules to". Amendment effective February 21, 1997.

1995 Amendment: Chapter 418 at beginning substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1981 Amendment: Changed "the department of natural resources and conservation" to "the department of state lands" at the beginning of the section.

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

76-11-102. Cooperative agreements with owners and lessees of land for fire protection and conservation.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), near middle, substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1981 Amendment: Changed "the department of natural resources and conservation" to "the department of state lands" in the middle of (1).

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Collateral References

Woods and Forests *key* 5.

98 C.J.S. Woods and Forests §13.

Part 2
Soil Survey and Mapping Program

Part Law Review Articles

Wrongful Geophysical Exploration, Rice, 44 Mont. L. Rev. 53 (1983).

The Surreptitious Geophysical Survey: An Interference With Prospective Advantage, Slater, 15 Pac. L.J. 381 (1984).

76-11-201. Short title.

Compiler's Comments

Severability: Section 6, Ch. 358, L. 1979, was a severability clause.

CHAPTER 12
WILD AND SCENIC RESOURCES

Chapter Law Review Articles

A Wilderness Primer, McCabe, 32 Mont. L. Rev. 19 (1971).

Claiming the Cabinets: The Right to Mine in Wilderness Areas, Loop, Pub. Land L. Rev. 45 (1986).

Livestock in Wilderness: A Review and Forecast, McClaran, 20 Envtl. L. 857 (1990).

Wilderness Areas and Federal Water Rights (The Changing Directions of Environmental Law in the 1990's), Baldwin, 37 Fed. B. News and J. 101 (1990).

Wilderness Areas and Land "Takings": Prohibiting Oil and Mineral Extraction in Some Areas May Now Be Unconstitutional; The Owners of Oil Leases and Mining Claims Have Been Deprived of Their Sole Intended Use for 11 Years, Holland, 8 Calif. Law. 57(2) (1988).

District Court's Approval of Bob Marshall Withdrawal Upstaged by Watt's Proposed Wilderness Legislation, Dougherty, 12 Envtl. L. Rep. 10,023 (1982).

Part 1
Natural Areas

Part Compiler's Comments

Severability Section Not Codified: Section 81-2713, R.C.M. 1947, a severability provision, was not codified. The section was not repealed and is still valid law. Citation may be made to sec. 13, Ch. 254, L. 1974.

Part Administrative Rules

Title 36, chapter 27, subchapter 2, ARM Rules governing the establishment, administration, and management of state natural areas.

Part Attorney General's Opinions

Compensation for School Trust Fund Land: The state must compensate its school trust for the full appraised value of school trust lands designated as or exchanged for natural areas under the Montana Natural Areas Act of 1974. 36 A.G. Op. 92 (1976).

76-12-102. Legislative findings.

Compiler's Comments

1987 Amendment: In (2) substituted "selected areas" for "the remaining areas"; inserted (4) relating to a legislative finding of necessity to establish system to develop natural areas and to encourage public and private participation; and inserted (5) concerning legislative finding that designation of natural areas first consider natural features in dedicated lands.

76-12-104. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 in definition of Department substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Code Commissioner Correction: The Code Commissioner deleted the definition of Council because 2-15-3203, which established the Natural Areas Advisory Council, terminated June 30, 1993. The definition was therefore obsolete.

1987 Amendment: In (2), after "advisory council", substituted reference to 2-15-3203 for "created by this part"; and inserted definitions of natural areas system and register.

Administrative Rules

ARM 36.27.201 Definitions.

76-12-107. Methods of bringing land under part.

Compiler's Comments

1987 Amendment: In (4), after "board", inserted remainder of subsection providing that land passing to the state may be protected and managed under Montana Natural Areas Act of 1974; and inserted (6) providing that registration of land designated, dedicated, or protected by owner as natural area may become subject to Montana Natural Areas Act of 1974.

Redundant Section Not Codified: Section 81-2706, R.C.M. 1947, is redundant with 76-12-107(2) and was not codified. The section was not repealed and is still valid law. Citation may be made to sec. 6, Ch. 254, L. 1974.

Attorney General's Opinions

Compensation for School Trust Fund Land: The state must compensate its school trust for the full appraised value of school trust lands designated as or exchanged for natural areas under the Montana Natural Areas Act of 1974. 36 A.G. Op. 92 (1976).

76-12-108. Acquisition of lands.

Compiler's Comments

2001 Amendment: Chapter 125 in second sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Administrative Rules

ARM 36.27.202 Applicability and scope of rules establishing natural areas.

76-12-109. Report to legislature.

Compiler's Comments

1993 Amendment: Chapter 349 after "board" substituted "may" for "shall".

1991 Amendment: Near beginning inserted reference to 5-11-210 and after "legislature" substituted "a" for "an annual". Amendment effective March 20, 1991.

76-12-110. Restriction on condemnation or development of natural areas.

Compiler's Comments

2001 Amendment: Chapter 125 at end inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

76-12-112. Duties of board — administrative rules and hearing requirements.

Compiler's Comments

1987 Amendment: In (2), in first sentence after "provide", substituted "for meetings by the board" for "at least two board meetings per year" and before "proposed designation" substituted "department's" for "board's"; and inserted (3) requiring Board to consider Department's recommendations and to issue statement of decision concerning proposed designation of natural areas.

Administrative Rules

Title 36, chapter 27, subchapter 2, ARM Establishment, administration, and management of state natural areas.

ARM 36.27.204 Duties of managing entity.

ARM 36.27.205 Master plan.
ARM 36.27.206 Water and mineral rights.
ARM 36.27.207 Public meetings.
ARM 36.27.208 Board meetings.
ARM 36.27.210 Publications.
ARM 36.27.211 Removal of state natural area designation.

76-12-115. Consultation with interested parties.

Compiler's Comments

1987 Amendment: At beginning of section substituted "The department" for "The board and the natural areas advisory council" and after "citizen organizations" inserted "organizations representing Montana's basic resource industries".

76-12-121. Duties of department — plan for natural areas system.

Compiler's Comments

Code Commissioner Correction: In (3) the Code Commissioner deleted a reference to the Council because 2-15-3203, which established the Natural Areas Advisory Council, terminated June 30, 1993. The reference was therefore obsolete.

76-12-123. Natural areas account.

Compiler's Comments

1997 Amendment: Chapter 422 in (3) deleted second sentence that read: "These funds, except funds used for administration of a program, are statutorily appropriated, as provided in 17-7-502." Amendment effective July 1, 1997.

1989 Amendment: In (3) inserted "except funds used for administration of a program". Amendment effective July 1, 1989.

CHAPTER 13
TIMBER RESOURCES

Chapter Compiler's Comments

Functions of Department of Natural Resources and Conservation Transferred to Department of State Lands (Now Abolished): Section 1, Ch. 529, L. 1981, provided: "(1) The functions of protecting natural resources from fire in Title 76, chapter 11, part 1; of protection of forest resources in Title 76, chapter 13; of appraising, protecting, and selling state timberlands in Title 77, chapter 5; and of recommending closing lands to hunting and fishing in fire danger areas under 87-3-106 are transferred from the department of natural resources and conservation to the department of state lands [department of state lands now abolished—functions were returned to department of natural resources and conservation].

(2) Unless inconsistent with this act, any reference to "department of natural resources and conservation" in those sections is changed to "department of state lands" [now abolished].

(3) Any corresponding internal references shall be changed by the code commissioner."

Functions of Board of Natural Resources and Conservation Transferred to Board of Land Commissioners: Section 2, Ch. 529, L. 1981, provided: "(1) The functions of the board of natural resources and conservation in Title 76, chapter 13, relating to protection of forest resources are transferred to the board of land commissioners.

(2) Unless inconsistent with this act, any reference in that chapter to "board of natural resources and conservation" is changed to "board of land commissioners".

(3) Any corresponding internal references shall be changed by the code commissioner."

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Chapter Case Notes

Federal Law Applied to Road Building and Logging in National Forest: The U.S. District Court discussed the applicability of federal law to road building and logging activities in certain portions of Beaverhead National Forest. The case examined long-range management guidance, environmental assessments, environmental impact statements, the effects of a finding of no significant impact, and regeneration of timber sale areas as affected by the 1978 Beaverhead National Forest Land Management Plan, the Roadless Area Review Evaluation (RARE II), the

Montana Wilderness Study Act of 1977, the National Environmental Policy Act, the National Forest Management Act of 1976, and the Multiple-Use Sustained-Yield Act of 1960. Big Hole Ranchers Ass'n, Inc. v. U.S. Forest Serv., 686 F. Supp. 256, 45 St. Rep. 908 (D.C. Mont. 1988).

Chapter Law Review Articles

Arbitrary Administrators, Capricious Bureaucrats and Prudent Trustees: Does It Matter in the Review of Timber Salvage Sales?, Souder & Fairfax, 18 Pub. Land & Resources L. Rev. 165 (1997).

Standing, Ripeness, and Forest Plan Appeals, Brennan & Clifford, 17 Pub. Land & Resources L. Rev. 125 (1996).

National Forest Planning: An Opportunity for Local Governments to Influence Federal Land Use, Hart, 16 Pub. Land & Resources L. Rev. 137 (1995).

Statewide Strategic Forest Resource Planning Programs; Evaluation Based on Context, Process, Outputs, and Performance, Gray & Ellefson, 15 Evaluation Rev. 441 (1991).

Citizen Participation in Long-Range Planning: The RPA Experience (Forest and Rangeland Renewable Resources Planning Act of 1974), Lyden, Twight, & Tuchmann, 30 Nat. Resources J. 123 (1990).

The Failure of the Federal Forest Planning Process (Hard Times: What Lessons Have We Learned?), Ramig, 3 Nat. Resources & Env't 31(5) (1989).

Let It Burn (The American Forest: Garden of Eden or Logger's Paradise?), Savage, Bus. & Soc'y Rev. 12 (1988).

Controlling the Fate of America's Forests, Austin, Bus. & Soc'y Rev. 55 (1987).

Introduction: Forest Law After the First Stage of the National Forest Management Act, Wilkinson, 17 Envtl. L. 365 (1987).

Forestland Preservation, Liberty, 5 Harv. Envtl. L. Rev. 153 (1981).

Part 1
Protection of Forest Resources

76-13-101. Purpose.

Compiler's Comments

1989 Amendment: Inserted (2) relating to forest management practices on private land. Amendment effective January 1, 1990.

Applicability: Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

Administrative Rules

ARM 36.10.119 and 36.10.120 Forest activity restrictions and forest closure.
ARM 36.10.125 Railroads and powerlines.
ARM 36.10.129 Wildland/urban interface.
ARM 36.10.130 Fire extinguishers and firefighting tools.
ARM 36.10.131 Correction of hazard and unusual circumstances or events.

Collateral References

98 C.J.S. Woods and Forests §§1, 2.

76-13-102. Definitions.

Compiler's Comments

1997 Amendment: Chapter 27 in definition of forest fire protection district, at end, substituted "department" for "board"; and in definition of recognized agency, in two places, substituted "department" for "board". Amendment effective February 21, 1997.

1995 Amendment: Chapter 418 in definition of Department substituted "department of natural resources and conservation provided for in Title 2, chapter 15, part 33" for "department of state lands provided for in Title 2, chapter 15, part 32"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1989 Amendment: Inserted definitions of forest practices, operator, person, and timber sale. Amendment effective January 1, 1990.

Applicability: Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

1981 Amendment: Changed the definition of "Board" from "the board of natural resources and conservation, provided for in 2-15-3302" to "the board of land commissioners provided for in Article X, section 4, of the Montana constitution"; and changed the definition of "Department" from "the department of natural resources and conservation" to "the department of state lands" and changed the internal reference from "Title 2, chapter 15, part 33" to "Title 2, chapter 15, part 32."

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

76-13-103. Applicability.

Compiler's Comments

1997 Amendment: Chapter 27 near middle substituted "department" for "board"; and made minor changes in style. Amendment effective February 21, 1997.

76-13-104. Functions of department.

Compiler's Comments

1989 Amendment: Inserted (3) relating to notification and consultation concerning conduct of forest practices. Amendment effective January 1, 1990.

Applicability: Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

1981 Amendment: Deleted subsection (3), which required the department of natural resources and conservation to assist the department of state lands (now abolished) in protecting and developing state forest and forest lands. This deletion was made because Ch. 529, L. 1981, transferred the duty of protecting forest resources from the department of natural resources and conservation to the department of state lands (now abolished).

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Administrative Rules

ARM 36.10.129 Wildland/urban interface.

76-13-105. Protection of nonforest lands and improvements.

Administrative Rules

ARM 36.10.161 Formula to set landowner assessments for fire protection.

76-13-106. Cooperation between department and county.

Compiler's Comments

1981 Amendment: Deleted "The department of state lands and" at the beginning of the first and the second sentences; substituted "shall list forest land under its jurisdiction" for "shall list forest land under their jurisdiction" in the second sentence.

Chapter 529, L. 1981, changed the definition of "department" for purposes of this section from the department of natural resources and conservation to the department of state lands (now abolished—Ch. 418, L. 1995, changed part definition of Department to Department of Natural Resources and Conservation). The effect of that change is to remove the reference to the department of natural resources and conservation from this section.

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Administrative Rules

ARM 36.10.128 Fireworks.

ARM 36.10.129 Wildland/urban interface.

76-13-107. Classification of forest lands.

Administrative Rules

ARM 36.10.101 Classification of forest lands.

76-13-108. Person responsible for performance of duties.

Collateral References

Woods and Forests *key* 5.

98 C.J.S. Woods and Forests §3.

76-13-109. Rules.

Compiler's Comments

1997 Amendment: Chapter 27 at beginning substituted "department" for "board" and after "enforce" deleted "through the department". Amendment effective February 21, 1997.

1997 Statement of Intent: The statement of intent attached to Ch. 27, L. 1997, provided: "A statement of intent is required for this bill because [section 4] [76-13-109] transfers rulemaking authority from the state board of land commissioners to the department of natural resources and conservation. It is the intent of [section 4] [76-13-109] to transfer the administration of protection of natural resources from fire, protection of forest resources, fire protection services, and control of timber slash and debris from the state board of land commissioners to the department of natural resources and conservation."

1981 Amendment: Deleted subsection (2), which provided that the rules adopted under this section may not conflict with the powers of the board of land commissioners. This amendment was made because the definition of "board" for purposes of this section was changed from the board of natural resources and conservation to the board of land commissioners by Sec. 2, Ch. 529, L. 1981 (see 76-13-102).

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Administrative Rules

Title 36, chapter 10, subchapter 1, ARM Fire prevention on state forest lands.

ARM 36.10.132 Definitions.

76-13-110. Owner's right to board hearing.

Administrative Rules

ARM 36.10.121 Review of agency requirements.

76-13-111. Permissible expenditures.

Compiler's Comments

1987 Amendment: In (1)(c), after "collected", inserted "except those collected in a justice's court".

76-13-112. Penalty for violation.

Compiler's Comments

1997 Amendment: Chapter 27 near middle, after "adopted", deleted "by the board or department". Amendment effective February 21, 1997.

Collateral References

98 C.J.S. Woods and Forests §6.

76-13-114. Disposition of fines.

Compiler's Comments

2001 Amendment: Chapter 257 in first sentence substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1997 Amendment: Chapter 532 near end of first sentence, after "deposit in the", substituted "state special revenue" for "agency"; and made minor changes in style. Amendment effective July 1, 1997.

1987 Amendment: In first and last sentences inserted "except those collected in a justice's court".

1983 Amendment: In first sentence, substituted "agency fund" for "federal and private grant clearance fund".

76-13-121. Permit for burning required.

Administrative Rules

ARM 36.10.119 Forest activity restrictions.

ARM 36.10.123 Debris burning.

ARM 36.10.127 Flaming and glowing substances.

Collateral References
98 C.J.S. Woods and Forests §5.

76-13-123. Failure to extinguish campfire.

Administrative Rules
ARM 36.10.124 Campfires.
ARM 36.10.127 Flaming and glowing substances.

76-13-124. Throwing lighted materials.

Administrative Rules
ARM 36.10.127 Flaming and glowing substances.

Collateral References
98 C.J.S. Woods and Forests §7.

76-13-125. Spark arresters required.

Administrative Rules
ARM 36.10.122 Applicability of forest fire rules.
ARM 36.10.126 Equipment.

76-13-131. Notification prior to forest practices — department response.

Compiler's Comments
Effective Date: Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.
Applicability: Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

76-13-132. Onsite consultation.

Compiler's Comments
1995 Amendment: Chapter 418 in (3), in second sentence, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.
Effective Date: Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.
Applicability: Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

76-13-133. Purpose of onsite consultation — department responsibility.

Compiler's Comments
Effective Date: Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.
Applicability: Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

76-13-134. When additional notification required.

Compiler's Comments
Effective Date: Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.
Applicability: Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

76-13-135. Emergency forest practices.

Compiler's Comments
Effective Date: Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.
Applicability: Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

Part 2
Provision of Fire Protection Services

Part Case Notes

Extinguishment of Fires in Woods — Aerial Retardant — Public Necessity: Actions of owner of airplane dropping aerial fire retardant on forest fire were in true character of public convenience, necessity, and safety, and no claim for relief for property damage from dropping of retardant should exist against owner as long as it reasonably appeared that action was to prevent or mitigate effects of an impending disaster. Stocking v. Johnson Flying Serv., 143 M 61, 387 P2d 312 (1963).

76-13-201. Duty of owner to protect against fire.

Compiler's Comments

2001 Amendment: Chapter 574 in (2) in second sentence after "pay" deleted "to the county treasurer of the county in which the land is situated" and at end inserted "to the department of revenue" and inserted third sentence concerning timing of payments; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 27 in (1), at end, substituted "department" for "board"; and made minor changes in style. Amendment effective February 21, 1997.

1991 Amendment: In (2), in first sentence, increased maximum allowable assessment from not more than 17 cents per acre per year with a minimum of up to $14 per owner per year to not more than $30 for each landowner in the district and up to 20 cents per acre per year for each acre in excess of 20 acres owned by each landowner. Amendment effective April 6, 1991.

Retroactive Applicability: Section 2, Ch. 360, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to calendar years beginning after December 31, 1989."

1985 Amendment: In (2), in first sentence, after "not more than" substituted "17 cents per acre per year except that the department shall make a minimum assessment of up to $14" for "16 cents per acre per year and not less than $6", and at end of sentence, after "district", inserted "as necessary to yield the amount of money provided for in 76-13-207".

Interim Study Committee Bill: Chapter 643, L. 1985, was introduced by request of Joint Interim Subcommittee No. 2. See committee report entitled "Timber Management and Forest Fire Protection Costs in Montana", Montana Legislative Council, December 1984.

Administrative Rules

ARM 36.10.125 Railroads and powerlines.

ARM 36.10.161 Formula to set landowner assessments for fire protection.

Collateral References

98 C.J.S. Woods and Forests §5.

76-13-204. Creation, annexation of land into, and dissolution of forest fire protection districts.

Compiler's Comments

1997 Amendment: Chapter 27 in (1) and (2) substituted "department" for "board"; and in (2)(b), after "shall", substituted "consider" for "report to the board" and after "change" substituted "in making a determination under this section" for "and shall make a recommendation to the board". Amendment effective February 21, 1997.

1993 Amendment: Chapter 147 at beginning of (1) inserted "in accordance with the provisions of subsections (2) and (3)" and after "create" inserted "annex land to, or dissolve"; in (2), after "created", inserted "land is annexed into a district, or a district is dissolved" and at end substituted "land affected by the proposed change is located" for "the proposed district or a part thereof is included"; in (2)(a), at end of first sentence, substituted "change" for "district" and in second sentence, before "certified", deleted "registered or" and after "mail" inserted "to each affected property owner"; inserted (2)(b) requiring a Department report and recommendation; in (3)(a), after "created", inserted "or dissolved" and near end, before "forest", substituted "affected" for "proposed"; inserted (3)(b) requiring landowner approval prior to annexation; inserted (4) prohibiting removal of annexed land from the district unless the district is dissolved; and made minor changes in style.

76-13-205. Determination of boundaries of district.

Compiler's Comments

1997 Amendment: Chapter 27 near middle substituted "department" for "board". Amendment effective February 21, 1997.

76-13-207. Determination and collection of costs of fire protection.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (2) and (3) substituted "department of revenue" for "county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1985 Amendment: In (1) near end, after "total amount received" substituted "from such landowners to no greater than one-third of the amount specified in the appropriation" for "to the amount specified in the approved plan".

Interim Study Committee Bill: Chapter 643, L. 1985, was introduced by request of Joint Interim Subcommittee No. 2. See committee report entitled "Timber Management and Forest Fire Protection Costs in Montana", Montana Legislative Council, December 1984.

Administrative Rules

ARM 36.10.161 Formula to set landowner assessments for fire protection.

76-13-209. Disposition of assessments.

Compiler's Comments

1989 Amendment: Near end substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

1983 Amendment: Substituted "other special revenue funds" for "federal and private revenue fund".

76-13-211. Amount due for protection treated as lien.

Compiler's Comments

1987 Amendment: At end of (2) deleted sentence that read: "The complaint and all subsequent proceedings in the action shall conform as nearly as practicable to those provided by 15-16-502."

Part 3
Control of Forest Diseases and Insect Pests

76-13-302. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 in definition of Department substituted "department of natural resources and conservation provided for in Title 2, chapter 15, part 33" for "department of state lands provided for in Title 2, chapter 15, part 32". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 285 inserted definition of salvage; and made minor changes in style.

1981 Amendment: Changed the definition of "Department" from "the department of natural resources and conservation, provided for in Title 2, chapter 15, part 33" to "the department of state lands, provided for in Title 2, chapter 15, part 32".

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

76-13-303. Creation of zone of infestation.

Compiler's Comments

1981 Amendment: Substituted "the board of land commissioners" for "the board of natural resources and conservation".

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Part 4
Control of Timber Slash and Debris

76-13-401. Definitions.

Compiler's Comments

2001 Amendment: Chapter 234 inserted definition of minimum slash hazard; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 279 deleted former definition of board that read: ""Board" means the board of land commissioners provided for in Article X, section 4, of the Montana constitution"; substituted "certificate of clearance" for "certification of clearance" as defined term; inserted definitions of exemption certificate and private forest lands; at end of definition of fire hazard reduction agreement and in definition of fire hazard reduction or management inserted "on private forest lands"; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 10, Ch. 279, L. 1999, was a severability clause.

Applicability: Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

1995 Amendment: Chapter 418 in definition of Department substituted "department of natural resources and conservation provided for in Title 2, chapter 15, part 33" for "department of state lands provided for in Title 2, chapter 15, part 32". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1989 Amendment: Inserted definitions of certification of clearance, contractor, fire hazard, fire hazard reduction agreement, fire hazard reduction or management, forest product, master fire hazard reduction agreement, and purchaser; and made minor change in phraseology. Amendment effective July 1, 1989.

1981 Amendment: Changed the definition of "Board" from "the board of natural resources and conservation, provided for in 2-15-3302" to "the board of land commissioners provided for in Article X, section 4, of the Montana constitution"; and changed the definition of "Department" from "the department of natural resources and conservation, provided for in Title 2, chapter 15, part 33" to "the department of state lands provided for in Title 2, chapter 15, part 32."

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Collateral References

Woods and Forests *key* 6.

98 C.J.S. Woods and Forests §7.

52 Am. Jur. 2d Logs and Timber §§64 through 69.

76-13-402. Basis for management of fire hazards.

Compiler's Comments

1989 Amendment: At beginning substituted "fire hazard reduction or management" for "reduction or management of fire hazards"; near middle, after "department", deleted "and the state fire wardens"; after "practices and" deleted "more"; and after "effective" substituted "forest fire protection" for "fire control". Amendment effective July 1, 1989.

76-13-403. Supervision by department.

Compiler's Comments

1999 Amendment: Chapter 279 at beginning substituted "shall" for "may", after "rules" inserted "by October 1, 2000", after "private" substituted "forest lands" for "land", and after "state" inserted "recognizing the benefits of slash retention". Amendment effective July 1, 1999.

Severability: Section 10, Ch. 279, L. 1999, was a severability clause.

Applicability: Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

1997 Amendment: Chapter 27 near beginning, after "department", deleted "under rules adopted by the board" and after "may" inserted "adopt and enforce rules to". Amendment effective February 21, 1997.

1989 Amendment: Near beginning, before "reduction", inserted "fire hazard"; near end substituted "forest products harvesting, timber stand improvement, and right-of-way clearing"

for "the cutting of any forest product"; and made minor changes in phraseology. Amendment effective July 1, 1989.

Administrative Rules

Title 36, chapter 11, subchapter 2, ARM Control of timber slash and debris.
ARM 36.11.221 Purpose of control of timber slash and debris law and this subchapter.
ARM 36.11.222 Definitions.
ARM 36.11.223 Control of slash and debris.
ARM 36.11.224 Residential structures and public campgrounds SMA.
ARM 36.11.225 High value communications structures and powerlines SMA.
ARM 36.11.226 Precommercial thinning units SMA.
ARM 36.11.227 Steep slope/partial cut units SMA.
ARM 36.11.228 Helicopter logging SMA.
ARM 36.11.229 Wet areas and areas with highly erodible soils SMA.
ARM 36.11.230 Slash retention sites SMA.
ARM 36.11.231 Right to inspect.
ARM 36.11.232 Master fire hazard reduction agreement.

76-13-405. Contracts with forest fire protection agencies.

Compiler's Comments

1989 Amendment: Near beginning, after "forest", substituted "fire protection" for "protective"; and made minor changes in phraseology. Amendment effective July 1, 1989.

76-13-406. Limitation on liability.

Compiler's Comments

1989 Amendment: Near beginning, after "department", deleted "state firewardens"; substituted "other recognized forest fire protection agencies" for "recognized forest protective agencies"; near middle, after "official", substituted "or employee of the department or other recognized forest fire protection agency is" for "of such agency shall"; after "provisions of" substituted "this part, the rules adopted under 76-13-403, and the fire hazard reduction agreement" for "76-13-402 through 76-13-405 and 76-13-411(1)"; after "when" substituted "reasonable" for "all requisite"; and made minor changes in phraseology. Amendment effective July 1, 1989.

Administrative Rules

ARM 36.11.224 Residential structures and public campgrounds SMA.
ARM 36.11.225 High value communications structures and powerlines SMA.
ARM 36.11.226 Precommercial thinning units SMA.
ARM 36.11.227 Steep slope/partial cut units SMA.
ARM 36.11.228 Helicopter logging SMA.
ARM 36.11.229 Wet areas and areas with highly erodible soils SMA.
ARM 36.11.230 Slash retention sites SMA.

76-13-407. Reduction of slash and debris along right-of-way.

Compiler's Comments

1989 Amendment: Near beginning of (2), before "burning", substituted "excluding" for "including", after "method" deleted "of disposal", and at end after "progresses" deleted "however, upon application to the department, it may grant a permit extending the time within which the burning must be done in compliance with this chapter relating to burning permits during the closed season"; and made minor changes in phraseology. Amendment effective July 1, 1989.

Administrative Rules

ARM 36.11.222 Definitions.
ARM 36.11.223 Control of slash and debris.
ARM 36.11.224 Residential structures and public campgrounds SMA.
ARM 36.11.225 High value communications structures and powerlines SMA.
ARM 36.11.226 Precommercial thinning units SMA.
ARM 36.11.227 Steep slope/partial cut units SMA.
ARM 36.11.228 Helicopter logging SMA.
ARM 36.11.229 Wet areas and areas with highly erodible soils SMA.
ARM 36.11.230 Slash retention sites SMA.

76-13-408. Fire hazard reduction agreement and bond — bond release and penalty — exemption.

Compiler's Comments

2001 Amendment: Chapter 234 in (1) near middle after "fire hazard to be created" inserted "except where a minimum slash hazard would exist"; and inserted (5) exempting activity regarding the creation of a minimum slash hazard from the provisions of Title 76, chapter 13, part 4. Amendment effective October 1, 2001.

1999 Amendment: Chapter 279 in middle of (1) before "thinning" inserted "precommercial", after "private" inserted "forest", after "work" inserted "must be issued an exemption certificate by the department or"; inserted second, third, fourth, and fifth sentences in (2) regarding master fire hazard reduction agreement bond amounts, administration of bonds, annual review of bond amounts, and bond adjustment according to timber harvested volume and level of bond compliance; deleted former (3) that read: "(3) Either the person conducting the work or the purchaser, as provided in 76-13-409(2), shall pay 15 cents for each 1,000 board feet (log scale) or equivalent measure if forest products other than logs are cut. The assessment may not exceed $20,000 a year. The full amount of this money must be deposited in the forestry extension service account provided for in 76-13-415"; inserted second, third, and fourth sentences in (4) requiring partial release of certain cash bonds, authorizing department to inspect sites on which release is requested, and providing for revocation of agreement or denial of future agreement in addition to penalty for submission of fraudulent affidavit or photographs; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 10, Ch. 279, L. 1999, was a severability clause.

Applicability: Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

1997 Amendment: Chapter 27 in (1), at end, and in (4)(b), at end, substituted "under this part" for "by the board". Amendment effective February 21, 1997.

1991 Amendment: Inserted (3) requiring payment of assessment for cutting certain forest products; and made minor changes in style. Amendment effective April 23, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 577, L. 1991, provided: "The legislature has committed the state of Montana to a course of voluntary compliance with best management practices for forestry. The educational programs and expertise of the Montana state university [now Montana state university-Bozeman] forestry extension program are critical to the effectiveness and success of this approach. However, the forestry extension program requires the addition of a second extension forester to serve the needs of the state's commercial and 11,000 nonindustrial private forest landowners and to ensure protection of water quality and proper management of the state's forested lands.

The legislature believes that the extension service and the forest products industry should be equal partners in the continuation and the expansion of the forestry extension program. The forest products industry, as provided in 76-13-408 and 76-13-414, has committed $60,000 annually for the purpose of funding one additional extension forester position and one administrative position. This additional funding is intended to supplement the existing federal funding for extension forestry, and the legislature strongly urges the Montana state university [now Montana state university-Bozeman] extension program to match these commitments by earmarking $54,000 annually for the extension service's forestry and natural resources program."

Applicability: Section 5, Ch. 577, L. 1991, provided: "[This act] applies to forest products cut after June 30, 1991."

1989 Amendments: Chapter 423 near beginning of (1) inserted "constructing or reconstructing any road in contemplation of forest product cutting"; and made minor changes in phraseology. Amendment effective January 1, 1990.

Chapter 513 near beginning of (1) inserted "constructing or reconstructing any road in contemplation of cutting any forest product" and near middle, after "agreement", substituted "or a master fire hazard reduction agreement with the department providing for the" for "with the department and by posting a bond to the state in such form and for such amount as may be prescribed by the department, conditioned upon"; inserted (2) requiring posting of a bond; inserted (3) setting out provisions of an agreement; at end of (4) substituted "the issuance of the certificate of clearance" for "completion of the work done in compliance with the terms of the agreement"; and made minor changes in phraseology. Amendment effective July 1, 1989.

Integration of 1989 Amendments: Although the amendments made to this section by Ch. 423, L. 1989, were not effective until January 1, 1990, the amendments were substantively identical to

amendments made by Ch. 513, L. 1989, effective July 1, 1989. The Code Commissioner has therefore integrated both amendments into a single version, effective July 1, 1989.

Applicability: Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

Administrative Rules

ARM 36.11.222 Definitions.
ARM 36.11.224 Residential structures and public campgrounds SMA.
ARM 36.11.225 High value communications structures and powerlines SMA.
ARM 36.11.226 Precommercial thinning units SMA.
ARM 36.11.227 Steep slope/partial cut units SMA.
ARM 36.11.228 Helicopter logging SMA.
ARM 36.11.229 Wet areas and areas with highly erodible soils SMA.
ARM 36.11.230 Slash retention sites SMA.
ARM 36.11.232 Master fire hazard reduction agreement.

Collateral References

Woods and Forests *key* 6.
98 C.J.S. Woods and Forests §5.

76-13-409. Duty of purchaser to ensure compliance — statement — bond.

Compiler's Comments

1999 Amendment: Chapter 279 in (1) near beginning after "private" inserted "forest" and near end after "agreement" inserted "or that the person has been issued an exemption certificate"; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 10, Ch. 279, L. 1999, was a severability clause.

Applicability: Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

1989 Amendment: At end of (1) substituted "by entering into a fire hazard reduction agreement as provided in 76-13-408" for "thus created, as provided in this part"; at beginning of (2) deleted "When the hazard reduction agreement provides that", after "purchaser" deleted "of forest products", after "withhold" substituted "sufficient money to meet the requirements of the bond provided for in 76-13-408 plus the fees for administration, inspection, and enforcement by the department as provided in the hazard reduction agreement" for "moneys to insure faithful compliance with this part", near beginning of second sentence substituted "money and fees" for "moneys", after "withheld" inserted "and a report of volumes of products purchased", after "15th day of" substituted "the following" for "each", and near end substituted "money, fees, and product volumes" for "moneys"; substituted present (3) concerning report of no receipts or purchases for former (3) that read: "(3) Upon the department making the determination that faithful compliance with this part has been achieved, the department shall return to the owner thereof all such withheld money with the exception of 4% for inspection, administration, enforcement, and smoke management"; inserted (4) relating to posting of a bond; and made minor changes in phraseology. Amendment effective July 1, 1989.

76-13-410. Failure to comply.

Compiler's Comments

2001 Amendment: Chapter 234 inserted (2) applying hazard reduction requirements if a department inspection determines that a minimum slash hazard does not exist; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 279 in (3) in middle of second sentence substituted "15 days" for "10 days" and after "demand" inserted language regarding automatic forfeiture of bond to cover cost and expenses of reducing or managing fire hazard plus penalty and in third sentence at beginning inserted "If the bond is insufficient to cover the cost, expenses, and penalty", after "department" substituted "may" for "shall", and at end substituted "cost, expenses, and penalty" for "debt"; inserted (4) authorizing department to require showing of cause why agreement or exemption certificate should not be withheld; inserted (5) authorizing department to withhold agreement or exemption certificate for 3 years for insufficient showing of cause; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 10, Ch. 279, L. 1999, was a severability clause.

Applicability: Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

1989 Amendment: In first sentence of (1), after "properly", substituted "reduce or manage the fire hazard" for "dispose of slash", after "76-13-408" deleted "and is engaged or is about to engage, either for himself or for another, in cutting timber or other forest products and thereby creates a fire hazard", and after "further" substituted "cutting, clearing, and construction" for "timber harvesting"; near beginning of (2), after "76-13-408", deleted "and has cut any forest products", near middle, after "authorize the", substituted "fire hazard reduction or management" for "disposal of the slash", after "expense" inserted "of the contractor or", and near end, before "fire", substituted "unabated" for "undisposed of"; near beginning of first sentence of (3) substituted "fire hazard reduction or management work" for "disposal", after "expense of the" substituted "work" for "disposal", and at end inserted "and upon the real and personal property of the contractor"; and made minor change in phraseology. Amendment effective July 1, 1989.

Administrative Rules

ARM 36.11.224 Residential structures and public campgrounds SMA.
ARM 36.11.225 High value communications structures and powerlines SMA.
ARM 36.11.226 Precommercial thinning units SMA.
ARM 36.11.227 Steep slope/partial cut units SMA.
ARM 36.11.228 Helicopter logging SMA.
ARM 36.11.229 Wet areas and areas with highly erodible soils SMA.
ARM 36.11.230 Slash retention sites SMA.

76-13-411. Certificate of clearance.

Compiler's Comments

1999 Amendment: Chapter 279 in middle before "hazard" inserted "fire" and after "issued" substituted "a certificate of clearance" for "a certification of clearance". Amendment effective July 1, 1999.

Severability: Section 10, Ch. 279, L. 1999, was a severability clause.

Applicability: Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

1989 Amendment: Substituted language concerning Department determination of compliance for former section that read: "(1) A person who has entered into a contract with the department for the reduction or management of any fire hazard, upon payment of the contract price in accordance with the terms of the contract and the full compliance with the terms of the contract by the person, shall be granted a certification of clearance by the department and be relieved of any and all further liability and responsibility for the removal or reduction of the fire hazard. The department may require that a cash bond, equivalent to the contract price and conditioned upon the faithful performance of the contract, be deposited by the person with the department.

(2) The department shall not file for record any lien against the property of any person who has been issued a certification of compliance with 76-13-408 and 76-13-409 covering the property." Amendment effective July 1, 1989.

76-13-412. Violations.

Compiler's Comments

1999 Amendment: Chapter 279 in middle inserted "except 76-13-408(4)". Amendment effective July 1, 1999.

Severability: Section 10, Ch. 279, L. 1999, was a severability clause.

Applicability: Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

76-13-413. Failure to submit withholding — remedy.

Compiler's Comments

1989 Amendment: Near beginning of first sentence of (1), after "money", inserted "and required reports", after "15th day of" substituted "the following" for "each", near middle, after "notified by", deleted "registered or", and near end, after "money", inserted "and reports" and in second sentence, after "department", inserted "may initiate a lien upon the real property of the purchaser and" and at end substituted "and all required reports are submitted" for "or

satisfactory arrangements for payments are made"; near beginning of (2), after "payment", substituted "and reports are not received by the department" for "is not made", after "5% of the" inserted "payment", and in middle of second sentence, after "amount due", inserted "or the reports"; inserted (3) relating to consideration of withheld money as excise taxes; and made minor changes in phraseology. Amendment effective July 1, 1989.

1981 Amendment: Changed "76-13-407" to "76-13-409" near the beginning of (1).

76-13-414. Fees.

Compiler's Comments

1999 Amendment: Chapter 279 inserted (1)(c) requiring payment by person conducting work or purchaser if forest products other than logs are cut, prohibiting assessment exceeding $20,000 a year, and requiring deposit of money in forestry extension service account; in middle of (3)(a) before "administration" inserted "direct" and after "shall" inserted "submit a detailed bill"; at end of second sentence in (3)(b) substituted "agreement" for "attachment"; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 10, Ch. 279, L. 1999, was a severability clause.

Applicability: Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

1997 Amendment: Chapter 27 in (3)(c), in second sentence and in two places in third sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective February 21, 1997.

1991 Amendment: In (3)(a), after "master fire", inserted "hazard"; inserted (3)(b) and (3)(c) requiring annual payment of assessment for cutting certain forest products; and made minor changes in style. Amendment effective April 23, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 577, L. 1991, provided: "The legislature has committed the state of Montana to a course of voluntary compliance with best management practices for forestry. The educational programs and expertise of the Montana state university [now Montana state university-Bozeman] forestry extension program are critical to the effectiveness and success of this approach. However, the forestry extension program requires the addition of a second extension forester to serve the needs of the state's commercial and 11,000 nonindustrial private forest landowners and to ensure protection of water quality and proper management of the state's forested lands.

The legislature believes that the extension service and the forest products industry should be equal partners in the continuation and the expansion of the forestry extension program. The forest products industry, as provided in 76-13-408 and 76-13-414, has committed $60,000 annually for the purpose of funding one additional extension forester position and one administrative position. This additional funding is intended to supplement the existing federal funding for extension forestry, and the legislature strongly urges the Montana state university [now Montana state university-Bozeman] extension program to match these commitments by earmarking $54,000 annually for the extension service's forestry and natural resources program."

Applicability: Section 5, Ch. 577, L. 1991, provided: "[This act] applies to forest products cut after June 30, 1991."

Effective Date: Section 16, Ch. 513, L. 1989, provided that this section is effective July 1, 1989.

76-13-415. Forestry extension service account — purpose — appropriation.

Compiler's Comments

1999 Amendment: Chapter 279 in (2)(a) substituted "76-13-414(2)(c)" for "76-13-408(3)"; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 10, Ch. 279, L. 1999, was a severability clause.

Applicability: Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

1995 Amendment: Chapter 418 in (2)(c), after "department", deleted "of state lands". Amendment effective July 1, 1995.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula" and "Montana state university" to "Montana state university-Bozeman".

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Statement of Intent: The statement of intent attached to Ch. 577, L. 1991, provided: "The legislature has committed the state of Montana to a course of voluntary compliance with best management practices for forestry. The educational programs and expertise of the Montana state university [now Montana state university-Bozeman] forestry extension program are critical to the effectiveness and success of this approach. However, the forestry extension program requires the addition of a second extension forester to serve the needs of the state's commercial and 11,000 nonindustrial private forest landowners and to ensure protection of water quality and proper management of the state's forested lands.

The legislature believes that the extension service and the forest products industry should be equal partners in the continuation and the expansion of the forestry extension program. The forest products industry, as provided in 76-13-408 and 76-13-414, has committed $60,000 annually for the purpose of funding one additional extension forester position and one administrative position. This additional funding is intended to supplement the existing federal funding for extension forestry, and the legislature strongly urges the Montana state university [now Montana state university-Bozeman] extension program to match these commitments by earmarking $54,000 annually for the extension service's forestry and natural resources program."

Effective Date: Section 4, Ch. 577, L. 1991, provided that this section is effective on passage and approval. Approved April 23, 1991.

Applicability: Section 5, Ch. 577, L. 1991, provided: "[This act] applies to forest products cut after June 30, 1991."

Part 6
Transportation of Coniferous Trees

76-13-601. Unlawful transportation of trees and boughs.

Compiler's Comments

1995 Amendment: Chapter 418 at end of (4) substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1989 Amendment: In (4) changed "patrolman" to "patrol officer".

1987 Amendment: Inserted (4) requiring bill of sale or written authorization for transport of trees to be exhibited upon request of law enforcement officials, game warden, Department of Highways employee, or Department of State Lands agent.

1983 Amendment: In (1), near beginning changed "highways of this state" to "ways of this state", and decreased number of trees that may be transported from 10 to 5; and inserted (3) prohibiting transport on ways of state of more than 200 pounds of boughs from coniferous trees without written authorization of boughs owner; (5), defining ways of this state, was enacted as a separate section but codified as part of this section.

Collateral References

52 Am. Jur. 2d Logs and Timber §§61 through 66.

CHAPTER 14
RANGELAND RESOURCES

Part 1
Rangeland Management

Part Law Review Articles

The Comb Wash Case: The Rule of Law Comes to the Public Rangelands, Feller, 17 Pub. Land & Resources L. Rev. 25 (1996).

A Comment on the Wilderness Debate: A Rancher's View, Jackson, 29 Nat. Resources J. 843 (1989).

Rancher Stewardship on Public Ranges: A Recent Court Decision, Huffaker & Gardner, 27 Nat. Resources J. 887 (1987).

The Law of Public Rangeland Management III: A Survey of Creeping Regulation at the Periphery, 1934-1982, Coggins, 13 Envtl. L. 295 (1983).

76-14-103. Definitions.

Compiler's Comments

1983 Amendment: Inserted definitions of person, range condition, and tame pasture.

76-14-106. Duties of rangeland resources committee.

Compiler's Comments

1985 Amendment: Inserted (2) authorizing Committee to consult with state and federal agencies and University System in performance of duties.

76-14-112. Rangeland improvement loan special revenue account.

Compiler's Comments

1991 Amendment: Near beginning of (2), after "account", deleted "$185,000 for the biennium ending June 30, 1989, from the renewable resource development account created in 90-2-125".

1987 Amendment: In (2) substituted "$185,000 for the biennium ending June 30, 1989, from the renewable resource development account created in 90-2-125" for "15% of the total amount of renewable resource development grants and loans as provided by 90-2-113".

1983 Amendment: In (1), substituted "special revenue account" for "earmarked account" and substituted "state special revenue fund" for "earmarked revenue fund".

76-14-113. Eligibility for loans.

Compiler's Comments

1997 Amendment: Chapter 42 in (3), at end, substituted "natural resources conservation service" for "soil conservation service". Amendment effective March 12, 1997.

76-14-116. Rules.

Compiler's Comments

Statement of Intent: The statement of intent attached to HB 486 (Ch. 171, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] in Section 7 [76-14-116].

The intent is to provide the Department with the authority to adopt those rules necessary to administer the Rangeland Improvement Loan Program. This authority is limited by Section 7 to adopting rules prescribing the form and content of applications for loans and the required conservation plan; to adopting rules governing the application, implementation, and interpretation of the criteria for awarding loans and of the procedure for the review of applications by conservation district supervisors, the committee, and the department; to adopting rules providing for the servicing of loans including arrangements for obtaining security interests and the establishment of reasonable fees or charges to be made; to adopting rules providing for the confidentiality of financial statements submitted; and, to adopting rules describing the terms and conditions for making loans."

CHAPTER 15
CONSERVATION DISTRICTS

Chapter Compiler's Comments

Short Title Not Codified: Section 76-101, R.C.M. 1947, a short title for an act, was not codified because of multiple changes in the original act. The section was not repealed and is valid law. Citation may be made to sec. 1, Ch. 72, L. 1939, as amended by sec. 1, Ch. 73, L. 1961.

Implied Repealer Not Codified: Section 76-116, R.C.M. 1947, purporting to repeal all provisions of law inconsistent with this act, was not codified. The section was not repealed and is valid law. Citation may be made to sec. 17, Ch. 72, L. 1939.

Chapter Administrative Rules
Title 36, chapter 6, ARM Soil conservation districts.

Chapter Law Review Articles
Attorneys' Guide to Montana Conservation Easements, Knight & Dye, 42 Mont. L. Rev. 21 (1981).

Chapter Collateral References
Conservancy Districts, Legislative Council, 1966.

Part 1
General Provisions

76-15-101. Legislative determinations.

Collateral References
Agriculture *key* 1, 3; Statutes *key* 179.
3 C.J.S. Agriculture §§2 through 4, 25, 31, 38; 82 C.J.S. Statutes §315.
3 Am. Jur. 2d Agriculture §23.
Validity of statutes, ordinances, or regulations for protection of vegetation against disease or infection. 70 ALR 2d 852.
Constitutionality of statute limiting or controlling exploitation or waste of natural resources. 24 ALR 307, supplemented by 78 ALR 834; subdivision III superseded by 13 ALR 2d 1095.

76-15-102. Declaration of policy.

Collateral References
Statutes *key* 179.
82 C.J.S. Statutes §315.

76-15-103. Definitions.

Compiler's Comments
1995 Amendment: Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302"; in definition of United States substituted "natural resource conservation service" for "soil conservation service"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Case Notes
Scope of Writ of Prohibition — Writ Inappropriate to Stop Conservation District From Making Initial Determination of Whether Body of Water Considered Natural Perennial Flowing Stream When Other Remedies Exist: After unsuccessfully attempting to have the Department of Natural Resources and Conservation, the Department of Fish, Wildlife, and Parks, and the Department of Environmental Quality make the determination as to whether a slough east of Victor was a perennial flowing stream and thus subject to The Natural Streambed and Land Preservation Act of 1975, the county conservation district decided to use a public hearing process to make the determination. Plaintiffs sought a writ of prohibition to stop the conservation district from determining the status of the slough. After the writ was denied in District Court, plaintiffs submitted it to the Supreme Court. A writ of prohibition serves to stop an entity exercising judicial functions from acting when the proceedings are beyond that entity's jurisdiction and are clearly unlawful, but should not replace an appeal or perform the function of a writ of review. A writ of prohibition is justified only by extreme necessity when the grievance cannot be redressed by ordinary proceedings at law, in equity, or by appeal. The existence of another remedy, even if inconvenient or indirect, prevents a party from seeking a writ of prohibition. In the interest of both judicial economy and agency efficiency, an exhaustion of administrative remedies allows a governmental agency to make a factual record and to correct its own errors within its specific expertise before a court interferes. After noting that the Act does not specifically authorize a conservation district or any other entity with the power to classify bodies of water as streams, the Supreme Court found that the conservation district was simply attempting to apply the Legislature's articulated requirement of a natural perennial flowing stream and declined to interfere with the conservation district's ability to initially determine the scope of its jurisdiction

and exercise its expertise to decide whether the slough was in fact a stream. Further, once the status of the slough was determined, there was nothing to prevent plaintiffs from seeking judicial review of the conservation district's declaratory rulings. Because extreme necessity and lack of redress did not exist, a writ of prohibition was inappropriate to stop the conservation district from making the initial ruling on the status of the slough, so the writ was denied. Bitterroot River Protection Ass'n, Inc. v. Bitterroot Conserv. District, 2002 MT 66, 309 M 207, 45 P3d 24 (2002).

Attorney General's Opinions

Cost of Election — Conservation District Supervisor: Conservation district supervisors were public officers within the meaning of 13-12-213 (now repealed). The county in which voting for a conservation district supervisor election occurs was responsible for paying the expenses incurred by the election. 38 A.G. Op. 25 (1979).

Collateral References

Agriculture *key* 3.
3 C.J.S. Agriculture §§8 through 10.

76-15-104. Adjournment of hearings.

Collateral References

Agriculture *key* 2.
3 C.J.S. Agriculture §6.

Part 2
Creation of Conservation Districts

Part Attorney General's Opinions

Effect of Unification of City-County Government Upon Existing Conservation District: The geographical territory of the city of Butte was not incorporated into the Mile High Conservation District by approval of a consolidated form of local government for Butte and the county of Silver Bow. If Butte is to be included, the appropriate statutory procedure must be followed. 37 A.G. Op. 20 (1977).

76-15-201. Petition to create conservation district.

Compiler's Comments

1995 Amendment: Chapter 418 in four places substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: At beginning of (1) substituted "Any 10% of the qualified electors" for "Any 10 qualified electors".

76-15-203. Hearing procedure if additional territory to be included.

Compiler's Comments

1995 Amendment: Chapter 418 in two places substituted "department" for "board" and after "hearing and" deleted "the department"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-204. Determination of need for district.

Compiler's Comments

1995 Amendment: Chapter 418 in two places substituted "department" for "board"; near middle of (1), after "available", deleted "to the department or the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-205. Criteria for determining need.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-206. Determination of administrative practicability of district.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-207. Referendum on question of creating district.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning of (1) and near end of (2) substituted "department" for "board"; near middle of (1), before "finding", deleted "board's"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-208. Administration of hearings and referenda.

Administrative Rules

ARM 36.6.101 Referendum on creation of district.

76-15-209. Procedure following referendum.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), after "referendum, and", deleted "the board"; near beginning of (2) and two places in (3) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.6.101 Referendum on creation of district.

76-15-210. Criteria for determining administrative practicability.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning of (1) and near beginning of (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-211. Appointment of supervisors.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-212. Submission of application by appointed supervisors.

Compiler's Comments

1995 Amendment: Chapter 418 near end of (1)(a), near beginning of (3)(a)(ii), near end of (3)(a)(iv), and at end of (3)(b) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-213. Processing of application by secretary of state.

Compiler's Comments

1995 Amendment: Chapter 418 in (2), at end of first sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-215. District as governmental subdivision and public body.

Attorney General's Opinions

Soil Conservation District Employees as County Employees: Although soil conservation districts are distinct governmental entities covering more than one county and the statutes governing the districts do not expressly designate district personnel as county employees to be included on the county payroll, if a county does include district personnel on its payroll, giving them the same benefits received by other county employees, to that extent district personnel must be considered county employees. 39 A.G. Op. 38 (1981).

Conflict With Powers of Conservation Districts: Title 75, ch. 7, on lakeshore protection does not conflict with the statutory powers of conservation districts. 36 A.G. Op. 97 (1976).

Jurisdiction Over State Waters: State conservation districts do not have jurisdiction over state waters. 36 A.G. Op. 97 (1976).

76-15-216. Limitation on territory included in district.

Compiler's Comments

1995 Amendment: Chapter 418 near middle substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Attorney General's Opinions

Effect of Unification of City-County Government Upon Existing Conservation District: The geographical territory of the city of Butte was not incorporated into the Mile High Conservation District by approval of a consolidated form of local government for Butte and the county of Silver Bow. If Butte is to be included, the appropriate statutory procedure must be followed. 37 A.G. Op. 20 (1977).

Part 3
Administration of Conservation Districts

76-15-301. Establishment and reorganization of supervisor areas.

Compiler's Comments

1995 Amendment: Chapter 418 in (2) substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: In (1)(b) inserted second and third sentences requiring that certified copy of ordinance be submitted to affected county election administrator and that sufficient supervisors-at-large be elected if less than five supervisor areas are established.

1983 Amendments: Chapter 173 enacted (2), allowing Board to reorganize district into seven supervisor areas in district containing no incorporated municipalities, as a separate section. The Code Commissioner codified it as a subsection.

Chapter 473, in (1)(a), before "five", inserted "no more than"; and inserted (1)(b) concerning representation of supervisor areas.

76-15-302. Nominations for supervisor.

Compiler's Comments

1985 Amendment: In (1) near end of second sentence after "boundaries of the district", deleted "or supervisor areas thereof"; in first sentence of (2) before "for supervisor", substituted language regarding required notice of a nominating election if more than twice the number of candidates are nominated than the number to be elected for "If more than six candidates are nominated, the registrar shall give due notice of a nominating election to be held for the selection of six candidates".

Compliance With Act: Section 4, Ch. 18, L. 1977, read: "For the purposes of bringing existing districts into compliance with this act by the time of the 1978 general elections the terms of office for all supervisors shall expire upon passage and approval of this act. However, each supervisor shall remain in office until his successor has been elected and has qualified in accordance with this act. For purposes of the 1978 general election three supervisors shall be elected for a 4-year term and the remaining two supervisors elected for a 2-year term. No action or undertaking of a district may be invalidated or voided for failure to comply with the amendatory provisions of this act prior to January 1, 1979."

76-15-303. General election — election by acclamation — appointment.

Compiler's Comments

1999 Amendment: Chapter 254 inserted third sentence in (5)(c) regarding term of office for supervisor elected by acclamation or appointed; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 184 in (2), at beginning, inserted exception clause; inserted (5) relating to situations in which the number of candidates is equal to or less than the number of positions to be elected, when the governing body may require an election to be held, and what happens if an election is not held; and made minor changes in style.

1985 Amendments: Chapter 76 at beginning of (2), substituted "The candidate or, if more than one supervisor position is to be filled by the general election, the candidates" for "The three candidates"; near beginning of (3) substituted "the" for "all" before "individuals" and after "nominated" deleted "by petition (if six or fewer) or by election"; and in (4) at end of first sentence substituted "if necessary" for "in which more than four candidates are nominated".

Chapter 576 in (3) after "shall be printed", deleted "arranged in a rotating order of the surnames".

Compliance With Act: Section 4, Ch. 18, L. 1977, read: "For the purposes of bringing existing districts into compliance with this act by the time of the 1978 general elections the terms of office for all supervisors shall expire upon passage and approval of this act. However, each supervisor shall remain in office until his successor has been elected and has qualified in accordance with this act. For purposes of the 1978 general election three supervisors shall be elected for a 4-year term and the remaining two supervisors elected for a 2-year term. No action or undertaking of a district may be invalidated or voided for failure to comply with the amendatory provisions of this act prior to January 1, 1979."

Attorney General's Opinions

Cost of Election — Conservation District Supervisor: Conservation District Supervisors were public officers within the meaning of 13-12-213 (now repealed). The county in which voting for a Conservation District Supervisor election occurs was responsible for paying the expenses incurred by the election. 38 A.G. Op. 25 (1979).

Conservation District Elections: Candidates for Supervisor must run at large in the entire district in both elections, each qualified elector voting for 10 candidates in the nominating election and five candidates in the general election when all five Supervisors will be elected. Ten candidates may be nominated to run in the general election when five Supervisors will be elected, and a reasonable method of determining recipients of 4-year terms must be chosen by the registrar and made available to candidates and electors prior to election. 37 A.G. Op. 137 (1978).

Election of Conservation District Supervisors to Be by Separate Ballot: Since there are no partisan designations in a Conservation District Supervisor election, a separate ballot is necessary

if the nominating election is held in conjunction with the state primary election. A separate ballot would also be necessary in a general election if the registrar determines that within his jurisdiction some of the qualified electors in the general election are ineligible to vote in the Supervisor election. A Supervisor, incidentally, must reside in the district wherein he is nominated and elected. 37 A.G. Op. 131 (1978).

Filing Fees: Filing fees are not required for election to the office of Conservation District Supervisor. 37 A.G. Op. 131 (1978).

76-15-304. Election of supervisors.

Attorney General's Opinions

Election in Even-Numbered Years: Officers of conservation districts shall be elected at the general election held in November of even-numbered years. 38 A.G. Op. 74 (1980).

Cost of Election — Conservation District Supervisor: Conservation District Supervisors were public officers within the meaning of 13-12-213 (now repealed). The county in which voting for a Conservation District Supervisor election occurs was responsible for paying the expenses incurred by the election. 38 A.G. Op. 25 (1979).

Conservation District Elections: Candidates for Supervisor must run at large in the entire district in both elections, each qualified elector voting for 10 candidates in the nominating election and five candidates in the general election when all five Supervisors will be elected. Ten candidates may be nominated to run in the general election when five Supervisors will be elected, and a reasonable method of determining recipients of 4-year terms must be chosen by the registrar and made available to candidates and electors prior to election. 37 A.G. Op. 137 (1978).

Election of Conservation District Supervisors to Be by Separate Ballot: Since there are no partisan designations in a Conservation District Supervisor election, a separate ballot is necessary if the nominating election is held in conjunction with the state primary election. A separate ballot would also be necessary in a general election if the registrar determines that within his jurisdiction some of the qualified electors in the general election are ineligible to vote in the Supervisor election. A Supervisor, incidentally, must reside in the district wherein he is nominated and elected. 37 A.G. Op. 131 (1978).

Filing Fees: Filing fees are not required for election to the office of Conservation District Supervisor. 37 A.G. Op. 131 (1978).

76-15-305. Transition to seven supervisors.

Compiler's Comments

1995 Amendment: Chapter 418 near end of (1) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-311. Governing body of district.

Compiler's Comments

1983 Amendments: Chapter 173, at end of (1), added clause referring to reorganization of conservation district.

Chapter 473 inserted (3) authorizing appointment of associate supervisors necessary to advise board of supervisors on operation of conservation district.

Implementation: The provisions that the term of office of appointed Supervisors be 3 years (in subsection (2)(a)) and that the term of office of each Supervisor be 4 years (in the first sentence of 76-15-312) so appeared in the 1977 act.

Section 4, Ch. 18, L. 1977, provided for the expiration of present directors' terms of office and for the election of directors in 1978 to bring existing districts into compliance with 1977 amendment.

76-15-312. Term of office and vacancies.

Compiler's Comments

1989 Amendment: Inserted (2) listing events that create a vacancy in office; and inserted (3) relating to method for excusing attendance at a meeting.

Implementation:

The provisions that the term of office of appointed Supervisors be 3 years (in 76-15-311(2)(a)) and that the term of office of each Supervisor be 4 years (in the first sentence of this section) so appeared in the 1977 act.

Section 4, Ch. 18, L. 1977, provided for the expiration of present directors' terms of office and for the election of directors in 1978 to bring existing districts into compliance with 1977 amendment.

76-15-313. Operation of supervisors.

Compiler's Comments

1983 Amendment: In (2), inserted "except as otherwise specifically provided"; and in (3) in first sentence, substituted language concerning compensation for "Except for special projects in which funds are available, a supervisor may not receive compensation for his services, but he is entitled to expenses, including travel expenses as provided for in 2-18-501 through 2-18-503, incurred in the discharge of his duties.", and inserted last sentence prohibiting compensation for regularly scheduled board of supervisors' meeting.

76-15-314. Removal of a supervisor.

Compiler's Comments

1995 Amendment: Chapter 418 near middle substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1989 Amendment: Near beginning, after "board", inserted reference to a vacancy.

76-15-317. Cooperation with state agencies.

Collateral References

Counties *key* 106; States *key* 87.

20 C.J.S. Counties §147.

76-15-319. Legal assistance.

Compiler's Comments

1995 Amendment: Chapter 418 at end of (2), after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: In (2), after "because of" deleted "lack of staff or".

Attorney General's Opinions

County Attorney to Provide Legal Services: Sections 7-4-2711 and 76-15-319 require the County Attorney to provide upon request such legal services as the conservation district may require. 38 A.G. Op. 73 (1980).

State Conservation Districts — Legal Representation: The Attorney General is responsible for civil legal representation upon request of a state conservation district, but private counsel may be employed as Special Assistant Attorneys General. The compensation may be set by the Supervisors and becomes a district obligation. County Attorneys' duty to represent districts extends only to giving their opinion in writing to the officers of the district on matters pertaining to their offices. (Opinion rendered prior to 1979 amendment.) 37 A.G. Op. 76 (1977).

76-15-320. Legal status of district — immunity.

Compiler's Comments

1999 Amendment: Chapter 23 inserted (1)(b) relating to satisfaction of judgment or settlement; inserted (1)(e) concerning implementation of Title 75, chapter 7, part 1; inserted (2) concerning immunity from suit and exceptions; and made minor changes in style. Amendment effective February 18, 1999.

Retroactive Applicability: Section 7, Ch. 23, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences prior to [the effective date of this act] [effective February 18, 1999] for which a cause of action has not been filed and served upon a conservation district."

Attorney General's Opinions

Conflict With Powers of Conservation Districts: Title 75, ch. 7, on lakeshore protection does not conflict with the statutory powers of conservation districts. 36 A.G. Op. 97 (1976).

Jurisdiction Over State Waters: State conservation districts do not have jurisdiction over state waters. 36 A.G. Op. 97 (1976).

76-15-321. Rulemaking authority.

Attorney General's Opinions

Conflict With Powers of Conservation Districts: Title 75, ch. 7, on lakeshore protection does not conflict with the statutory powers of conservation districts. 36 A.G. Op. 97 (1976).

Jurisdiction Over State Waters: State conservation districts do not have jurisdiction over state waters. 36 A.G. Op. 97 (1976).

Part 4
Operation of Conservation Districts

76-15-403. Operation of projects and works.

Compiler's Comments

1999 Amendment: Chapter 23 in (3) at end inserted language of proviso regarding conditions supervisors consider necessary; inserted (9) concerning execution of district duties to implement Title 75, chapter 7, part 1; inserted (10) concerning execution of projects for specified purposes; and made minor changes in style. Amendment effective February 18, 1999.

Retroactive Applicability: Section 7, Ch. 23, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences prior to [the effective date of this act] [effective February 18, 1999] for which a cause of action has not been filed and served upon a conservation district."

76-15-407. Selection and acquisition of water storage sites.

Compiler's Comments

Severability Clause: Section 5, Ch. 418, L. 1977, was a severability clause.

76-15-408. Funding of storage reservoirs.

Compiler's Comments

1995 Amendment: Chapter 418 in second sentence, after "department", deleted "of natural resources and conservation". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Severability Clause: Section 5, Ch. 418, L. 1977, was a severability clause.

76-15-409. Purposes of off-stream storage.

Compiler's Comments

Severability Clause: Section 5, Ch. 418, L. 1977, was a severability clause.

76-15-410. Disposition of excess water.

Compiler's Comments

Severability Clause: Section 5, Ch. 418, L. 1977, was a severability clause.

Part 5
Financial Aspects of Conservation Districts
Loan Program

Part Attorney General's Opinions

Soil Conservation District Employees as County Employees: Although soil conservation districts are distinct governmental entities covering more than one county and the statutes governing the districts do not expressly designate district personnel as county employees to be included on the county payroll, if a county does include district personnel on its payroll, giving them the same benefits received by other county employees, to that extent district personnel must be considered county employees. 39 A.G. Op. 38 (1981).

Election in Even-Numbered Years: Officers of conservation districts shall be elected at the general election held in November of even-numbered years, since conservation districts may be

multicounty districts and 13-1-104(1) provides that elections in multicounty districts be held in even-numbered years. 38 A.G. Op. 74 (1980).

76-15-501. Financial management.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 23 inserted (7) regarding funds, grants, and loans; and made minor changes in style. Amendment effective February 18, 1999.

Chapter 584 in (4) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Retroactive Applicability: Section 7, Ch. 23, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences prior to [the effective date of this act] [effective February 18, 1999] for which a cause of action has not been filed and served upon a conservation district."

Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

1983 Amendment: Inserted (6) authorizing supervisors of conservation district to establish conservation practice loan program.

Attorney General's Opinions

Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District: Despite the fact that 76-15-516 purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

76-15-502. Allocation of state funds among districts.

Compiler's Comments

1985 Amendment: In (2) after "76-15-503", deleted "and 76-15-504".

1983 Amendment: At end of (1), deleted "in accordance with the procedure specified in subsections (2) and (3) of this section"; and deleted former (2), which read: "(a) Seventy-five percent of all money which may be appropriated to pay the administrative and other expenses of conservation districts shall be allocated by the department among all the districts organized or to be organized within the ensuing biennial fiscal period under this chapter in direct proportion to the total acreage of land within each district.

(b) The remaining 25% of the money shall be allocated by the department among the districts on such basis of allocation as is fair, reasonable, and in the public interest, giving due consideration to the greater relative expense of carrying on operations within the particular districts because of such factors as unusual topography, unusual severity of erosion, special difficulty of carrying on operations, special volume of work to be done, and the special importance of instituting erosion control operations immediately."

76-15-505. Authorization to borrow money — limitations.

Compiler's Comments

2001 Amendment: Chapter 574 at beginning of (2) inserted "Subject to 15-10-420"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 418 in two places in (1) and in (2), after "board", inserted "of supervisors"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Attorney General's Opinions

Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District: Despite the fact that 76-15-516 purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be

read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

76-15-506. Bonds authorized — election.

Attorney General's Opinions

Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District: Despite the fact that 76-15-516 purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

76-15-507. Investment of funds.

Compiler's Comments

1983 Amendment: Substituted "debt service fund" for "sinking fund" in two places.

76-15-508. Management of surplus funds.

Compiler's Comments

1991 Amendment: Near beginning of first sentence, after "funds of the district", deleted "except county tax funds". Amendment effective July 1, 1991.

76-15-511. Estimate of money to be raised by assessment.

Collateral References

Agriculture *key* 1.
3 C.J.S. Agriculture §2.

76-15-512. Expenses to be covered by estimate.

Compiler's Comments

1983 Amendment: After "expenses of the district" inserted last clause relating to loan program.

76-15-515. Maximum regular assessment.

Compiler's Comments

1993 Amendment: Chapter 573 at beginning inserted exception clause; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: At end of first sentence, deleted ", except that cities that voted to be included in a district prior to July 1, 1971, shall be excluded from the district by a majority vote of the council."

Attorney General's Opinions

Conservation Assessments Subject to Property Tax Limitations: Regular and special assessments by conservation districts are subject to the property tax limitations in Title 15, ch. 10, part 4. 42 A.G. Op. 73 (1988).

Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District: Despite the fact that 76-15-516 purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

Taxation — Definition of Real Property: "Real property" for purposes of taxation means both real estate and improvements. 37 A.G. Op. 76 (1977).

76-15-516. Levy of regular and special assessments.

Compiler's Comments

2001 Amendment: Chapter 574 in (3) near end of first sentence after "assessment" substituted "on the taxable value of all taxable property located" for "not to exceed 3 mills on the taxable real property". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 in three places inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Amendment: Chapter 573 inserted (2) relating to a conservation district special administrative assessment on taxable real property; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: In (1), at end of first sentence, deleted ", except that cities that voted to be included in a district prior to July 1, 1971, shall be excluded from the district by a majority vote of the council".

Attorney General's Opinions

Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District: Despite the fact that this section purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

76-15-517. Computation of rate of assessment.

Compiler's Comments

1983 Amendment: In first sentence, after "district", deleted ", except that cities that voted to be included in a district prior to July 1, 1971, shall be excluded from the district by a majority vote of the council".

76-15-518. Certification of assessment to department of revenue — entry on property tax record.

Compiler's Comments

1999 Amendment: Chapter 584 inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Special Session Amendment: Chapter 27 in second sentence substituted "department of revenue" for "county assessor of each of the respective counties" and "property tax record of each county" for "assessment roll"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

76-15-523. Depository of district funds.

Compiler's Comments

1983 Amendment: Inserted last sentence authorizing district to receive upon demand all or portion of county district funds for deposit in bank or financial account deemed appropriate by board of supervisors for district operation and administration.

76-15-524. Receipt and crediting of district funds — responsibility on bond.

Compiler's Comments

1997 Amendment: Chapter 141 near middle of first sentence substituted "for conservation practice loan repayments, including principal, interest, if any, administrative fees or charges for loans, and interest paid and collected on deposits or investments" for "for all loan repayments and administrative fees or charges"; and made minor changes in style. Amendment effective March 25, 1997.

Retroactive Applicability: Section 5, Ch. 141, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all loans issued before [the effective date of this act] [effective March 25, 1997] and to all funds that are on deposit in a conservation practice loan account."

1983 Amendment: In first sentence, inserted "and for all loan repayments and administrative fees or charges under a conservation practice loan program".

76-15-527. Purpose of expenditures.

Compiler's Comments

1993 Amendment: Chapter 573 inserted "76-15-531, and 76-15-532" and at end substituted "Title 76, chapter 15" for "76-15-502 and 76-15-503 and for an established conservation practice loan program"; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: Inserted last clause relating to loan program.

76-15-530. Conservation district appropriations — administration.

Compiler's Comments

1995 Amendments: Chapter 418 in (1), in two places, in (2), and in (4), after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 509 in (1), at beginning, deleted "There is a conservation district account in the state special revenue fund of the state treasury. Money is paid into this account under 15-35-108" and after "from" substituted "appropriations of allocations authorized as provided under 15-35-108" for "this account"; in (2), in first sentence, substituted "appropriations referred to in subsection (1)" for "account" and in second sentence, after "distributed", deleted "from the account"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Preamble: The preamble to HB 223 (Ch. 479, L. 1981) provided: "WHEREAS, Montana's Conservation Districts are legal subdivisions of state government responsible under law to develop and carry out long-range programs that will result in the conservation and improvement of the soil and water resources, to provide assistance in the planning and application of conservation measures, and to encourage maximum participation of the general public and all local public and private agencies to fulfill this purpose; and

WHEREAS, Montana's Conservation Districts represent about 14,500 cooperators totaling 43,550,000 acres of farmland and ranchland within their boundaries; and

WHEREAS, districts in urban and developing areas provide soil surveys, water inventories, assistance with waste disposal, and other services to builders, contractors, planning commissions, municipal officials, schools, hospitals, industries, and smaller landowners; and

WHEREAS, two concepts gaining support and understanding are the desirability of decentralized government and the limits of natural resources. In combination, these ideas and the demands on their services have resulted in tremendously magnified responsibilities for conservation districts."

Statement of Intent: The statement of intent attached to HB 223 (Ch. 479, L. 1981) provided: "Because HB 223 directs the Department of Natural Resources and Conservation to adopt rules establishing the form and content of applications and the criteria, terms, and conditions for making grants to conservation districts from the funds appropriated to the conservation districts earmarked revenue account from the allocation of 1% of the coal severance tax, the House Committee on Taxation issues this statement of intent for the purpose of clarifying that authority.

Section 2 of HB 223 provides rulemaking authority in the Department of Natural Resources and Conservation. It is contemplated the rules should address the following:

(a) the form of an application for a grant to a conservation district;

(b) the content that must be included in an application, including but not limited to:

(1) the name of the district;

(2) a statement that the maximum statutory mill levage [sic] has been levied;

(3) the sources of funding the conservation district is receiving that the grant is intended to supplement;

(4) the special project or purpose, including administrative purposes, which must be a recognized purpose for which conservation districts are authorized by law;

(5) a statement of the need for the grant; and

(6) an authorized signature

(c) the criteria under which the department may grant funds, including but not limited to:

(1) the basis of the need for a grant;

(2) the availability of other funding sources;

(3) the type of project or purpose; and

(4) the maximum amount of funding

(d) such terms and conditions that would insure that the grant funds are used for the purposes specified by statute;

(e) such rules as may be necessary to monitor and account for the disbursement and expending of any grant funds."

76-15-531. Special administrative assessment permitted — voter approval.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (1)(a) after "for administrative costs and expenses of the district if" deleted "at a regularly scheduled election or special election" and at end inserted "at an election held as provided in 15-10-425". Amendment effective October 1, 2001.

Chapter 574 in (1)(a) near middle after "assessment" deleted "not to exceed the amount determined under subsection (1)(b) each year", after "district if" deleted "at a regularly scheduled election or special election", and at end inserted "at an election held as provided in 15-10-425"; deleted former (1)(b) that read: "(b) The annual levy authorized by this section may not exceed the difference between the amount raised by the annual mill levy authorized under 76-15-515 and $20,000"; and made minor changes in style. Amendment effective July 1, 2001.

Effective Date: Section 8, Ch. 573, L. 1993, provided that this section is effective July 1, 1993.

76-15-532. Limitations — reduction or repeal of special administrative assessment.

Compiler's Comments

Effective Date: Section 8, Ch. 573, L. 1993, provided that this section is effective July 1, 1993.

76-15-541. Conservation practice loan program — definition.

Compiler's Comments

1997 Amendment: Chapter 42 in (3), at end, substituted "natural resources conservation service" for "soil conservation service". Amendment effective March 12, 1997.

76-15-542. Conservation practice loan account.

Compiler's Comments

1997 Amendment: Chapter 141 in (2), near middle of first sentence after "interest", inserted "if any" and inserted second sentence directing crediting of interest to certain accounts; in (3) inserted second sentence allowing use of interest for general operations of a conservation district; and made minor changes in style. Amendment effective March 25, 1997.

Retroactive Applicability: Section 5, Ch. 141, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all loans issued before [the effective date of this act] [effective March 25, 1997] and to all funds that are on deposit in a conservation practice loan account."

76-15-543. Application for loan.

Compiler's Comments

1997 Amendment: Chapter 42 in (2), at end, substituted "natural resources conservation service" for "soil conservation service". Amendment effective March 12, 1997.

76-15-546. Terms and conditions of loan.

Compiler's Comments

1997 Amendments: Chapter 42 in (4) substituted "natural resources conservation service" for "soil conservation service"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 141 in (3), in middle of second sentence after "closing", deleted "other than administrative costs of the district"; in (4) substituted "United States natural resources conservation service" for "United States soil conservation service"; and made minor changes in style. Amendment effective March 25, 1997.

Retroactive Applicability: Section 5, Ch. 141, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all loans issued before [the effective date of this act] [effective March 25, 1997] and to all funds that are on deposit in a conservation practice loan account."

76-15-547. Rules for loan program.

Compiler's Comments

1997 Amendment: Chapter 141 in introductory clause, after "rules", deleted "in accordance with the Montana Administrative Procedure Act"; and in (6) inserted "if any". Amendment effective March 25, 1997.

Retroactive Applicability: Section 5, Ch. 141, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all loans issued before [the effective date of this act] [effective March 25, 1997] and to all funds that are on deposit in a conservation practice loan account."

Statement of Intent: The statement of intent attached to HB 349 (Ch. 473, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority in section 17 [76-15-547] to conservation districts that elect to establish conservation practice loan programs.

The intent is to provide conservation districts with the authority to adopt those rules necessary to administer conservation practice loan programs. This authority is limited by section 17 [76-15-547] to adopting rules: prescribing the form and content of applications for loans and plans for the resource conservation practice; governing the application, implementation, and interpretation of the criteria and preferences for awarding loans; providing for the servicing of loans, including arrangements for obtaining security interests and the establishment of reasonable fees or charges; providing for the confidentiality of financial statements submitted; prescribing the conditions for making loans; establishing the interest rate for the loans; and determining the type and amount of security interest in real estate that will be accepted and any conditions to be made upon the security interest."

Part 6
Project Areas

76-15-623. Administration of special assessment.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) near middle after "project area" substituted "may" for "shall", after "special assessment" substituted "on the taxable value of all taxable property" for "of the taxable real property", and after "area" deleted "not to exceed 3 mills"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Attorney General's Opinions

Conservation Assessments Subject to Property Tax Limitations: Regular and special assessments by conservation districts are subject to the property tax limitations in Title 15, ch. 10, part 4. 42 A.G. Op. 73 (1988).

Part 7
Land Use Regulations

76-15-701. Adoption of land use regulations.

Attorney General's Opinions

Supervisors' Review of Impact on Land Between Stream Crossings: District Supervisors do not have authority under The Natural Streambed and Land Preservation Act of 1975 (Title 75, ch. 7, part 1) to review the route of a proposed pipeline within the county at places other than stream crossings. This is true even though a lawful review of several stream crossings may amount to a review of the land between the crossings, since the Act and the standards adopted by the Board of Natural Resources and Conservation (functions now transferred to Department of Natural Resources and Conservation) make clear that the review applies only to the stream sites themselves. However, the Supervisors may formulate regulations under this section to address the issue of land use in their jurisdiction. 39 A.G. Op. 2 (1981).

76-15-710. Court procedure after petition is filed.

Compiler's Comments

1985 Amendment: Near end of (3) and (4) increased interest rate from 5% to 10%.

76-15-721. Board of adjustment.

Compiler's Comments

1995 Amendment: Chapter 418 at beginning of fourth sentence of (3) deleted "Members of the board of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: In (5) increased compensation from $4 to $25 per day.

76-15-725. Board decision.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning of (1) and (2), after "board", inserted "of adjustment"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-726. Appeal to district court from board decision.

Compiler's Comments

1995 Amendment: Chapter 418 in two places in (1) and in three places in (2), after "board", inserted "of adjustment"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-727. Court proceedings.

Compiler's Comments

1995 Amendment: Chapter 418 at end of (1), near beginning and end of (2), and in three places in (3), after "board", inserted "of adjustment"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 8
Alteration and Termination of Conservation Districts

76-15-803. Combination or division of districts.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), in seventh sentence near beginning, substituted "department shall determine from the hearing record" for "board of natural resources and conservation upon the record of the hearing shall determine"; in (1), in eighth sentence, and in (2), in three places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-804. Petition to discontinue all or part of district.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), near middle, substituted "requesting the termination of" for "praying that the board terminate"; in (2), after "it", deleted "and the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: In (1), before "qualified electors", changed "any 10" to "10% or more of the".

76-15-806. Decision in case of petition for discontinuance of entire district.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), (2), and (3) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-807. Decision in case of petition for discontinuance of portion of district.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), after "referendum and", deleted "the board"; in (2) and (3) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-808. Criteria for decision on discontinuance.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning of (1) and (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-15-809. Procedure to terminate district.

Compiler's Comments

1995 Amendment: Chapter 418 at beginning of (1) substituted "Upon certification of the department that the department" for "Upon receipt from the department of a certification of the board that the board"; in (3), in two places in first sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 9
Coal Bed Methane Protection Program

76-15-904. Coal bed methane protection account — use.

Compiler's Comments

Termination: Section 10, Ch. 531, L. 2001, provided that subsection (2) of this section terminates June 30, 2011.

CHAPTER 16
GRAZING DISTRICTS

Part 1
General Provisions

Part Law Review Articles

The Comb Wash Case: The Rule of Law Comes to the Public Rangelands, Feller, 17 Pub. Land & Resources L. Rev. 25 (1996).

Livestock Grazing in BLM Wilderness and Wilderness Study Areas, Shepard, 5 J. Envtl. L. & Litigation Ann. 61 (1990).

The Law of Public Rangeland Management III: A Survey of Creeping Regulation at the Periphery, 1934-1982, Coggins, 13 Envtl. L. 295 (1983).

The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power, Coggins, Evans, & Lindberg-Johnson, 12 Envtl. L. 535 (1982).

Part Collateral References

Agriculture *key* 1 through 6.

3 C.J.S. Agriculture §§138 through 158.

3 Am. Jur. 2d Agriculture §§45, 48.

Taylor Grazing Act, 43 U.S.C. §315, et seq.

76-16-101. Short title.

Case Notes

Constitutionality:

This act is not in violation of the Due Process Clauses of the state or federal constitutions. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

Reasonable regulation of the grazing of livestock is proper under the police power of the state. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

This act is not a local or special law in violation of Art. V, sec. 26, 1889 Mont. Const. (now Art. V, sec. 12, 1972 Mont. Const.). Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

The privilege of grazing livestock on property not belonging to the owner of the cattle is not a vested property right but a revocable license. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

This act does not treat nonmembers differently from members under like circumstances. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

This act does not violate the 14th amendment to the United States Constitution by discriminating against small landowners, by denying equal protection of the laws to nonmembers owning land in the district, by denying equal protection of the laws to operators owning land outside the district, or in being unreasonably discriminatory in providing for the cost of constructing and maintaining fences. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

Collateral References

Agriculture *key* 1 through 3, 6.

3 C.J.S. Agriculture §§2, 6, 8, 9; 43 C.J.S. Industrial Co-operative Societies §2.

3 Am. Jur. 2d Agriculture §§45, 48.

76-16-102. Purpose.

Compiler's Comments

2001 Amendment: Chapter 31 near beginning after "nonprofit" substituted "state districts" for "grazing districts" and at end after "commensurate" deleted "ranch"; and made minor changes in style. Amendment effective March 13, 2001.

Federal Statute: The Taylor Grazing Act referred to in this section is codified at 43 U.S.C. 315 through 315r.

Case Notes

Grazing District Not Required to Purchase or Substitute Lands to Allow Full Exercise of Grazing Preferences: The statutory language authorizing a grazing district to purchase or substitute lands in order to provide sufficient land under district control upon which members can exercise their grazing preferences is clearly discretionary, and the failure of a district to do so does not in itself constitute an abuse of discretion or breach of a fiduciary duty. The proper method for remedying such a loss of land is found in 76-16-403. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

76-16-103. Definitions.

Compiler's Comments

2001 Amendment: Chapter 31 at end of definition of animal unit month after "local" substituted "state district" for "grazing district"; in definition of dependent commensurate property in (c) after "range" deleted "for a period of any 3 years or for any 2 consecutive years in

the 5-year period immediately preceding June 28, 1934, or in the case of districts organized after March 15, 1945" and substituted "state district" for "districts"; inserted definition of directors; near end of definition of grazing preference after "interest in" substituted "state district assets" for "grazing district assets"; in definition of range after "within a" substituted "state district" for "grazing district"; and made minor changes in style. Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 inserted definition of animal unit month; inserted definition of commission; in definition of grazing preference in first sentence inserted "expressed in animal unit months" and inserted second sentence regarding member's proportionate interest in grazing district assets; inserted definition of secretary; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendment Uncodified — Early Termination — Section Uncodified: Section 2, Ch. 244, L. 1997, inserted new (1) that provided: "(1) "Advisory committee" means the Montana grass conservation advisory committee created in [section 1] [not codified]"; and made minor changes in style. Section 5, Ch. 244, L. 1997, provided: "[This act] terminates January 1, 1999." Because of the early termination date, the Code Commissioner has determined not to codify the amendment made by sec. 2, Ch. 244, L. 1997, and [section 1]. Section 1 provided: "**Section 1. Montana grass conservation advisory committee established.** (1) There is a Montana grass conservation advisory committee.

(2) The director of the department, giving equal consideration to both large and small operators, shall appoint six people to serve on the advisory committee and shall serve as an ex officio member of the committee. The committee must include:

(a) two members, one member who must be a member of the board of directors of the Montana association of state grazing districts and one member who is either an officer or serves on the board of directors of a state district;

(b) two members who hold active preference rights within state districts; and

(c) two members who are secretaries for state districts.

(3) The advisory committee shall:

(a) elect from its membership a presiding officer and a vice-presiding officer;

(b) convene meetings as the members consider appropriate and solicit comments and suggestions from state district boards of directors, district members, and the public;

(c) provide notices of all meetings to the state district secretaries at least 14 days before the meeting;

(d) analyze issues regarding the function of state grazing districts and identify services that the districts may need to assist them in functioning effectively; and

(e) analyze Title 76, chapter 16, governing grazing districts and other laws that may affect grazing districts, and submit a report discussing findings and recommendations for changes to existing laws on or before October 1, 1998, to the director and the 1999 legislature.

(4) The members of the advisory committee serve for no salary but must be compensated for mileage and per diem as provided in 2-18-501 through 2-18-512 in fulfilling their duties as provided in this section.

(5) The term of office for each member is from [the effective date of this act] to January 1, 1999."

1995 Amendment: Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302, except where the term is used in connection with the board of directors of a state district"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Case Notes

Nonprofit Corporation: Under subsection (11) of this section, a grazing district is a nonprofit corporation rather than a subdivision of the state, so its powers are not necessarily limited to those expressly granted. Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

76-16-104. Role of the commission.

Compiler's Comments

2001 Amendment: Chapter 31 at beginning of (1) substituted "commission" for "department" and near end after "operation of" substituted "state districts" for "districts"; and at beginning of (2) substituted "commission" for "department". Amendment effective March 13, 2001.

1997 Amendment Uncodified — Early Termination — Section Uncodified: Section 3, Ch. 244, L. 1997, at the end of (1) inserted "and support the advisory committee established in [section 1] [not codified]"; and made minor changes in style. Section 5, Ch. 244, L. 1997, provided: "[This act] terminates January 1, 1999." Because of the early termination date, the Code Commissioner has determined not to codify the amendment made by sec. 3, Ch. 244, L. 1997, and [section 1]. Section 1 provided: "**Section 1. Montana grass conservation advisory committee established.** (1) There is a Montana grass conservation advisory committee.

(2) The director of the department, giving equal consideration to both large and small operators, shall appoint six people to serve on the advisory committee and shall serve as an ex officio member of the committee. The committee must include:

(a) two members, one member who must be a member of the board of directors of the Montana association of state grazing districts and one member who is either an officer or serves on the board of directors of a state district;

(b) two members who hold active preference rights within state districts; and

(c) two members who are secretaries for state districts.

(3) The advisory committee shall:

(a) elect from its membership a presiding officer and a vice-presiding officer;

(b) convene meetings as the members consider appropriate and solicit comments and suggestions from state district boards of directors, district members, and the public;

(c) provide notices of all meetings to the state district secretaries at least 14 days before the meeting;

(d) analyze issues regarding the function of state grazing districts and identify services that the districts may need to assist them in functioning effectively; and

(e) analyze Title 76, chapter 16, governing grazing districts and other laws that may affect grazing districts, and submit a report discussing findings and recommendations for changes to existing laws on or before October 1, 1998, to the director and the 1999 legislature.

(4) The members of the advisory committee serve for no salary but must be compensated for mileage and per diem as provided in 2-18-501 through 2-18-512 in fulfilling their duties as provided in this section.

(5) The term of office for each member is from [the effective date of this act] to January 1, 1999."

1995 Amendment: Chapter 418 in (1), at beginning after "department", deleted "of natural resources and conservation" and after "advisory capacity with the" deleted "department of state lands"; in (2), after "advisory capacity to the", deleted "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-16-106. Commission fees.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) near beginning after "state" deleted "grazing", after "districts" deleted "of the state", after "month of" inserted "grazing", and near middle after "for which the" inserted "state"; and in (3) near beginning after "after the" inserted "state". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 throughout section substituted "commission" for "department"; in (1) changed fee from "15 cents per animal unit" to "10 cents per animal unit month of preference" and substituted "animal unit months" for "animal units"; in (2) inserted "operation and" and substituted "commission" for "department's functions"; and made minor changes in style. Amendment effective July 1, 1999.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

1981 Amendment: Increased the fee from 10 cents to 15 cents per animal unit.

76-16-107. Range for wild game animals.

Compiler's Comments

2001 Amendment: Chapter 31 at end of first sentence before "district" inserted "state". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in second sentence near beginning substituted "commission" for "department" and deleted former third sentence that read: "The department shall encourage

the transfer of beaver from streams where they are doing damage to other streams where they are needed"; and made minor changes in style. Amendment effective July 1, 1999.

76-16-108. Nature of rights.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) at beginning inserted "Grazing", after "creation of the" inserted "state", after "AUMs of" inserted "grazing", and near end after "controlled by the" inserted "state". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (1) substituted "based on AUMs of preference" for "or preferences"; and made minor changes in style. Amendment effective July 1, 1999.

76-16-109. Appeal procedure.

Compiler's Comments

2001 Amendment: Chapter 31 throughout section substituted "state district" for "district"; and made minor changes in style. Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 throughout (2) substituted "commission" for "department". Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 in (1) and in second sentence of (2), before "certified mail", deleted "registered or"; in (2), in four places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Case Notes

Grazing District and Board of Natural Resources and Conservation (Now Abolished) Required to Comply With Administrative Procedure Act: In the conduct of proceedings pursuant to the Grass Conservation Act, both the grazing district and the Board of Natural Resources and Conservation (now abolished) are required to comply with the requirements of the Montana Administrative Procedure Act. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

Scope of Review by District Court: On appeal to the District Court, the court should limit its inquiry to determining whether upon the evidence and the law the Commission's action is based upon an error of law or is wholly unsupported by the evidence or is clearly arbitrary or capricious. Langen v. Badlands Co-op St. Grazing District, 125 M 302, 234 P2d 467 (1951), followed in N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989).

76-16-111. What constitutes receipt of notice.

Compiler's Comments

2001 Amendment: Chapter 31 near beginning after "chapter by" deleted "registered or" and near end before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 at end substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

76-16-112. Creation of Montana grass conservation commission — membership — meetings — compensation.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) deleted former third sentence that read: "Beginning on January 1, 2000, one member shall serve a 1-year term and two members shall serve 2-year terms, with assignment of terms based on a random drawing"; in (2)(a)(i) after "state" deleted "grazing"; in (2)(a)(ii) after "active" inserted "grazing" and after "state" deleted "grazing"; in (2)(a)(iii) after "state" deleted "grazing"; in (4) in second sentence substituted "7 days' written notice" for "14 days' written notice"; and made minor changes in style. Amendment effective March 13, 2001.

Effective Date: Section 36, Ch. 401, L. 1999, provided that this section is effective July 1, 1999.

76-16-113. Powers of commission.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) in two places after "state" deleted "grazing"; near middle of (2) before "state" deleted "cooperative" and after "state" deleted "grazing"; in (3) after "state"

deleted "grazing" and after "historical" inserted "grazing"; inserted (4) regarding state district forms; inserted (5) regarding issuing citations; inserted (6) regarding submission of records; inserted (7) regarding furnishing financial reports; inserted (8) regarding cooperating and entering into agreements; and made minor changes in style. Amendment effective March 13, 2001.

Effective Date: Section 36, Ch. 401, L. 1999, provided that this section is effective July 1, 1999.

Part 2
Establishment of Districts

76-16-201. Procedure to incorporate state district.

Compiler's Comments

2001 Amendment: Chapter 31 in (3) near middle substituted "state district" for "district"; and made minor changes in style. Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 throughout section substituted "commission" for "department". Amendment effective July 1, 1999.

Case Notes

Constitutionality:

The Legislature may provide for grazing districts applicable to the entire state or only to certain designated counties or portions if there be a reasonable ground for such classification and if the action is not arbitrary or capricious. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

Although the law permits three or more persons to initiate proceedings, the discretion to create the district rests in the Commission and there is no unconstitutional delegation of powers. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

76-16-202. Notice and hearing on question of incorporation.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) near beginning of first sentence after "state" deleted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (1) near middle and in (2) near beginning substituted "commission" for "department". Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 in (2), at beginning after "department", deleted "for and on behalf of the board" and deleted second sentence that read: "The record taken upon the hearing, together with the report of the department, shall be submitted to the board." Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-16-203. Certificate of approval.

Compiler's Comments

2001 Amendment: Chapter 31 near end substituted "state district" for "district". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 substituted "commission" for "department". Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 near end substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-16-204. Articles of incorporation.

Compiler's Comments

1999 Amendment: Chapter 401 in (2) substituted "commission" for "department"; deleted former (2)(d) that read: "(d) the term for which the state district is incorporated, which may not exceed 40 years"; and made minor changes in style. Amendment effective July 1, 1999.

76-16-206. Amending articles of incorporation.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) at end of second sentence before "district" inserted "state"; and in (2) near middle before "district" inserted "state". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 throughout (1) substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

Section Not Codified: The last sentence of subsection (8), 46-2310, R.C.M. 1947, providing that amendments to articles of incorporation of grazing districts may be filed with the Secretary of State without charge, was not codified in the MCA, as it is redundant with provision in 76-16-206. The language was not repealed and is still valid law. Citation may be made to sec. 10, Ch. 208, L. 1939.

76-16-207. Filing of map or plat of state district.

Compiler's Comments

1999 Amendment: Chapter 401 in first sentence near beginning inserted "commission and the" and after "state district" inserted language regarding individual and common allotments, allotment names, and lands used as base properties; in second sentence substituted "commission" for "department" and inserted "and with the commission" and "revised"; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 near end substituted "by the department after a hearing" for "by the board after a hearing thereon before the department". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-16-208. Adoption of bylaws and periodic review — annual report.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) in third sentence after "incorporated" inserted "state" and deleted former fourth sentence that read: "The first review and update must be completed no later than January 1, 2001"; in (2) at end of first sentence before "district" inserted "state" and in second sentence after "allocation of" inserted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (1) in first and second sentences at end substituted "commission" for "department" and inserted third through fifth sentences regarding review and update of district bylaws; inserted (2) regarding annual reports; and made minor changes in style. Amendment effective July 1, 1999.

76-16-209. Alteration of state district.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) after "boundaries of the" inserted "state". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (2)and (3) substituted "commission" for "department". Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 at end of (2) and (3) substituted "by the department after a hearing" for "by the board after a hearing thereon before the department". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-16-210. Request for dissolution of state district.

Compiler's Comments

1999 Amendment: Chapter 401 in first sentence substituted "commission" for "department" and inserted "subject to the preferences of this chapter"; and inserted second sentence requiring commission to establish dissolution procedures. Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 near end substituted "department" for "board of natural resources and conservation". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-16-211. Dissolution of state district.

Compiler's Comments

2001 Amendment: Chapter 31 in five places before "district" inserted "state". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 throughout section substituted "commission" for "department"; and in (1) in first sentence inserted "in accordance with its bylaws and this chapter" and substituted "the majority of members of" for "those who own or control more than 50% of the lands included in". Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 in (1), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-16-212. Distribution of state district assets.

Compiler's Comments

2001 Amendment: Chapter 31 in (2) at beginning of second sentence inserted "State"; and made minor changes in style. Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (1) in three places substituted "commission" for "department"; in (2) in first sentence inserted "or through another competitive bidding procedure" and inserted second sentence regarding opportunity to meet highest bid; and made minor changes in style. Amendment effective July 1, 1999.

76-16-213. Final report on dissolution proceedings.

Compiler's Comments

2001 Amendment: Chapter 31 in two places substituted "commission" for "department". Amendment effective March 13, 2001.

1995 Amendment: Chapter 418 in second sentence substituted "report, the department" for "report by the department, the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 3
Organization, Administration, and Operation

Part Attorney General's Opinions

Annual Corporate Report Not Required: A state grazing district organized under Title 76, ch. 16, is not required to file an annual corporation report with the Secretary of State. 36 A.G. Op. 15 (1975).

76-16-301. Powers and duties of directors.

Compiler's Comments

2001 Amendment: Chapter 31 near end after "regulation of the" substituted "commission" for "department". Amendment effective March 13, 2001.

76-16-302. Membership in state district.

Compiler's Comments

2001 Amendment: Chapter 31 in six places throughout section before "district" inserted "state"; in (3) near middle before "preference" inserted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (3) at beginning substituted language regarding certain livestock producers who held preferences for "All members who possessed preferential grazing permits" and after "grazing season or" deleted "who possess such a permit"; and made minor changes in style. Amendment effective July 1, 1999.

Case Notes

Constitutionality: Even if membership in the district would confer special privileges or immunities over nonmembers, still no constitutional right is involved since small owners are

privileged to become members of the district. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

Attorney General's Opinions

Withdrawal of Membership: An individual shall withdraw from a grazing district if he is no longer eligible for membership. The directors of the district should then determine, with the approval of the Department of Natural Resources and Conservation, the rights and interests involved. A member may withdraw from membership in a district if the district's articles of incorporation or bylaws provide conditions and procedures for voluntary withdrawal. If a member of a district continues to be engaged in the livestock business and owns or leases forage-producing land and the district's articles of incorporation and bylaws do not provide for voluntary withdrawal, a member may not unilaterally withdraw from the district. 42 A.G. Op. 127 (1988).

76-16-303. Voting rights.

Compiler's Comments

2001 Amendment: Chapter 31 in first and fourth sentences before "district" inserted "state". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in first sentence near beginning inserted "in good standing as set forth in the district bylaws"; inserted second sentence prohibiting individuals and certain livestock producers from voting; in fourth sentence at end inserted exception clause; and made minor changes in style. Amendment effective July 1, 1999.

76-16-304. Effect of transfer of land.

Compiler's Comments

1999 Amendment: Chapter 401 at end substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

76-16-305. Acquisition and disposal of property.

Case Notes

Grazing District Not Required to Purchase or Substitute Lands to Allow Full Exercise of Grazing Preferences: The statutory language authorizing a grazing district to purchase or substitute lands in order to provide sufficient land under district control upon which members can exercise their grazing preferences is clearly discretionary, and the failure of a district to do so does not in itself constitute an abuse of discretion or breach of a fiduciary duty. The proper method for remedying such a loss of land is found in 76-16-403. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

76-16-306. Management of grazing lands.

Case Notes

Classification of Lands: For purposes of determining whether a grazing permittee has increased his commensurate rating by additions and improvements, a state grazing district may classify lands as self-furnished grazing lands, even though they are cultivated and not used for grazing. Burke v. S. Phillips County Co-op St. Grazing District, 135 M 209, 339 P2d 491 (1959).

Mandamus: Where the action of a grazing district in classifying owners of grazing preferences was a clear violation of the grazing act and no question of administrative discretion was involved, a proceeding in mandamus was proper as against contention that the court was taking over the duties of the district. State ex rel. Engle v. District Court, 119 M 319, 174 P2d 582 (1946).

Collateral References

Liability for injury to trespassing stock from poisonous substances on the premises. 12 ALR 3d 1103.

76-16-307. Leasing of state lands.

Compiler's Comments

2001 Amendment: Chapter 31 in three places before "district" substituted "state" for "grazing" and in third sentence after "directors of a" deleted "cooperative". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in first sentence after "under this chapter" substituted language regarding lease that is in accordance with laws and department regulations and second sentence authorizing board to assist members in acquiring and administering lease for former text that read: "and that is not otherwise disposed of by the department must be leased by the grazing

district at a reasonable rental when offered for lease to the officers of the grazing district by the department. However, the officers of the grazing district may appear or submit evidence in writing before the department and show reason and cause for a change in the rental. If there is cause, the department may reappraise the land in question"; in last sentence substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 in first, second, and third sentences, after "department", deleted "of state lands"; in fourth sentence, after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Case Notes

State Grazing District Not Allowed Lease Preference Right for State Land: The exercise of a preference right, whereby lessees of state-owned land are preferred and may renew their leases by meeting the highest bid submitted, by a grazing district which does not use the land itself and thus cannot further the policy of sustained yield, is an unconstitutional application of the preference right statute. Grazing districts may obtain state leases only by pure competitive bidding. Jerke v. St. Dept. of Lands, 182 M 294, 597 P2d 49 (1979).

76-16-308. Regulation of stock grazing in state district.

Compiler's Comments

1999 Amendment: Chapter 401 deleted former (3) that read: "(3) impose sanitary provisions, regulations, and practices"; and made minor changes in style. Amendment effective July 1, 1999.

76-16-309. Knowledge of state district boundaries responsibility of livestock owner.

Compiler's Comments

2001 Amendment: Chapter 31 at end before "district" inserted "state". Amendment effective March 13, 2001.

76-16-310. Permit required to run livestock in state district.

Compiler's Comments

2001 Amendment: Chapter 31 in (2) near middle of first sentence after "from the" inserted "state" and at end inserted "that are a result of the person's unpermitted use of the state district", in second sentence in three places before "district" inserted "state", and at end of third sentence after "damages" substituted "that are caused by the trespassing livestock" for "sustained thereby to the party entitled thereto"; and made minor changes in style. Amendment effective March 13, 2001.

76-16-311. Control of trespassing livestock.

Compiler's Comments

1999 Amendment: Chapter 401 in (2) in second sentence increased allowable charge from 50 cents to $2 per animal unit per day; in (4) after "owners, or person in charge" deleted "thereof, by leaving said notice at his usual place of residence with some member of his family over the age of 14 years"; and made minor changes in style. Amendment effective July 1, 1999.

Case Notes

Assessments: In view of 76-16-321, grazing district was not limited to the remedies permitted by this section in case of trespassing livestock but could provide by its bylaws for assessments against its members controlling trespassing livestock. Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

Constitutionality:

Contention that since statute makes no provision as to who shall determine sufficiency of bond it must of necessity be for the district to determine and that the statute is therefore unconstitutional cannot be raised by one who has not been adversely affected by the approval of the bond by the district. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

This statute is not unconstitutional as denying due process in the matter of ascertaining the amount of damages and costs due and also in ascertaining whether the statute applies in a particular case since all these issues can be determined judicially by depositing bond as security in

lieu of the livestock taken. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

Land Not Controlled by District: Subsections (1) and (2) apply only when the grazing is done upon land owned or controlled by the district, without regard to whether or not the land is fenced or whether the animals merely stray thereon or are driven upon it; where animals trespass upon unfenced land of a nonmember or permittee of a grazing district and there is no evidence that they were herded upon the land or of overstocking of neighboring land and consequent trespass upon lands of others, the open range law applies. McKee v. Clark, 115 M 438, 144 P2d 1000 (1943).

Collateral References

Liability for injury to trespassing stock from poisonous substances on the premises. 12 ALR 3d 1103.

76-16-312. Impoundment of trespassing livestock.

Case Notes

Impoundment Power: The owner of unfenced ranch lands located within the exterior boundaries of a state grazing district, who is neither a member nor a permittee of the district and upon whose property livestock trespassed, has no right to impound the animals or to recover damages for the trespass and compensation for their care and feed during the time impounded, in his action to foreclose the lien upon the animals granted by 81-4-217, this chapter giving the right to impound to the district, not to an individual placed as was plaintiff. McKee v. Clark, 115 M 438, 144 P2d 1000 (1943).

76-16-315. Procedure upon inability to locate person responsible for trespassing livestock.

Compiler's Comments

1999 Amendment: Chapter 401 near middle inserted reference to 76-16-311, after "livestock was taken" inserted "into possession or to the nearest state livestock inspector", and at end substituted reference to 76-16-311 for "addition thereto, he shall mail, by prepaid registered or certified mail, a copy of said statement addressed to the nearest state livestock inspector"; and made minor changes in style. Amendment effective July 1, 1999.

Case Notes

Constitutionality: Whether or not this section is unconstitutional as denying due process of law to those owners who cannot be found cannot be raised by persons who do not fall in that class. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

76-16-316. Sale of trespassing livestock.

Compiler's Comments

2001 Amendment: Chapter 31 in first sentence of (2) before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (2) in first sentence substituted "in a newspaper of general circulation" for "in three public places" and at end after "county" deleted "one of which shall be within the district"; and made minor changes in style. Amendment effective July 1, 1999.

76-16-317. Disposition of sale proceeds.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) in middle of third sentence after "designated state" deleted "grazing" and at end before "district" inserted "state" and in fourth sentence after "each" substituted "state district" for "of said districts"; in (3) at end deleted "at the expiration of said period"; and made minor changes in style. Amendment effective March 13, 2001.

76-16-318. Unlawful recovery of trespassing livestock.

Compiler's Comments

2001 Amendment: Chapter 31 near beginning after "state" deleted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

76-16-319. No liability for official acts.

Compiler's Comments

1999 Amendment: Chapter 401 in first sentence in two places substituted "commission" for "department". Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 in first sentence, in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

76-16-320. Maintenance of fences.

Compiler's Comments

2001 Amendment: Chapter 31 at beginning of (1) deleted "Regarding fences within the external boundaries of state districts"; in (2) near end after "members of the" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

Case Notes

Fence Costs: Fact that the grazing district is exempted from building or paying for any part of partition fences is a matter falling within legislative discretion. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

76-16-321. Construction of trespass and fence provisions.

Case Notes

Assessments: This section preserved grazing district's power to provide in its bylaws for assessments against members controlling trespassing livestock, despite the fact that 76-16-310 through 76-16-321 provide other remedies against trespass. Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

76-16-323. State district finances.

Compiler's Comments

2001 Amendment: Chapter 31 in (3) at end before "district" inserted "state". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (1) near middle substituted "a grazing preference" for "an animal unit"; and in (3) substituted "commission" for "department". Amendment effective July 1, 1999.

Case Notes

Assessments: Grazing district bylaw providing for assessment against members owning or in control of livestock trespassing on district land was valid implementation of power granted to grazing district by 76-16-306. Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

76-16-325. Compliance with commission orders required.

Compiler's Comments

2001 Amendment: Chapter 31 near end of (1) in two places before "district" inserted "state"; and in (2) near end of first sentence before "district" inserted "state". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 throughout (1) and (2) substituted "commission" for "department". Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 in (1), in two places, substituted "department" for "board"; in (2), near end of first sentence, substituted "removed from office by the department" for "removed by the board from office"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 4
Grazing Permit System

76-16-401. Distribution of grazing preferences.

Compiler's Comments

2001 Amendment: Chapter 31 in (2) at end before "preference" inserted "grazing"; in (3) near middle after "members" deleted "preferring those that have used the range for any 3 years or any 2 consecutive years in the 5-year period immediately preceding June 28, 1934, or in the case of districts organized after March 15, 1945" and at end substituted "the state district" for "such districts"; and made minor changes in style. Amendment effective March 13, 2001.

Case Notes

Discriminatory Action: Action of grazing district in classifying all owners of classes 1 and 2 grazing preferences as temporary permittees and issuing 1946 grazing permits on that basis, so that plaintiffs who had a class 1 preference appurtenant to their land for the grazing of 206 animal units were granted only a temporary permit for grazing of 152 animal units for 1946, was a clear violation of the grazing act. State ex rel. Engle v. District Court, 119 M 319, 174 P2d 582 (1946).

76-16-402. Conversion of temporary permittee lands to dependent commensurate property.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) in three places before "district" inserted "state" and near end before "preference" inserted "grazing"; in (2) in two places before "preference" inserted "grazing" and near end before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

Case Notes

Discriminatory Action: Action of grazing district in classifying all owners of classes 1 and 2 grazing preferences as temporary permittees and issuing 1946 grazing permits on that basis, so that plaintiffs who had a class 1 preference appurtenant to their land for the grazing of 206 animal units were granted only a temporary permit for grazing of 152 animal units for 1946, was a clear violation of the grazing act. State ex rel. Engle v. District Court, 119 M 319, 174 P2d 582 (1946).

76-16-403. Procedure if reduction in grazing privileges necessary.

Compiler's Comments

2001 Amendment: Chapter 31 in (2) after "directors of a" deleted "cooperative" and after "holder of the" inserted "grazing". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (1) after "will be reduced" deleted "first" and at end inserted "prior to reduction to any holder of grazing preference" and deleted former second sentence that read: "When the extent of reduction of privileges exceeds that of temporary permits, then the rights of operators with both dependent commensurate property and commensurate property shall be reduced together on a proportionate basis"; inserted (2) regarding reductions of grazing preference; and made minor changes in style. Amendment effective July 1, 1999.

Case Notes

Inability to Exercise Grazing Preference Because of District Loss of Land — Statutory Applicability: A grazing district lost control of about 50,000 acres upon which members could exercise assigned grazing preferences. The district tendered monetary compensation to the 26 affected permittees pursuant to 76-16-414, based on the loss of grazing preferences. Twenty-five of the members accepted the offer, but Kalfell Ranch did not, arguing that under this section, a proportionate reduction of all members' grazing rights was proper and that the district directors had breached their fiduciary duty by failing to purchase the land that was subsequently lost, failing to prohibit competitive bidding, and failing to collect the value of and compensate for improvements made to the land prior to sale. The Board of Natural Resources and Conservation found that the applicable statute was this section and that the district was thus required to proportionally reduce all grazing preferences, but rejected the claim that the district was required to purchase the land or other grazing land sufficient to meet the assigned grazing preferences. The District Court affirmed the Board's decision and determined that the Board's failure to address Kalfell's other claims constituted an implied denial of those issues, a denial that the court agreed with on the merits. On appeal, the Supreme Court found that under the plain language of 76-16-414, Kalfell did not lose any grazing preferences or permits, but rather merely became unable to exercise its preferences because the district lost access to the lands. Therefore, under this section, reductions in grazing privileges became necessary and should have been reduced proportionately. Kalfell's other claims were properly rejected based on clear statutory language and the district's discretionary powers. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994). (Kalfell I), followed in In re Kalfell Ranch, Inc. v. Prairie County Co-op St. Grazing District (Kalfell II), 2000 MT 317, 302 M 492, 15 P3d 888, 57 St. Rep. 1340 (2000).

Discriminatory Action: Action of grazing district in classifying all owners of classes 1 and 2 grazing preferences as temporary permittees and issuing 1946 grazing permits on that basis, so that plaintiffs who had a class 1 preference appurtenant to their land for the grazing of 206 animal

units were granted only a temporary permit for grazing of 152 animal units for 1946, was a clear violation of the grazing act. State ex rel. Engle v. District Court, 119 M 319, 174 P2d 582 (1946).

76-16-404. Application for grazing preferences.

Compiler's Comments

2001 Amendment: Chapter 31 near beginning of first sentence after "state" deleted "grazing", near middle before "district" inserted "state", and at end before "preference" inserted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

Temporary Provision Not Codified: The first sentence of 46-2321, R.C.M. 1947, was not codified but has not been repealed and is still valid law. Citation may be made to sec. 21, Ch. 208, L. 1939.

Case Notes

Provisions Mandatory: The provisions of this section are mandatory. Langen v. Badlands Co-op St. Grazing District, 125 M 302, 234 P2d 467 (1951).

76-16-405. Grazing preferences appurtenant to dependent commensurate property and commensurate property.

Case Notes

Purchaser of Deteriorated Ranch: Where the present owner purchased ranch lands formerly having preference rights of 97 animal units but which, just prior to the sale, had been rated at only 43 animal units due to deterioration in ranch, he could not later object to such rating as a violation of this section. Burke v. S. Phillips County Co-op St. Grazing District, 135 M 209, 339 P2d 491 (1959).

76-16-406. Transfer of grazing preferences.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) in three places before "preference" inserted "grazing". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (1) in first sentence and in (2) at end substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

Case Notes

Purchaser of Deteriorated Ranch: Where the present owner purchased ranch lands formerly having preference rights of 97 animal units but which, just prior to the sale, had been rated at only 43 animal units due to deterioration in ranch, he could not later object to such rating as a violation of this section. Burke v. S. Phillips County Co-op St. Grazing District, 135 M 209, 339 P2d 491 (1959).

76-16-407. Processing of application for transfer.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) in first sentence after "secretary" inserted "of the state district", at end of second sentence before "district" inserted "state", and at end of third sentence before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

76-16-408. Effect of transfer of grazing preference.

Compiler's Comments

2001 Amendment: Chapter 31 near end before "preference" inserted "grazing". Amendment effective March 13, 2001.

76-16-409. Transfer of underlying property.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) in two places before "preference" inserted "grazing"; and near middle of (2) before "preferences" inserted "grazing". Amendment effective March 13, 2001.

76-16-410. Compensation to state district for range improvements.

Compiler's Comments

2001 Amendment: Chapter 31 at end of fourth sentence substituted "commission" for "department"; and made minor changes in style. Amendment effective March 13, 2001.

Case Notes

Compensation to Grazing District for Improvements in Which District Involved: Under this section, subsequent owners of land must compensate a grazing district for the value of range improvements constructed with the consent of the owner upon lands leased by the district. However, this section applies only to improvements in which the district itself is involved and does not require a district to collect those funds for payment to a previous lessee. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

76-16-411. Grazing permits to owners of land not controlled by state district.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) near beginning of first sentence before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

Case Notes

Constitutionality: Chapter 208, L. 1939, does not unreasonably discriminate against nonmembers who have lands in the district since they have ample opportunity to protect themselves and their rights. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

76-16-412. Revocation of grazing preferences upon failure to obtain permits, pay fees, or obey rules.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) and (2) near middle of first sentence before "certified" deleted "registered or" and before "preference" inserted "grazing" and in second sentence before "preference" inserted "grazing"; in (2) near end of first sentence before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

Case Notes

Competitive Bidding — Revocation of Grazing Preferences and Permit Cancellation Discretionary: Decisions to revoke grazing preferences or to cancel grazing permits are entirely discretionary with the grazing district. Further, a district rule prohibiting competitive bidding against another district member for the lease of grazing lands in the district did not apply in this instance when the land in question was sold rather than leased. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

76-16-413. Effect of revocation.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) in two places before "preference" inserted "grazing". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (1) inserted second sentence concerning revocation. Amendment effective July 1, 1999.

76-16-414. Equalization of state district assets.

Compiler's Comments

2001 Amendment: Chapter 31 in (1) near middle before "district" inserted "state"; and in (3) in two places before "preference" inserted "grazing". Amendment effective March 13, 2001.

1999 Amendment: Chapter 401 in (2) in first sentence inserted "or any portion of a grazing preference" and inserted second sentence regarding valuation of reserves and assets; in (3) in second sentence inserted "as prescribed by the bylaws of the state district"; and made minor changes in style. Amendment effective July 1, 1999.

Case Notes

Inability to Exercise Grazing Preference Because of District Loss of Land — Statutory Applicability: A grazing district lost control of about 50,000 acres upon which members could exercise assigned grazing preferences. The district tendered monetary compensation to the 26 affected permittees pursuant to this section, based on the loss of grazing preferences. Twenty-five of the members accepted the offer, but Kalfell Ranch did not, arguing that under 76-16-403, a proportionate reduction of all members' grazing rights was proper and that the district directors had breached their fiduciary duty by failing to purchase the land that was subsequently lost, failing to prohibit competitive bidding, and failing to collect the value of and compensate for improvements made to the land prior to sale. The Board of Natural Resources and Conservation

found that the applicable statute was 76-16-403 and that the district was thus required to proportionally reduce all grazing preferences, but rejected the claim that the district was required to purchase the land or other grazing land sufficient to meet the assigned grazing preferences. The District Court affirmed the Board's decision and determined that the Board's failure to address Kalfell's other claims constituted an implied denial of those issues, a denial that the court agreed with on the merits. On appeal, the Supreme Court found that under the plain language of this section, Kalfell did not lose any grazing preferences or permits, but rather merely became unable to exercise its preferences because the district lost access to the lands. Therefore, under 76-16-403, reductions in grazing privileges became necessary and should have been reduced proportionately. Kalfell's other claims were properly rejected based on clear statutory language and the district's discretionary powers. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

TITLE 77
STATE LANDS

CHAPTER 1
ADMINISTRATION OF STATE LANDS

Part 1
General Provisions

Part Law Review Articles

Changing the Focus: Managing State Trust Lands in the Twenty-First Century, Budge, 19 J. Land, Resources, & Envtl. L. 223 (1999).

The Transformation on Public Lands, Laitos & Carr, 26 Ecology L.Q. 140 (1999).

State Trust Lands—Reconciling the Public Interest in Environmental Protection With Trust Management Principles, Andrews, 44 Rocky Mtn. Min. L. Inst. 5-1 (1998).

America's Public Lands: Legal Issues in the New War for the West, Miller, 24 Urb. Law. 895 (1992).

The Wilderness Inventory of the Public Lands: Purity, Pressure, and Procedure, Torrey, 12 J. Energy Nat. Resources & Envtl. L. 453 (1992).

Wildlife Protection on the Public Lands, Brennan & Swanson, 1992 Min. L. Series: Rocky Mtn. Min. L. Found. 7-1 (1992).

Land Use Planning and Management of State School Lands, McCormack, 1982 Utah L. Rev. 525 (1982).

Part Collateral References

The Effects of State-Owned Property on Local Governments In Montana, Report to the 47th Legislature, Interim Study Committee Report, Montana Legislative Council (1980).

Public Access to Public Lands, Report to the 45th Legislature, Subcommittee on Agricultural Lands, Montana Legislative Council (1976).

77-1-101. Definitions.

Compiler's Comments

1997 Amendment: Chapter 32 in definition of state land, in (b)(iv) after "through", deleted "foreclosure of any", after "investments" deleted "purchased", and at end substituted "17-6-201" for "17-6-211"; and made minor changes in style.

1995 Amendments: Chapter 370 in definition of state land or lands inserted (b)(iii) providing that certain lands that the Board of Regents is authorized to dispose of are not considered state land; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 deleted definition of Commissioner that read: ""Commissioner" means the commissioner of state lands provided for in 2-15-3202"; in definition of Department substituted "natural resources and conservation provided for in Title 2, chapter 15, part 33" for "state lands provided for in Title 2, chapter 15, part 32"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: Inserted definitions of commercial or concentrated recreational use, general recreational use, and legally accessible state lands. Amendment effective March 1, 1992.

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

1987 Amendment: In introduction inserted "and except for the definition of state land in 77-1-701".

Case Notes

Department's Definition of Recreational Use and Application of Rule Prohibiting Travel Across State Land Rejected: The Weitzs owned a ranch, and within the boundaries of their land was state land that they leased. The Weitzs were using roads on their leased land to spot game and were traveling across the leased land on existing roads to get to their own property to hunt. The Department of Natural Resources and Conservation concluded that the defendants were engaged in recreational use of state lands and were in violation of a Department rule prohibiting vehicle travel across state lands. The Supreme Court upheld the District Court's decision that noted that the hearings examiner had acknowledged that no elk or deer had been killed, shot at, or pursued on leased state land by the defendants and therefore reversed the hearings examiner's decision as being based upon faulty reasoning, conjecture, and speculation. The Supreme Court also upheld the lower court's ruling that the Department's application of the rule prohibiting travel across state lands by a lessee to conduct activity elsewhere was an overbroad and unlawful application of the rule. Weitz v. Dept. of Natural Resources and Conservation, 284 M 130, 943 P2d 990, 54 St. Rep. 807 (1997).

Collateral References

Public Lands *key* 92.

73A C.J.S. Public Lands §66.

53A Am. Jur. 2d Mines and Minerals §§13, 23; 63C Am. Jur. 2d Public Lands §§108, 112.

Acquisition of title to land by adverse possession by state or other governmental unit or agency. 18 ALR 3d 678.

77-1-102. Ownership of certain islands and abandoned riverbeds.

Law Review Articles

Ownership of Abandoned Navigable Riverbeds: To Whom Does the Windfall Blow?, DePuy, 8 Pub. Land L. Rev. 115 (1987).

Collateral References

Navigable Waters *key* 36(1).

65 C.J.S. Navigable Waters §108.

63C Am. Jur. 2d Public Lands §53.

77-1-105. Determining title.

Collateral References

Navigable Waters *key* 36(1); Waters *key* 89.

65 C.J.S. Navigable Waters §108; 93 C.J.S. Waters §§170 through 173.

77-1-106. Setting of rates or fees — rules.

Compiler's Comments

Effective Date: Section 18, Ch. 586, L. 1993, provided: "[This act] is effective July 1, 1993."

77-1-107. Purchase of historic easement across state land for benefit of private land.

Compiler's Comments

Contingent Effective Date: Section 6(2), Ch. 107, L. 1999, provided: "If the Montana Supreme Court invalidates subsection (4)(a) of 77-1-130, [section 1] [77-1-107] is effective on the date of the decision. If the Montana Supreme Court does not invalidate subsection (4)(a) of 77-1-130, then [section 1] [77-1-107] is void." On November 2, 1999, the Montana Supreme Court held this section unconstitutional in Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

77-1-108. Trust land administration account.

Compiler's Comments

2001 Amendment: Chapter 34 near beginning of (2) after "nine" substituted "permanent funds" for "nonexpendable trust funds"; and in (3) near middle after "each of the" substituted "permanent funds" for "nonexpendable trust funds" and before "contribution" substituted "fund's" for "trust's". Amendment effective July 1, 2001.

Effective Date: Section 9, Ch. 122, L. 1999, provided: "[This act] is effective July 1, 1999."

77-1-109. Deposits of proceeds in trust land administration account.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 34 in (2) after "deposited in the" substituted "appropriate permanent fund" for "permanent fund for the appropriate trust"; and in (3) after "nine" substituted "permanent funds" for "nonexpendable trust funds". Amendment effective July 1, 2001.

Chapter 420 in (1)(b) substituted "public school and Montana university system lands" for "public school lands"; in (2) in first sentence inserted "other than proceeds from timber from Montana university system lands" and inserted second sentence pertaining to allocation of timber proceeds for Montana university system lands; and made minor changes in style. Amendment effective July 1, 2001.

Effective Date: Section 9, Ch. 122, L. 1999, provided: "[This act] is effective July 1, 1999."

77-1-110. Written undertaking required in legal action for challenge to use or disposition of state lands.

Compiler's Comments

2001 Amendment: Chapter 504 inserted (1) referring to Article X, section 11, of Montana constitution; in (2) in two places after "board" inserted reference to department; and made minor changes in style. Amendment effective May 1, 2001.

Saving Clause: Section 3, Ch. 273, L. 1995, was a saving clause.

Case Notes

Sanctions Not Applied Absent Finding of Bad Faith in State Timber Sale: Plaintiff sought sanctions against the Department of Natural Resources and Conservation (DNRC) under Rule 11, M.R.Civ.P. (Title 25, ch. 20), for requesting an injunction bond pursuant to this section in relation to plaintiff's attempt to halt a timber sale. The District Court found that an injunction bond was not required, but also denied sanctions. On appeal, plaintiff contended that sanctions should apply because the DNRC's actions were intended solely to harass and cause needless increase in the cost of litigation. The Supreme Court agreed that the DNRC could not be said to have acted in bad faith by seeking to have a bond posted, so the District Court did not err in declining to impose sanctions under Rule 11, M.R.Civ.P. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

Statute Inapplicable to Injunction Based on Inadequacy of Department EIS: Plaintiff sought an injunction against the Department of Natural Resources and Conservation (DNRC) to halt a timber sale based on inadequacy of the DNRC environmental impact statement (EIS). The DNRC contended that this section required plaintiff to post a postappeal injunction bond during the pendancy of the appeal. The District Court concluded that because the timber sale was expected to lose money, it would be difficult to comprehend how damages might be incurred as a result of enjoining the project and that a bond was thus not required. The Supreme Court affirmed. This section pertains to actions enjoining a decision by the Board of Land Commissioners, but does not apply to cases that deal with an injunction against the DNRC based on the inadequacy of an EIS and that have no effect on any decision by the Board of Land Commissioners. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

77-1-111. Court actions.

Collateral References

District and Prosecuting Attorneys *key* 7(1).

27 C.J.S. District and Prosecuting Attorneys §12; 73A C.J.S. Public Lands §83.

77-1-112. Violations classified.

Collateral References

63C Am. Jur. 2d Public Lands §129.

77-1-113. Restrictions on who may buy or lease state lands.

Compiler's Comments

1995 Amendment: Chapter 418 near middle substituted "officer or employee of the department" for "person connected with the department of state lands as an officer or employee"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 36, chapter 2, subchapter 10, ARM General state land rules.

ARM 36.2.1002 Sale of state lands.

Title 36, chapter 25, ARM State land leasing.

ARM 36.25.603 Who may lease — qualified metalliferous mineral and gem lessees.

Collateral References

63C Am. Jur. 2d Public Lands §129.

77-1-116. Additional penalty.

Collateral References

63C Am. Jur. 2d Public Lands §§19, 129.

77-1-117. Disposition of fines.

Compiler's Comments

2001 Amendment: Chapter 257 near end substituted "paid to the department of revenue for deposit in the general fund" for "paid to the state treasurer and by him deposited to the credit of the general fund"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1987 Amendment: Near middle, after "state", inserted "except money received by a justice's court".

77-1-121. Environmental review — exemptions.

Compiler's Comments

2001 Amendment: Chapter 478 in (1) after "permit" deleted "or other authorization for use of state lands"; inserted (3) exempting department or board from environmental review requirements on actions related to growth policy, neighborhood plan, zoning regulations, proposed subdivision review, annexation, extension of services, or local planning; and made minor changes in style. Amendment effective April 30, 2001.

Retroactive Applicability: Section 3, Ch. 478, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all matters pending before the department or the board on [the effective date of this act]." Effective April 30, 2001.

Effective Date: Section 4, Ch. 223, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 1, 1999.

Retroactive Applicability: Section 5, Ch. 223, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all matters pending before an agency on [the effective date of this act]." Effective April 1, 1999.

77-1-125. Liability for unauthorized installation or construction of facility or structure on state trust land — penalty.

Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 460, L. 1997, provided: "It is the intent of the legislature to protect state trust land from resource damage by nonauthorized use of state trust land. The legislature intends that the department of natural resources and conservation and the board of land commissioners use this legislation to ensure that all use of state trust land is in the best interests of the state and returns full market value to the school trust. The legislature intends that the penalty amounts established in this bill be used as maximums and expects the board to set appropriate specific penalty amounts on a case-by-case basis, taking into account the facts of each situation. It is not the intent of the legislature that the board impose the maximum penalty without sufficient justification. Nothing in this bill should be construed as requiring the department or the board to change or increase current state trust land trespass enforcement efforts."

Effective Date: Section 3, Ch. 460, L. 1997, provided: "[This act] is effective July 1, 1997."

77-1-130. Recognition of historic right-of-way — criteria for right-of-way deed — conditions — fees.

Compiler's Comments

2001 Amendment: Chapter 270 in (1) in first sentence near middle after "to provide continuation of a county road" inserted "or to provide for authorization of existing utilities" and after "October 1" substituted "2006" for "2001"; in (1)(b)(i) and (1)(b)(ii) substituted "1997" for "1973"; in (3) in third sentence near beginning after "The department" deleted "may not require a fee for the approval of an assignment and"; in (4)(a) at end after "historic right-of-way" deleted part of introductory clause and former (4)(a)(i) through (4)(a)(iv) that read: "based on the following classification of land:

(i) $37.50 per acre for state land classified as grazing land;

(ii) $275 per acre for state land classified as timber land;

(iii) $100 per acre for state land classified as crop land; and

(iv) $100 per acre for other land"; in (5)(b) near middle after "condition of the road" inserted "or utility facilities"; in (8) deleted former second sentence that read: "However, the department may not require reversion of the right-of-way to the state"; and made minor changes in style. Amendment effective April 20, 2001.

Extension of Termination Date: Section 6, Ch. 270, L. 2001, amended sec. 5, Ch. 461, L. 1997, by extending the termination date imposed by Ch. 461 to October 1, 2011. Effective April 10, 2001.

Preamble: The preamble attached to Ch. 461, L. 1997, provided: "WHEREAS, the Department of State Lands, as the predecessor of the Department of Natural Resources [and Conservation] with respect to state land, encouraged the development of road rights-of-way across state land before 1972; and

WHEREAS, the Department of State Lands either did not charge for these rights-of-way or charged minimal fees for the rights-of-way before 1972; and

WHEREAS, many of the road rights-of-way granted by the Department of State Lands were granted without a written easement; and

WHEREAS, Article X, section 11(2), of the Montana Constitution requires that the fair market value, ascertained in the manner provided by law, must be charged for the disposition of an interest in state land; and

WHEREAS, the 55th Legislature intends that the Department of Natural Resources and Conservation honor the historical uses of state land for rights-of-way."

Termination: Section 5, Ch. 461, L. 1997, provided: "[This act] terminates October 1, 2003."

Case Notes

Market Value of State Land Rights-of-Way Set by Statute at 1972 Levels — Unconstitutionality: The plain language of this section as it read prior to the 2001 amendments required that full market valuations of right-of-way acreage for historic deeds on state trust lands be based on the median values for the classifications of land at 1972 levels, leaving the Department of Natural Resources and Conservation no choice but to use those levels instead of current market value. The state argued that pursuant to 40 A.G. Op. 24 (1983), the figures in this section were merely a minimum above which the Department may charge full market value. However, the statutory language prior to amendment was mandatory rather than discretionary and violated the provisions of the Montana Constitution and The Enabling Act, which require the state to receive full market value for school trust lands, and thus is unconstitutional. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

77-1-131. State lands historic right-of-way account.

Compiler's Comments

Extension of Termination Date: Section 6, Ch. 270, L. 2001, amended sec. 5, Ch. 461, L. 1997, by extending the termination date imposed by Ch. 461 to October 1, 2011. Effective April 10, 2001.

1999 Amendment: Chapter 389 in second sentence after "account" substituted "must be used" for "is statutorily appropriated to the department, as provided in 17-7-502". Amendment effective July 1, 1999.

Preamble: The preamble attached to Ch. 461, L. 1997, provided: "WHEREAS, the Department of State Lands, as the predecessor of the Department of Natural Resources [and Conservation] with respect to state land, encouraged the development of road rights-of-way across state land before 1972; and

WHEREAS, the Department of State Lands either did not charge for these rights-of-way or charged minimal fees for the rights-of-way before 1972; and

WHEREAS, many of the road rights-of-way granted by the Department of State Lands were granted without a written easement; and

WHEREAS, Article X, section 11(2), of the Montana Constitution requires that the fair market value, ascertained in the manner provided by law, must be charged for the disposition of an interest in state land; and

WHEREAS, the 55th Legislature intends that the Department of Natural Resources and Conservation honor the historical uses of state land for rights-of-way."

Termination: Section 5, Ch. 461, L. 1997, provided: "[This act] terminates October 1, 2003."

77-1-141. Determination of date of delivery.

Compiler's Comments

Preamble: The preamble attached to Ch. 67, L. 2001, provided: "WHEREAS, the state administers over 10,000 leases, licenses, permits, and agreements on state lands; and

WHEREAS, as a result of the decisions of the Montana Supreme Court in Johansen v. Department of Natural Resources and Conservation, 288 Mont. 39, 955 P.2d 653 (1998), and Johansen v. State, 1999 MT 187, 983 P.2d 962 (1999), the determination of the date of delivery for the submission of documents and payments required by the terms of leases, licenses, permits, and agreements issued by the Board of Land Commissioners or the Department has been made less efficient; and

WHEREAS, there is a need to provide a uniform and exclusive method for determining the date of delivery of documents and payments to the state for uses of state lands."

Effective Date: Section 3, Ch. 67, L. 2001, provided that this section is effective on passage and approval. Approved March 16, 2001.

Part 2
Board of Land Commissioners

Part Compiler's Comments

Severability — Board to Bridge Gap: Section 122, Ch. 60, L. 1927, provided: "If any subdivision, section or part of section of this act should be found to be unconstitutional by the Supreme Court of this State, such finding of unconstitutionality shall not affect the remainder of the act but such remainder shall remain in full force and effect and shall be carried out, and the State Board of Land Commissioners is hereby specifically charged with the duty of bridging over as far as possible any gap which might result in case any portion or portions of this act should be found unconstitutional by exercising the general grant of powers given to it by the Constitution of the State."

77-1-202. Powers and duties of board.

Compiler's Comments

1995 Amendment: Chapter 222 in (1), in second sentence after "guiding", deleted "rule and" and at end inserted "as provided in The Enabling Act"; and made minor changes in style.

1991 Amendment: Inserted (2) providing that the people are entitled to general recreational use of state lands to the extent that trusts are compensated for value of the recreation. Amendment effective March 1, 1992.

1991 Statement of Intent: The statement of intent attached to Ch. 609, L. 1991, provided: "A statement of intent is required for this bill because [section 13] [77-1-804] requires the board of land commissioners to adopt rules to implement the provisions for recreational use of state lands established by this bill. Consistent with the provisions of this bill, it is intended that public recreational use of state lands be accomplished to the fullest extent possible. It is acknowledged that certain state lands will merit closure from public recreational use due to certain considerations, including but not limited to the presence of growing crops and livestock and the proximity of dwellings and agricultural buildings. Nothing in this bill authorizes or purports to authorize trespass on private lands to reach state lands.

This bill requires the board to adopt rules governing the actions of the recreational user of state lands. These rules must address protection of the resource value, compensation for damage to improvements, criteria for closure, restrictions upon certain recreational activities, and, when state land is posted, provision for the recreational user to contact the lessee or his agent to provide prior notice of the type and extent of the recreational use contemplated.

[Section 18] [77-1-810] authorizes the department to adopt rules for weed control activities. It is the intent of the legislature that the board establish a procedure whereby weed infestations on state lands that are attributable to recreational access are controlled or eradicated. Examples of procedures that fulfill this intent include:

(1) a departmental weed control program;

(2) payments for weed control activities; and

(3) payments to county weed boards.

It is the intent of the legislature that the board evaluate the implementation of this bill, develop recommendations to address problems, if any, that arise through the course of rulemaking and implementation, and report its findings and recommendations to the 53rd legislature."

Severability: Section 21, Ch. 609, L. 1991, was a severability clause.

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

1983 Amendment: Inserted (2) requiring valuation of land after an appraisal by a qualified appraiser.

Administrative Rules

ARM 36.2.1004 Home site and farmyard leases.

ARM 36.25.102 Definitions.

ARM 36.25.103 General provisions.

ARM 36.25.109 Reclassification of state land leases.

ARM 36.25.113 Lease and license reports.

ARM 36.25.114 Disposal of crops.

ARM 36.25.124 Surrenders or consolidation of leases or licenses.

ARM 36.25.126 Conservation measures.

ARM 36.25.133 Reservations of rights.

ARM 36.25.134 Water rights.

ARM 36.25.136 Secondary use licenses.

ARM 36.25.137 Cabin sites.

ARM 36.25.138 Lessee or licensee damage compensation requirements.

ARM 36.25.141 Federal farm program compliance.

ARM 36.25.143 through 36.25.146, 36.25.149, 36.25.150, 36.25.152, 36.25.155 through 36.25.159, 36.25.161, and 36.25.162 Recreational access.

ARM 36.25.211 Shut-in oil royalties.

ARM 36.25.617 Hearings and appeals.

Case Notes

Standard of Review Applicable to Noncontested Cases — Approval of Plan for Drilling Exploratory Well: The District Court incorrectly applied the "clearly erroneous" standard set out in 2-4-704 when reviewing whether the Department of State Lands (now Department of Natural Resources and Conservation) properly approved a plan proposing drilling of an exploratory well on a leased tract near Glacier Park. The court found that shortcomings in the approval procedure, coupled with the fact that information gathered by the Department indicating that the well would generate a significant environmental impact, necessitated preparation of an environmental impact statement. However, 2-4-704 was inapplicable because the case was not truly contested. No hearing was requested or held before the Department, there was no action initiated until after the Department had approved the operating plan, and there was no evidentiary record against which to measure the Department's decision and determine whether it was clearly erroneous. Rather, the proper standard of review was whether the record established that the Department acted arbitrarily, capriciously, or unlawfully. The fact that the Department conducted two preliminary environmental reviews, conditioned approval on 42 protective stipulations, and considered the concerns raised in the approval process and took significant steps to address them indicated that the decision to forego preparation of an environmental impact statement was not arbitrary, capricious, or illegal. N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989), distinguishing Conner v. Burford, 605 F. Supp. 107 (D.C. Mont. 1985), and followed in Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995), Mont. Envtl. Information Center, Inc. v. Dept. of Transportation,

2000 MT 5, 298 M 1, 994 P2d 676, 57 St. Rep. 18 (2000), and Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000), in which omission of a cumulative impact analysis was directly related to the "unlawful" portion of the MEPA standard of review. See also Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

Lease Rental Affected by Land Reclassification — Writ of Prohibition Proper: Lessees developed a water spreading project on a portion of their state grazing lease, and the Department of State Lands (now Department of Natural Resources and Conservation) reclassified 32 acres of the lease as agricultural. Lessees later concluded that the project was inadequate for producing a profitable crop at the higher agricultural rental rates. They negotiated to pay back a loan for the project and reverted the land to grazing. After the loan was repaid, there were no other agreements supplementing the original lease. However, the Department subsequently determined that the 32 acres should retain the agricultural classification, sought rental at the agricultural rate, and canceled the lease upon nonpayment. The District Court properly filed a writ of prohibition restraining the Department from canceling the lease, re-leasing the property to other parties, and taking action against lessees for trespass after finding the Department was in excess of its jurisdiction for canceling the lease for nonpayment of agricultural rental when the property was leased for grazing only. Winchell v. Dept. of State Lands, 235 M 10, 764 P2d 1267, 45 St. Rep. 2121 (1988).

School Trust Land Water Rights Owned by State: In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Board's Fiduciary Duty — Basis of Discretionary Power — No Mandamus to Compel Discretionary Action: The Board and the Department are under a fiduciary duty to manage the school lands according to the highest standards. Therefore, the Department's power when administering the trust is discretionary, and a Writ of Mandamus may not be issued to compel the Department to approve an assignment of a lease. Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983).

Leasing State-Owned Land: State Board of Land Commissioners had discretion to award 10-year lease to bidder at 33 ⅓% crop share, rather than to another who bid 50%, especially where lessee had farmed the land before and the Board was taking less risk. State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966).

Lapse of Time Not Confirming a Void Act: In a proceeding in mandamus, commenced in 1937, to compel the state Board of Land Commissioners to refund the purchase price of a tract of state land sold in 1910, in violation of Art. XVII, sec. 1, 2, 1889 Mont. Const. (similar to Art. X, sec. 11, 1972 Mont. Const.), the defenses of laches and Statute of Limitations may not be relied upon, lapse of time not confirming a void act. Under 77-1-303, the Board may refund money. State ex rel. Boorman v. St. Bd. of Land Comm'rs, 109 M 127, 94 P2d 201 (1939).

Protection of Interest of State: An arrangement whereby the state will share in all the natural gas brought to the surface on a certain unified area in proportion to the acreage owned by the state in that area fully protects the rights of the state in securing to it its full share of the gas underlying its lands. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

Attorney General's Opinions

Diversion of School Lands: The state must actually compensate its school trust in money for the full appraised value of school trust lands designated as or exchanged for natural areas to prevent a breach of trust under The Enabling Act and the Montana Constitution. 36 A.G. Op. 92 (1976).

Law Review Articles

Note: Public Rights in Public Lands, Moore, 32 Mont. L. Rev. 147 (1971).

Land Use Planning and Management of State School Lands, McCormack, 1982 Utah L. Rev. 525 (1982).

Collateral References

Public Lands *key* 54.

73A C.J.S. Public Lands §§82, 84; 73B C.J.S. Public Lands §§178 through 180.

53A Am. Jur. 2d Mines and Minerals §23; 63C Am. Jur. 2d Public Lands §§112, 113, 121.

77-1-203. Multiple-use management.

Compiler's Comments

1991 Amendment: Inserted (3) providing that state lands are open for general recreational use subject to certain conditions; and inserted (4) requiring a provision in land leases that the land may not be closed to general recreational use without advance written permission. Amendment effective March 1, 1992.

1991 Statement of Intent: The statement of intent attached to Ch. 609, L. 1991, provided: "A statement of intent is required for this bill because [section 13] [77-1-804] requires the board of land commissioners to adopt rules to implement the provisions for recreational use of state lands established by this bill. Consistent with the provisions of this bill, it is intended that public recreational use of state lands be accomplished to the fullest extent possible. It is acknowledged that certain state lands will merit closure from public recreational use due to certain considerations, including but not limited to the presence of growing crops and livestock and the proximity of dwellings and agricultural buildings. Nothing in this bill authorizes or purports to authorize trespass on private lands to reach state lands.

This bill requires the board to adopt rules governing the actions of the recreational user of state lands. These rules must address protection of the resource value, compensation for damage to improvements, criteria for closure, restrictions upon certain recreational activities, and, when state land is posted, provision for the recreational user to contact the lessee or his agent to provide prior notice of the type and extent of the recreational use contemplated.

[Section 18] [77-1-810] authorizes the department to adopt rules for weed control activities. It is the intent of the legislature that the board establish a procedure whereby weed infestations on state lands that are attributable to recreational access are controlled or eradicated. Examples of procedures that fulfill this intent include:

(1) a departmental weed control program;

(2) payments for weed control activities; and

(3) payments to county weed boards.

It is the intent of the legislature that the board evaluate the implementation of this bill, develop recommendations to address problems, if any, that arise through the course of rulemaking and implementation, and report its findings and recommendations to the 53rd legislature."

Severability: Section 21, Ch. 609, L. 1991, was a severability clause.

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

Administrative Rules

ARM 36.25.103 General provisions — state land leasing.

ARM 36.25.127 Domestic sheep grazing in bighorn sheep habitat.

ARM 36.25.136 Secondary use licenses.

Case Notes

Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

Law Review Articles

Multiple Surface Use—Rights of Mining Claimants and Other Users of Public Lands, Hull, 32 Rocky Mtn. Min. L. Inst. 10 (1986).

Collateral References

Federal Classification and Multiple Use Act of 1964, Pub. L. No. 94-579, 43 U.S.C.S. §1701, et seq.

77-1-204. Power to sell, lease, or exchange certain state lands.

Compiler's Comments

1991 Amendment: In (1), at end of first sentence, deleted subsection reference to 77-1-203. Amendment effective March 1, 1992.

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

1985 Amendment: In (1) at end, increased lease period limitation from 25 to 40 years.

Administrative Rules

Title 36, chapter 2, subchapter 10, ARM General state land rules.

ARM 36.25.103 General provisions — state land leasing.

Case Notes

Statutes Presumed Constitutional — Burden of Proof — Standard of Review: In deciding whether certain statutes violated the mandates of the Montana Constitution and The Enabling Act regarding use of school trust lands, the Supreme Court eschewed standards of review suggested by both parties, holding that the proper standard was whether the District Court's conclusions of law were correct. Statutes are presumed to be constitutional, and the Supreme Court will avoid an unconstitutional interpretation if possible. A party challenging the constitutionality of a statute has the burden of proving it unconstitutional beyond a reasonable doubt, and any doubt will be resolved in favor of the statute. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following Steer, Inc. v. Dept. of Revenue, 245 M 470, 803 P2d 601, 47 St. Rep. 2199 (1990), St. v. Martel, 273 M 143, 902 P2d 14, 52 St. Rep. 873 (1995), Davis v. Union Pac. RR Co., 282 M 233, 937 P2d 27, 54 St. Rep. 328 (1997), and St. v. Nye, 283 M 505, 943 P2d 96, 54 St. Rep. 766 (1997).

Collateral References

States *key* 89.

73B C.J.S. Public Lands §197; 81A C.J.S. States §149.

Conveyance of land as including mature but unharvested crops. 51 ALR 4th 1263.

77-1-205. Board to correct errors.

Collateral References

States *key* 85.

81A C.J.S. States §146.

77-1-208. Cabin site licenses and leases — method of establishing value.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 11 at end of (1) substituted "chapter 15" for "chapter 2". Amendment effective February 14, 2001.

Chapter 270 in (3) near beginning after "set forth in" substituted "77-6-302, 77-6-303, and 77-6-306" for "77-6-302 through 77-6-306". Amendment effective April 20, 2001.

1997 Amendment: Chapter 463 in (1), at end of fourth sentence, inserted "without any adjustments as a result of phasing in values". Amendment effective April 30, 1997.

Effective Date — Retroactive Applicability: Section 15, Ch. 463, L. 1997, provided: "[This act] is effective on passage and approval, and [sections 1 through 9] [7-6-2514 (now repealed), 15-6-134, 15-7-102, 15-7-111, 15-10-401, 15-10-402, 15-10-412 (now repealed), 15-36-323 (now repealed), and 77-1-208] apply retroactively, within the meaning of 1-2-109, to property tax years beginning after December 31, 1996."

1993 Amendment: Chapter 586 in (1), in first sentence near beginning after "shall", inserted bracketed reference to Advisory Council, after "fee" inserted "based on the full market value", and after "site" deleted "subject to a license or lease in effect on January 1, 1988" and in second sentence, near beginning after "must", substituted "attain full market value based on" for "be 3.5% of the" and at end, after "revenue", deleted "or $150, whichever is greater"; deleted (4) that read: "(4) Nothing in this section may be construed as a delegation of rulemaking authority to the board"; and made minor changes in style. Amendment effective July 1, 1993.

Applicability: Section 16(1), Ch. 586, L. 1993, provided: "[Section 1] [77-1-208] applies to leases entered into or renewed on or after [the effective date of this act] [effective July 1, 1993] and, for leases in effect on [the effective date of this act] [effective July 1, 1993], to rentals due after rental adjustments made pursuant to adjustment provisions in the lease."

1989 Amendment: Rewrote (1), (2), and (3) relating to percentage of market value appraisal (see 1987 MCA for former text) to require Board to value cabin site licenses and leases at greater of 3.5% of value determined by Department of Revenue or $150 and directing Board to follow procedures in 77-6-302 through 77-6-306 for disposal or valuation of cabin site improvements (see 1989 Session Law for text); and made minor changes in form. Amendment effective May 22, 1989.

Effective Date — Retroactive Applicability: Section 3, Ch. 705, L. 1989, provided: "[This act] is effective on passage and approval [approved May 22, 1989] and applies retroactively, within the meaning of 1-2-109, to licenses or leases on cabin sites entered into or extended on or after January 1, 1988."

Preamble: The preamble to Ch. 459, L. 1983, provided: "WHEREAS, on February 13, 1981, the Board of Land Commissioners proposed to adopt rules concerning surface licenses and leases for the use of state forest lands for recreational cabin sites by private individuals, which rules would have established the market value of recreational cabin site licenses and leases by a system of competitive bidding; and

WHEREAS, the rules would have allowed out-of-state interests and other parties to increase by competitive bidding the cost of current cabin site licenses and leases and would thereby have worked a hardship on or dispossessed current licensees and lessees and were therefore subsequently withdrawn by the Board; and

WHEREAS, the policy of this state for the leasing of state lands as provided in 77-1-202 is that the guiding principle in the leasing of state lands is "that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state"; and

WHEREAS, allowing current cabin site licensees and lessees to continue to enjoy the benefits of existing licenses and leases and the benefits of their labor is a worthy object helpful to the well-being of the people of this state in that it promotes continuity in the care of state lands, promotes use of state lands by the public by granting a minimal expectation of continuing enjoyment, and promotes satisfaction with governmental processes.

THEREFORE, it is the intent of this bill to direct that if the Board of Land Commissioners adopts any rules under whatever existing rulemaking authority it may have to establish the market value of current cabin site licenses or leases, that the Board, in furtherance of the state policy expressed in 77-1-202, adopt a method of establishing the market values of cabin site licenses and leases which would not cause undue disruption to the lives and property of and useful enjoyment by current licensees and lessees."

Administrative Rules

ARM 36.25.110 Minimum rental rates.

ARM 36.25.137 Cabin sites.

Case Notes

State Land Cabin Site Renewal Policy Not Violative of Obligation to Obtain Full Market Value: Plaintiff contended that this section is facially invalid because the use of a cabin site renewal policy that did not employ competitive bidding was calculated to keep cabin site rental rates below full market value. However, nothing in the plain language of this section abrogates the mandate that full market value be obtained for school trust lands. Plaintiff failed to show that the statute violates the duty of undivided loyalty or that the preference accorded lessees on cabin site leases on state lands resulted in renewal rates below market value. The statute legislatively establishes a method by which full market value is obtained, which is allowed pursuant to Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979), but the language of this section nevertheless requires that full market value be obtained, by whatever method is used, and therefore on its face does not violate the trust. Thus, the District Court correctly held that the renewal preference in this section

does not violate the school trust requirements of the Montana Constitution or The Enabling Act of 1889. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

State Land Cabin Site Rental Policy Violative of School Trust Obligation to Obtain Fair Market Value: The policy employed by the Department of Natural Resources and Conservation in renting cabin sites on state lands, in a manner that resulted in below-market rentals, violated the state's school trust obligations under the Montana Constitution and The Enabling Act of 1889, even though this section is facially valid because it requires that full market value be obtained. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979).

77-1-209. Leasing rules.

Compiler's Comments

1993 Amendment: Chapter 586 inserted second sentence concerning procedure for setting fees and rental rates and inserted third sentence concerning content of procedure. Amendment effective July 1, 1993.

Administrative Rules

Title 36, chapter 2, subchapter 10, ARM General state land rules.
ARM 36.2.1004 Home site and farmyard leases.
ARM 36.11.101 Cabin site maintenance and restrictions.
Title 36, chapter 25, ARM State land leasing.

77-1-211. Acceptance of federal land grants.

Compiler's Comments

1995 Amendment: Chapter 418 in (3) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1989 Amendment: Inserted (5) relating to land granted under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

Collateral References

73A C.J.S. Public Lands §§71, 76, 102, 119.
63C Am. Jur. 2d Public Lands §108.

77-1-213. Acceptance of gifts, donations, grants, legacies, and devises to the state.

Collateral References

Colleges and Universities *key* 6(2); Schools and School Districts *key* 17; States *key* 127.
14A C.J.S. Colleges and Universities §12; 78 C.J.S. Schools and School Districts §18; 81A C.J.S. States §228.

77-1-214. Donations of land for forestry purposes.

Collateral References

States *key* 85.
81A C.J.S. States §146.

77-1-215. Expenditures authorized.

Collateral References

States *key* 87, 119.
81A C.J.S. States §§147, 204, et seq.

77-1-223. Forest land report to trust beneficiaries — contents.

Compiler's Comments

Effective Date: Section 5, Ch. 462, L. 1999, provided that this section is effective July 1, 1999.

77-1-224. Asset value and average return of revenue methods described.

Compiler's Comments

Effective Date: Section 5, Ch. 462, L. 1999, provided that this section is effective July 1, 1999.

77-1-225. Annual report provided.

Compiler's Comments

Effective Date: Section 5, Ch. 462, L. 1999, provided that this section is effective July 1, 1999.

Part 3
Department of Natural Resources and Conservation

77-1-301. Powers and duties of the department.

Administrative Rules

Title 36, chapter 2, subchapter 10, ARM General state land rules.
ARM 36.25.104 Administrative details and information.
ARM 36.25.113 Lease and license reports.
ARM 36.25.114 Disposal of crops.
ARM 36.25.141 Federal farm program compliance.

Case Notes

Lease Rental Affected by Land Reclassification — Writ of Prohibition Proper: Lessees developed a water spreading project on a portion of their state grazing lease, and the Department of State Lands (now Department of Natural Resources and Conservation) reclassified 32 acres of the lease as agricultural. Lessees later concluded that the project was inadequate for producing a profitable crop at the higher agricultural rental rates. They negotiated to pay back a loan for the project and reverted the land to grazing. After the loan was repaid, there were no other agreements supplementing the original lease. However, the Department subsequently determined that the 32 acres should retain the agricultural classification, sought rental at the agricultural rate, and canceled the lease upon nonpayment. The District Court properly filed a writ of prohibition restraining the Department from canceling the lease, re-leasing the property to other parties, and taking action against lessees for trespass after finding the Department was in excess of its jurisdiction for canceling the lease for nonpayment of agricultural rental when the property was leased for grazing only. Winchell v. Dept. of State Lands, 235 M 10, 764 P2d 1267, 45 St. Rep. 2121 (1988).

Lack of Oil and Gas Production — Lease Properly Canceled: The Department of State Lands (now Department of Natural Resources and Conservation) was entitled to a surrender of an oil and gas lease when the clear terms of the lease agreement provided the lease would end after 10 years if no commercial quantities were being produced and it was shown that commercial quantities were never produced. Gypsy-Highview Gathering System, Inc. v. Dept. of State Lands, 231 M 330, 753 P2d 317, 45 St. Rep. 657 (1988).

Department's Fiduciary Duty — Basis of Discretionary Power — No Mandamus to Compel Discretionary Action: The Department is under a fiduciary duty to manage the school lands according to the highest standards. Therefore, the Department's power when administering the trust is discretionary, and a Writ of Mandamus may not be issued to compel the Department to approve an assignment of a lease. Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983).

Law Review Articles

Land Use Planning and Management of State School Lands, McCormack, 1982 Utah L. Rev. 525 (1982).

Collateral References

63C Am. Jur. 2d Public Lands §§113, 121.

77-1-302. Setting fees.

Administrative Rules

ARM 36.2.1003 Schedule of fees.
ARM 36.25.418 Fees — geothermal lease.

77-1-303. Refunding of money paid by mistake.

Case Notes

Interest Paid State Refunded: Interest on installment payments plus principal paid the state on a sale of land for which the state could not produce title must be refunded. State ex rel. Wash. Phosphate & Silver Co. v. St. Bd. of Land Commr's, 113 M 298, 124 P2d 1001 (1942).

Mandamus to Compel Refund: Mandamus lies to compel state boards and officers to perform a clear legal duty, such as is imposed upon the state Board of Land Commissioners by this section to

refund money erroneously paid to it on a contract of sale of state lands where the contract is invalid. State ex rel. Boorman v. St. Bd. of Land Comm'rs, 109 M 127, 94 P2d 201 (1939).

Money Never Becoming Part of State School Fund: Where the state Board of Land Commissioners received money erroneously paid to it on a void contract of sale of state lands, such money never becomes a part of the common School Fund; however, the Board, under 77-1-202, has control over the disposition thereof and, under this section, has authority to refund it to the purchaser. A legislative appropriation is not required for that purpose, "appropriation" applying to state funds with reference exclusively to the General Fund. State ex rel. Boorman v. St. Bd. of Land Comm'rs, 109 M 127, 94 P2d 201 (1939), distinguished in State ex rel. Wash. Phosphate & Silver Co. v. St. Bd. of Land Comm'rs, 113 M 298, 124 P2d 1001 (1942).

Collateral References

States *key* 123.
81A C.J.S. States §156.
63C Am. Jur. 2d Public Lands §126.

77-1-304. Selection and location of lands granted by United States.

Compiler's Comments

1985 Amendment: In first sentence, after "lands", deleted "except timberlands".

Collateral References

73A C.J.S. Public Lands §§78, 80, 81.
63C Am. Jur. 2d Public Lands §§108, 112.

Part 4
Classification of State Lands

Part Case Notes

School Trust Land Water Rights Owned by State: In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

77-1-401. Classes of land.

Administrative Rules

ARM 36.25.108 Lands available for leasing or licensing.

77-1-402. Basis for classification or reclassification.

Compiler's Comments

1991 Amendment: In (1), at end of first sentence, deleted subsection reference to 77-1-203. Amendment effective March 1, 1992.

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

Administrative Rules

ARM 36.25.108 Lands available for leasing or licensing.

Case Notes

Lease Rental Affected by Land Reclassification — Writ of Prohibition Proper: Lessees developed a water spreading project on a portion of their state grazing lease, and the Department of State Lands (now Department of Natural Resources and Conservation) reclassified 32 acres of the lease as agricultural. Lessees later concluded that the project was inadequate for producing a

profitable crop at the higher agricultural rental rates. They negotiated to pay back a loan for the project and reverted the land to grazing. After the loan was repaid, there were no other agreements supplementing the original lease. However, the Department subsequently determined that the 32 acres should retain the agricultural classification, sought rental at the agricultural rate, and canceled the lease upon nonpayment. The District Court properly filed a writ of prohibition restraining the Department from canceling the lease, re-leasing the property to other parties, and taking action against lessees for trespass after finding the Department was in excess of its jurisdiction for canceling the lease for nonpayment of agricultural rental when the property was leased for grazing only. Winchell v. Dept. of State Lands, 235 M 10, 764 P2d 1267, 45 St. Rep. 2121 (1988).

77-1-405. Island parks established — development limited.

Compiler's Comments

Preamble: The preamble attached to Ch. 449, L. 1997, provided: "WHEREAS, publicly owned or leased islands in Montana's navigable rivers, streams, and lakes provide the public an opportunity for a unique recreational experience; and

WHEREAS, in order to preserve the integrity of the island experience, those public properties should remain in as natural and undeveloped state as possible."

Effective Date: Section 3, Ch. 449, L. 1997, provided: "[This act] [77-1-405] is effective on passage and approval." Approved April 30, 1997.

Part 5
State Land Equalization Amount

77-1-501. List of state lands by county.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 after "department of revenue" substituted "that designates" for "or its agent in"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

77-1-502. Computation of state land equalization amount.

Compiler's Comments

2001 Amendment: Chapter 574 at end of (4) substituted "amount" for "payment"; and made minor changes in style. Amendment effective July 1, 2001.

77-1-503. Form to be completed by department of revenue.

Compiler's Comments

2001 Amendment: Chapter 574 at end of last sentence substituted "amount" for "payment". Amendment effective July 1, 2001.

1993 Special Session Amendment: Chapter 27 in first sentence, after "completed by", deleted "the agent of"; in second sentence substituted "department of revenue" for "agent"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

77-1-504. Processing of statements.

Compiler's Comments

2001 Amendment: Chapter 574 near middle of first sentence substituted "amount" for "payment" and near middle of second sentence substituted "amounts" for "payments" and at end substituted "receives through the entitlement share provided for in 15-1-121" for "will receive". Amendment effective July 1, 2001.

1993 Special Session Amendment: Chapter 27 in first sentence, after "returned by the", deleted "agent of the"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Part 6
Development of State Lands

Part Compiler's Comments

Severability Clause: Section 9, Ch. 295, L. 1967, was a severability clause.

Part Administrative Rules

ARM 36.25.140 Resource development project requests.

Title 36, chapter 27, subchapter 1, ARM Resource Development Division.

Title 36, chapter 27, subchapter 2, ARM Establishment, administration, and management of state natural areas.

Part Law Review Articles

The Transformation on Public Lands, Laitos & Carr, 26 Ecology L.Q. 140 (1999).

Land Use Planning and Management of State School Lands, McCormack, 1982 Utah L. Rev. 525 (1982).

77-1-601. Statement of policy.

Administrative Rules

Title 36, chapter 2, subchapter 7, ARM Citizen participation in agency decisions.

ARM 36.25.140 Resource development project requests.

ARM 36.27.101 Resource development.

77-1-602. Definition of terms.

Compiler's Comments

2001 Amendment: Chapter 34 in definition of income after "placed in the" substituted "permanent fund type" for "Montana nonexpendable trust fund type". Amendment effective July 1, 2001.

Deletion of Termination Date: Section 9, Ch. 533, L. 1993, amended sec. 6, Ch. 14, Sp. L. January 1992, by removing the termination date for this section.

1992 Special Session Amendment: Chapter 14, at end of (2) inserted "and revenue from the sale of timber"; and made minor changes in style. Amendment effective February 4, 1992.

Preamble: The preamble attached to Ch. 14, Sp. L. January 1992, provided: "WHEREAS, the Legislature recognizes that timber on school trust lands is a finite renewable resource to be managed on a sustainable yield basis by the Department of State Lands [now Department of Natural Resources and Conservation]."

Termination: Section 6, Ch. 14, Sp. L. January 1992, provided that this section terminates June 30, 1993.

1983 Amendment: In (1), substituted "state special revenue fund" for "earmarked revenue fund"; and in (2), substituted "Montana nonexpendable trust fund type" for "Montana trust and legacy fund".

Administrative Rules

ARM 36.25.140 Resource development project requests.

77-1-603. Rules.

Administrative Rules

ARM 36.25.140 Resource development project requests.

Title 36, chapter 27, ARM Land administration — resource development — state natural areas.

77-1-604. Resource development account.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Administrative Rules

ARM 36.27.101 Resource development.

77-1-605. Types of developments.

Administrative Rules

ARM 36.27.101 Resource development.

77-1-606. Restriction on use of income from school and institutional lands.

Compiler's Comments

Repeal of Termination Date: Section 3, Ch. 157, L. 1995, repealed sec. 12, Ch. 533, L. 1993, that terminated this section. Repealer effective June 30, 1995.

1993 Amendment: Chapter 533 near beginning, before "account", inserted "resource development" and after "account" inserted "created in 77-1-604"; and made minor changes in style. Amendment effective June 30, 1993, and terminates June 30, 1995.

Administrative Rules

ARM 36.27.101 Resource development.

77-1-607. Deductions from income for development account — maximum percentage.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 16, L. 1999, repealed sec. 4, Ch. 247, L. 1997, which terminated the 1997 amendments to this section June 30, 1999. Effective February 17, 1999.

1997 Amendment: Chapter 247 in (1) substituted "3%" for "2 ½%"; and made minor changes in style. Amendment effective July 1, 1997, and terminates June 30, 1999.

Termination: Section 4, Ch. 247, L. 1997, provided: "[This act] terminates June 30, 1999."

Repeal of Termination Date: Section 3, Ch. 157, L. 1995, repealed sec. 12, Ch. 533, L. 1993, that terminated this section. Repealer effective June 30, 1995.

1993 Amendment: Chapter 533 inserted (2) providing exception for income deducted and expended under 77-1-613; and made minor changes in style. Amendment effective June 30, 1993, and terminates June 30, 1995.

Administrative Rules

ARM 36.27.101 Resource development.

77-1-608. Crediting of deductions.

Compiler's Comments

Repeal of Termination Date: Section 3, Ch. 157, L. 1995, repealed sec. 12, Ch. 533, L. 1993, that terminated this section. Repealer effective June 30, 1995.

1993 Amendment: Chapter 533 after "77-1-607" inserted "(1)"; and made minor changes in style. Amendment effective June 30, 1993, and terminates June 30, 1995.

77-1-613. Deduction of portion of income received from sale of timber from state trust lands — creation of account.

Compiler's Comments

1995 Amendment: Chapter 157 in (1), at end of first sentence, inserted "called the state timber sale account", deleted former second sentence that read: "The amount of $312,000 per year of the income received from the sale of timber from state trust lands must be deducted and placed in the account to the credit of the state timber sale program", at beginning of second sentence inserted "Money in the account may be appropriated by the legislature", and inserted third sentence concerning placing funds in the account corresponding to appropriation; and deleted (5) that read: "(5) A timber purchaser who successfully bids on a contract to purchase timber from state trust lands shall deposit with the department 20% of the bid price as a downpayment when the contract is awarded." Amendment effective June 30, 1995.

Repeal of Termination Date: Section 3, Ch. 157, L. 1995, repealed sec. 12, Ch. 533, L. 1993, that terminated this section. Repealer effective June 30, 1995.

Preamble: The preamble attached to Ch. 533, L. 1993, provided: "WHEREAS, the amount of timber harvested from state lands continues to decline; and

WHEREAS, the gap between the level of harvest and the biological sustained yield continues to grow; and

WHEREAS, the price of timber continues to escalate because of market conditions and reduced harvesting of federal timber; and

WHEREAS, Montana schools and other institutions face a continuing funding crisis; and

WHEREAS, the rate of return on timber sales is approximately 3 to 1; and

WHEREAS, the use of state trust lands is intended to provide the maximum dollar return to the trusts; and

WHEREAS, investment of a portion of the money from timber sales on state lands directly into activities that will result in additional sales being offered will result in more revenue flowing to the trusts."

Effective Date: Section 11, Ch. 533, L. 1993, provided that this section is effective June 30, 1993.

Termination Date: Section 12, Ch. 533, L. 1993, provided that this section terminates June 30, 1995.

77-1-617. Management of isolated trust lands — reciprocal access.

Compiler's Comments

Effective Date: Section 4, Ch. 182, L. 1999, provided that this section is effective on passage and approval. Approved March 26, 1999.

Part 7
Ownership Records of State-Owned Land

Part Administrative Rules

Title 36, chapter 2, subchapter 9, ARM Ownership records for nonschool trust land.

77-1-701. Definitions.

Compiler's Comments

1997 Amendment: Chapter 32 in definition of state land, in (a) after "through", deleted "foreclosure of any", after "investments" deleted "purchased", and at end substituted "17-6-201" for "17-6-211".

77-1-702. Transfer of records held by secretary of state.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

77-1-703. Filing of ownership records.

Administrative Rules

ARM 36.2.901 Purpose.
ARM 36.2.903 Filing of ownership records.
ARM 36.2.905 Index and verification of ownership records.

77-1-704. Department to maintain repository.

Compiler's Comments

1987 Statement of Intent: The statement of intent attached to Ch. 467, L. 1987, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of state lands [now department of natural resources and conservation] to implement and administer the transfer and filing of ownership records of state lands.

Currently, certain records regarding state ownership of land are held by the secretary of state. This bill requires the secretary of state to transfer these records to the department of state lands [now department of natural resources and conservation] by November 1, 1987. It further requires the department of state lands [now department of natural resources and conservation] to transfer records of land held or administered by the department of highways [now department of transportation] for highway rights-of-way and maintenance to that department. Finally, the bill requires the department of state lands [now department of natural resources and conservation] to transfer any remaining ownership records, other than those of state lands , to the state agency administering the interest or property described in such records.

The legislature intends that the department of state lands [now department of natural resources and conservation] be the sole repository for records of all state lands owned by virtue of fee simple title, grant, or deed except for land specifically excluded under the bill. State land with buildings attached to it and used by the department of highways [now department of transportation] for maintenance must be recorded on records maintained by the department of state lands [now department of natural resources and conservation].

It is intended that the department of state lands [now department of natural resources and conservation] may adopt rules to specify which records will be kept by the department and which records will be transferred to other agencies, including records of lesser interests such as leases. In

addition, it is intended that the rules clarify which records must be filed in the future with the department of state lands [now department of natural resources and conservation] and specify the format that the records must follow to ensure a reliable and uniform body of records and index as required under section 5 [77-1-705]."

Administrative Rules

ARM 36.2.901 Purpose.
ARM 36.2.904 Department to maintain central record depository.
ARM 36.2.905 Index and verification of ownership records.

77-1-705. Index and verification of ownership records.

Administrative Rules

ARM 36.2.902 Definitions.
ARM 36.2.905 Index and verification of ownership records.

77-1-706. Treatment of highway lands.

Compiler's Comments

1995 Amendment: Chapter 418 in two places, after "department", deleted "of state lands". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Administrative Rules

ARM 36.2.903 Filing of ownership records.

77-1-707. Rules.

Compiler's Comments

1995 Amendment: Chapter 418 after "department" deleted "of state lands". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Statement of Intent: The statement of intent attached to Ch. 467, L. 1987, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of state lands [now department of natural resources and conservation] to implement and administer the transfer and filing of ownership records of state lands.

Currently, certain records regarding state ownership of land are held by the secretary of state. This bill requires the secretary of state to transfer these records to the department of state lands [now department of natural resources and conservation] by November 1, 1987. It further requires the department of state lands [now department of natural resources and conservation] to transfer records of land held or administered by the department of highways [now department of transportation] for highway rights-of-way and maintenance to that department. Finally, the bill requires the department of state lands [now department of natural resources and conservation] to transfer any remaining ownership records, other than those of state lands, to the state agency administering the interest or property described in such records.

The legislature intends that the department of state lands [now department of natural resources and conservation] be the sole repository for records of all state lands owned by virtue of fee simple title, grant, or deed except for land specifically excluded under the bill. State land with buildings attached to it and used by the department of highways [now department of transportation] for maintenance must be recorded on records maintained by the department of state lands [now department of natural resources and conservation].

It is intended that the department of state lands [now department of natural resources and conservation] may adopt rules to specify which records will be kept by the department and which records will be transferred to other agencies, including records of lesser interests such as leases. In addition, it is intended that the rules clarify which records must be filed in the future with the department of state lands [now department of natural resources and conservation] and specify the

format that the records must follow to ensure a reliable and uniform body of records and index as required under section 5 [77-1-705]."

Administrative Rules

Title 36, chapter 2, subchapter 9, ARM Ownership records for nonschool trust land.

Part 8
Recreational Use of State Lands

Part Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 609, L. 1991, provided: "A statement of intent is required for this bill because [section 13] [77-1-804] requires the board of land commissioners to adopt rules to implement the provisions for recreational use of state lands established by this bill. Consistent with the provisions of this bill, it is intended that public recreational use of state lands be accomplished to the fullest extent possible. It is acknowledged that certain state lands will merit closure from public recreational use due to certain considerations, including but not limited to the presence of growing crops and livestock and the proximity of dwellings and agricultural buildings. Nothing in this bill authorizes or purports to authorize trespass on private lands to reach state lands.

This bill requires the board to adopt rules governing the actions of the recreational user of state lands. These rules must address protection of the resource value, compensation for damage to improvements, criteria for closure, restrictions upon certain recreational activities, and, when state land is posted, provision for the recreational user to contact the lessee or his agent to provide prior notice of the type and extent of the recreational use contemplated.

[Section 18] [77-1-810] authorizes the department to adopt rules for weed control activities. It is the intent of the legislature that the board establish a procedure whereby weed infestations on state lands that are attributable to recreational access are controlled or eradicated. Examples of procedures that fulfill this intent include:

(1) a departmental weed control program;
(2) payments for weed control activities; and
(3) payments to county weed boards.

It is the intent of the legislature that the board evaluate the implementation of this bill, develop recommendations to address problems, if any, that arise through the course of rulemaking and implementation, and report its findings and recommendations to the 53rd legislature."

Severability: Section 21, Ch. 609, L. 1991, was a severability clause.

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

Effective Date: Section 23, Ch. 609, L. 1991, provided: "[This act] is effective March 1, 1992."

Part Administrative Rules

ARM 36.25.143 through 36.25.146, 36.25.149, 36.25.150, 36.25.152, 36.25.155 through 36.25.159, 36.25.161, and 36.25.162 Recreational access.

Part Law Review Articles

Preservation and Recreation on the Public Lands, Potter, 1992 Min. L. Series: Rocky Mtn. Min. L. Found. 9-1 (1992).

Outfitting on Public Lands: A Study of Federal and State Regulation, Smith, 26 Idaho L. Rev. 9 (1989-90).

Public Access to Landlocked Public Lands, Chavez, 39 Stan. L. Rev. 1373 (1987).

77-1-802. Recreational use license — fee.

Compiler's Comments

1993 Amendment: Chapter 586 in (1), after "license", substituted "must[, taking into account recommendations of the state land board advisory council [now terminated],] attain full market value" for "is $5. The fee is based upon:

(a) a $3 charge as the value of 1 year of recreational use of state lands; and

(b) a $2 surcharge for the administrative costs of providing recreational access to state lands and the maintenance of a state lands recreational use account pursuant to 77-1-808"; in (2)(a), at

beginning, inserted exception clause and substituted "license fees" for "proceeds collected under subsection (1)(a)"; and substituted (2)(b) concerning disposition of license fee for former (2)(b) that read: "(b) proceeds collected under the surcharge of subsection (1)(b), less 50 cents for each license to be returned as a commission to license dealers, must be deposited in the state lands recreational use account established by 77-1-808 for use by the department in the management of state lands open to general recreational use". Amendment effective July 1, 1993.

Applicability: Section 16(2), Ch. 586, L. 1993, provided: "[Section 2] [77-1-802] applies to licenses sold after February 28, 1994."

77-1-804. Rules for recreational use of state lands — penalty.

Compiler's Comments

1997 Amendment: Chapter 42 in (8), at end, substituted "87-1-601(7)" for "87-1-601(6)"; and made minor changes in style. Amendment effective March 12, 1997.

Administrative Rules

ARM 36.25.153 Management closures and restrictions.
ARM 36.25.154 Recreational Use Advisory Council.
ARM 36.25.156 Recreational use — notice for use other than licensed hunting.
ARM 36.25.163 through 36.25.167 Block management.

77-1-808. State lands recreational use account.

Compiler's Comments

2001 Amendment: Chapter 117 deleted former (2)(b) that read: "(b) all revenue received from the imposition of fines under 77-1-801 and 77-1-806 and from civil penalties imposed pursuant to 77-1-804"; and made minor changes in style. Amendment effective March 23, 2001.

1995 Amendment: Chapter 509 in (3), after "account", deleted "is statutorily appropriated, as provided in 17-7-502, and". Amendment effective July 1, 1995.

77-1-809. Compensation for damage to improvements, growing crops, or livestock.

Compiler's Comments

1995 Amendment: Chapter 509 in fifth sentence inserted "appropriations from" and at end substituted "available appropriation" for "existing balance of the account"; and made minor changes in style. Amendment effective July 1, 1995.

77-1-810. Weed control management.

Compiler's Comments

1995 Amendment: Chapter 509 in (2) inserted "appropriations from". Amendment effective July 1, 1995.

CHAPTER 2
TRANSFERS AND RESERVATIONS OF PROPERTY INTERESTS

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 480, L. 1993, provided: "WHEREAS, the State of Montana still owns the Montana Territorial Prison, more commonly known as the old Montana State Prison, in the city of Deer Lodge in Powell County, Montana; and

WHEREAS, since at least 1980, the Department of Corrections and Human Services [now Department of Corrections] has leased the old Montana State Prison to the city of Deer Lodge, which has, since 1980, assigned that lease to the Powell County Museum and Arts Foundation; and

WHEREAS, the Powell County Museum and Arts Foundation has maintained the old Montana State Prison as a museum and regional tourist attraction and has expended substantial sums of money for the operation and maintenance of the prison complex, all of which have benefited the prison structure and the economy of the Powell County area and have been made for the education and enjoyment of the public; and

WHEREAS, continued operation of the old Montana State Prison as a museum by the Powell County Museum and Arts Foundation will fulfill a substantial governmental purpose by

contributing to the local economies of the city of Deer Lodge and of Powell County and by providing for the care and upkeep of the prison complex without public expense; and

WHEREAS, the city of Deer Lodge, Powell County, the Powell County Museum and Arts Foundation, and the Department of Corrections and Human Services [now Department of Corrections] desire to make the land available to the Foundation for museum purposes; and

WHEREAS, transfer of the prison complex to the Powell County Museum and Arts Foundation will recognize the consideration paid over the years by the Foundation in the form of the expenditure of funds for the maintenance and upkeep of the prison complex."

Disposition of Old Prison: Section 1, Ch. 480, L. 1993, provided: "(1) The department of corrections and human services [now department of corrections] is directed to transfer the interest of the state of Montana in the Montana territorial prison, commonly known as the old Montana state prison, which property is further described in subsection (2), by 99-year lease to the Powell County museum and arts foundation or its successor for operation as a museum. The lease must guarantee the rights of the Montana law enforcement museum that were established in the December 14, 1989, lease between the Powell County museum and arts foundation and the Montana law enforcement museum.

(2) The property is described as all the buildings comprising the Montana state prison complex, which constitutes blocks 52, 53, 61 (lots 5 through 10), 62, 63, 66, 67, and 68 (lots 1 through 10) of the original townsite of the city of Deer Lodge, all situated in the northwest quarter of section 4, township 6 north of the official plat thereof on file at the Powell County courthouse.

(3) The department of corrections and human services [now department of corrections] shall establish appropriate conditions to protect the interests of the state on the transfer of the property, including a provision for reversion should the property cease to be used for museum purposes. The commitment to expend sums of money, the past expenditure of money in the development of the property for use for museum purposes, and the dedication of the property as so developed for public use for the benefit of all Montanans may be considered as a part or all of the consideration necessary to constitute full market value if it is determined that the state cannot transfer the property without obtaining full market value for it.

(4) The provisions of Title 77, chapter 2, part 3, do not apply to the transfer of land directed by this section."

Part 1
Easements

Part Administrative Rules

ARM 36.2.1001 Leasing or other use of state lands.

Part Law Review Articles

Ownership of Abandoned Navigable Riverbeds: To Whom Does the Windfall Blow?, DePuy, 8 Pub. Land L. Rev. 115 (1987).

Avoidance of Disputes Between the Surface Owner and the Coal Owner-Operator Through Properly Drafted Severance Deeds, Leases, Subsidence Agreements and Other Instruments, Palmore & McGuire, 9 E. Min. L. Found. 6-1 (41) (1988).

Intelligent Taxable Transfers of Mineral Properties, Thompson, 31 Rocky Mtn. Min. L. Inst. 5-1 (1985).

Part Collateral References

Easement, servitude, or covenant as affected by sale for taxes. 7 ALR 5th 187.

77-2-101. Easements for specific uses.

Compiler's Comments

2001 Amendment: Chapter 230 in (1) substituted language outlining purposes for which the board may grant easements on state lands for former language that read: "The board may grant easements in state lands for schoolhouse sites and grounds, public parks, community buildings, cemeteries, and other public uses upon proper applications accompanied by accurate and duly verified plats from the lawfully constituted authorities having charge of those properties"; in (2)(a) deleted former second sentence that read: "This subsection shall not be construed to grant authority to convey any such land, except for the purposes above set forth"; inserted (2)(b) allowing the grant of an easement for any private building or private sewage system that encroaches on state lands; and made minor changes in style. Amendment effective April 12, 2001.

Administrative Rules
ARM 36.25.135 Easements for public purposes.

Collateral References
Public Lands *key* 54.
73A C.J.S. Public Lands §84.

77-2-102. Application for easement.

Compiler's Comments
2001 Amendment: Chapter 7 in (4) in first sentence substituted "electrical energy" for "electric energy". Amendment effective October 1, 2001.
1999 Amendment: Chapter 277 at beginning of second sentence in (1) inserted reference to subsection (4); inserted (3) requiring application to include affidavit stating methodology accurate within 5 meters, requiring survey tied to established section corner or monument, and authorizing department to request greater accuracy if needed to describe easement; inserted third sentence in (4) requiring that accuracy requirements be met; and made minor changes in style. Amendment effective October 1, 1999.
1995 Amendment: Chapter 300 in (1), at beginning of second sentence, inserted exception clause; in (2), at end of first sentence, substituted "engineer or surveyor who prepared the application" for "county surveyor or county or city engineer or other engineer having prepared the same endorsed thereon"; in (3), at beginning of second sentence, inserted "An exact geographical survey is not required, but the application must include" and at end inserted "that refers to an established monument within a filed corner recordation form, certificate of survey, or subdivision plat" and inserted fourth sentence requiring no archaeological survey absent impact to heritage properties; and made minor changes in style. Amendment effective March 30, 1995.

77-2-103. Processing of application.

Compiler's Comments
1995 Amendment: Chapter 300 in (1) deleted fifth sentence that read: "The board shall issue right-of-way deeds for all such easements that it grants upon full payment being made"; and made minor changes in style. Amendment effective March 30, 1995.

77-2-106. Charge for granting of easement.

Compiler's Comments
1999 Amendment: Chapter 18 deleted second sentence that provided: "Where a road follows the section lines of state lands, the increased value accruing to said lands on account of construction of a road on said right-of-way easement shall be taken into consideration by the board in determining compensation, if any, for the easement"; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules
ARM 36.2.1005 Minimum easement charges.

77-2-107. Involvement of lessee when land subject to prior lease.

Compiler's Comments
1995 Amendment: Chapter 418 in (3)(b), in three places, substituted "director" for "commissioner"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.
1983 Amendment: Inserted (3) requiring arbitration of disputed valuation of easement damages, providing a process for arbitration, and providing for judicial review of a departmental valuation.

Part 2
Exchanges of Land

Part Law Review Articles
The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests, Wenzel, 42 Am. U.L. Rev. 607 (1993).

Land Exchanges With the Federal Government, Kite & Black, 1992 Min. L. Series: Rocky Mtn. Min. L. Found. 6-1 (1992).

77-2-201. Exchange of land with United States or tribal governments.

Compiler's Comments

1985 Amendment: Inserted (2) allowing the Board to contract for rights to lands located within tribal government reservations.

Bill From Select Committee on Indian Affairs (now Law and Justice Interim Committee): Chapter 628, L. 1985, was introduced by request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See committee report to the 49th Legislature, November 1984, by the Montana Legislative Council.

Collateral References

73A C.J.S. Public Lands §§85, 86.

63C Am. Jur. 2d Public Lands §§53, 58, 120.

77-2-203. Exchange for nongovernment, state government, and other state and local public entity land.

Compiler's Comments

2001 Amendment: Chapter 139 in (1) in introductory clause at beginning inserted "Subject to subsection (2)" and substituted "exchange state land for land owned by" for "exchange state land for private land"; inserted (1)(a) through (1)(d) regarding certain owners of land; in (2) at beginning of first sentence substituted "The board may exchange the land described in subsection (1) if the land" for "provided that the private land"; in (3) near beginning inserted reference to subsection (2) and in two places substituted "nongovernment-owned land" for "private land"; and made minor changes in style. Amendment effective March 28, 2001.

1985 Amendment: In (1) inserted second sentence concerning making appraisal available upon request.

1983 Amendment: In first sentence of (1), inserted ", as determined by the board after appraisal by a qualified land appraiser,".

Case Notes

Summary Judgment Holding Board of Land Commissioners' Decision Approving Land Exchange Not Arbitrary, Capricious, or Unlawful Found Improper: The plaintiffs, various environmental groups, sought a preliminary injunction to prevent the exchange of certain properties during the pendency of their lawsuit challenging the action of the Board of Land Commissioners. The District Court denied the injunction and entered a summary judgment in favor of the Board, holding that the Board's decision to make the exchange was based on an adequate consideration of the requirements set forth in subsection (2) of this section and therefore was not arbitrary, capricious, or unlawful. The Supreme Court vacated and remanded the lower court's decision, finding that the plaintiffs had raised genuine issues of material fact, including whether the streams on the land to be given to the state have a significant public use value; whether a "potential to" provide significant public use value is equivalent to providing significant public use value; and the weight, if any, to be accorded an increase in stream mileage. The Supreme Court held that as a result of the material issues of fact raised by the plaintiffs, a material issue of fact also existed as to whether the Board's decision approving the proposed land exchange was arbitrary, capricious, or unlawful. Skyline Sportsmen's Ass'n v. Bd. of Land Comm'rs, 286 M 108, 951 P2d 29, 54 St. Rep. 1326 (1997).

Collateral References

73A C.J.S. Public Lands §§85, 86.

77-2-204. Notification of proposed exchange — hearing.

Compiler's Comments

1985 Amendment: Inserted (1) requiring notice of a proposal for exchange of land and allowing the right to comment by affected leaseholders; in (2) at beginning, deleted "Prior to completing any such exchange under 77-2-203", near beginning, after "hearing", inserted "on any exchange under this part", in second sentence, after "raised", inserted "before or" and after "hearing" inserted "pursuant to subsection (1)".

77-2-205. Restriction on exchange for nongovernment-owned land.

Compiler's Comments

2001 Amendment: Chapter 139 near beginning inserted "for nongovernment-owned land"; and made minor changes in style. Amendment effective March 28, 2001.

77-2-206. Settlement for improvements.

Compiler's Comments

2001 Amendment: Chapter 270 in second sentence near beginning after "The provisions of 77-6-301 through" inserted "77-6-303 and"; and made minor changes in style. Amendment effective April 20, 2001.

77-2-211. Exchange of timbered, cut-over, or burned-over lands.

Compiler's Comments

1999 Amendment: Chapter 18 in third sentence substituted "77-2-303(2)" for "77-2-303(3)"; and made minor changes in style. Amendment effective October 1, 1999.

1983 Amendment: In first sentence, inserted ", as determined by the board after appraisal by a qualified land appraiser,".

77-2-213. Department to investigate.

Compiler's Comments

1985 Amendment: Changed the Department of Natural Resources and Conservation to the Department of State Lands (now abolished). "Department" means Department of State Lands (now Department of Natural Resources and Conservation). See 77-1-101.

77-2-214. Investigation and findings concerning exchange of land.

Compiler's Comments

1985 Amendment: In (1) changed the Department of Natural Resources and Conservation to the Department of State Lands (now abolished). "Department" means Department of State Lands (now Department of Natural Resources and Conservation). See 77-1-101.

77-2-215. Notice and hearing concerning exchange of timbered lands.

Compiler's Comments

1995 Amendment: Chapter 418 in first sentence, after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

77-2-216. Final order of board.

Compiler's Comments

1985 Amendment: At beginning deleted "Within 10 days after the conclusion of the hearing".

Part 3
Sales

77-2-301. Sales of state land under board control.

Compiler's Comments

1989 Amendment: In second sentence inserted "and except as provided in 77-2-318".

Collateral References

Public Lands *key* 142.

73A C.J.S. Public Lands §§85 through 94; 73B C.J.S. Public Lands §178.

63C Am. Jur. 2d Public Lands §17.

77-2-302. Disposition of former institutions and certain federal land grants.

Compiler's Comments

1995 Amendment: Chapter 418 in (2), near end, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1989 Amendment: Inserted (2) relating to land granted under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

Attorney General's Opinions

Waiver of Federal Restrictions — Effect of State Requirements for Land Transfer: Notwithstanding the waiver of federal restrictions on land, in order for the state to transfer title to state land to a city, all state constitutional and statutory requirements must be fulfilled (opinion issued prior to passage of this section). 36 A.G. Op. 113 (1976).

77-2-303. Restrictions on land available for sale.

Compiler's Comments

2001 Amendment: Chapter 418 in (1) at beginning of first sentence inserted "Subject to purchase by the department pursuant to 17-6-340" and after "judgment of the" substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 18 deleted former (1) that provided: "(1) Except as provided in 77-2-318, lands classified as timberlands are not subject to sale, but timber thereon may be sold and disposed of in the manner provided by law"; in (2)(a) near beginning before "nonnavigable meandered lakes" deleted "bordering on" and before "navigable streams" deleted "from all state lands bordering on"; and made minor changes in style. Amendment effective October 1, 1999.

1989 Amendment: In (1) inserted "Except as provided in 77-2-318".

Law Review Articles

"Public Trust" as a Constitutional Provision in Montana, Leaphart, 33 Mont. L. Rev. 175 (1972).

77-2-304. Mineral reservations in state land.

Compiler's Comments

2001 Amendment: Chapter 418 at beginning of second sentence inserted "Subject to 17-6-340"; and made minor changes in style. Amendment effective July 1, 2001.

1981 Amendment: Deleted subsection (2) which made reference to mineral reservations applying to sale of lands to the United States under 77-2-316 (repealed by sec. 4, Ch. 157, L. 1981).

Law Review Articles

Montana's Statutory Protection of Surface Owners From Strip Mining and Resultant Problems of Mineral Deed Construction, Karell, 37 Mont. L. Rev. 347 (1976).

Collateral References

Mines and Minerals *key* 1; Public Lands *key* 158 ½.

58 C.J.S. Mines and Minerals §4; 73B C.J.S. Public Lands §178.

53A Am. Jur. 2d Mines and Minerals §§6, 23.

Estate created by minerals grant, reservation or exception. 66 ALR 2d 978.

Surface owner's right of access through solid mineral seam or vein to reach underlying water. 25 ALR 2d 1250.

77-2-306. Who may purchase.

Compiler's Comments

1991 Amendment: Near end of first sentence, after "laws of this state", inserted "or towns, cities, counties, or consolidated local governments of this state"; and made minor changes in style.

1985 Amendment: Inserted (3) allowing sale of state lands to any sovereign state of the United States or certain agencies or political subdivisions thereof for educational or scientific purposes.

Bill From Select Committee on Indian Affairs (now Law and Justice Interim Committee): Chapter 628, L. 1985, was introduced by request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See committee report to the 49th Legislature, November 1984, by the Montana Legislative Council.

Case Notes

Sale to Public Agencies: This section makes it possible for property to be sold to a public corporation or political subdivision, but nothing in the section permits the Board of Land

Commissioners to restrict the sale to any such corporation or subdivision. State ex rel. Werner v. District Court, 142 M 145, 382 P2d 824 (1963).

Collateral References

Public Lands *key* 158 ½.

73A C.J.S. Public Lands §88; 73B C.J.S. Public Lands §178.

77-2-307. Limitation on acreage.

Compiler's Comments

1985 Amendment: In (1), inserted "Except as provided in subsection (2)" and substituted "may" for "shall be entitled to"; inserted (2)(b) exempting acreage limitations on lands sold to a tribal government; and made minor changes in phraseology.

Bill From Select Committee on Indian Affairs (now Law and Justice Interim Committee): Chapter 628, L. 1985, was introduced by request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See committee report to the 49th Legislature, November 1984, by the Montana Legislative Council.

Collateral References

73B C.J.S. Public Lands §181.

77-2-308. Approval or disapproval of sales.

Case Notes

Reason for Disapproval: Where the state Board of Land Commissioners rejected all bids and ordered another sale in order that lessee of state-owned armory building might meet the highest bid and be given preference of purchase, it was not required by this section that the Board set forth in their minutes why the original sale was disadvantageous to the state. State ex rel. Werner v. District Court, 142 M 145, 382 P2d 824 (1963).

Rejection of Sale: The Board of Land Commissioners was warranted in rejecting the sale of state land and in causing the property sold to petitioner to again be advertised for public auction where it was shown that competitive bidding was stifled and that the person who asked for the sale was erroneously notified as to the time for the holding of the sale. Because of this, the full market value of the land had not been obtained. State ex rel. Robbins v. Bonner, 128 M 45, 270 P2d 400 (1954).

Collateral References

73A C.J.S. Public Lands §§85, 86.

77-2-311. Survey and plat of shore lands.

Compiler's Comments

1999 Amendment: Chapter 18 in first sentence substituted "77-2-303(2)" for "77-2-303(3)" and in third sentence substituted "77-2-303(2)(a)" for "77-2-303(3)(a)"; and made minor changes in style. Amendment effective October 1, 1999.

77-2-312. Subdivision of lands in or near municipalities.

Compiler's Comments

1993 Amendment: Chapter 155 at end of (1), after "sale", deleted "and the lots must then be sold alternately at regular sales of state lands"; and made minor changes in style. Amendment effective March 24, 1993.

77-2-313. Land subject to taxation.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in first sentence, at end, deleted "to the full value thereof"; in first sentence of (3), after "revenue", deleted "or its agent in each county"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

77-2-318. Sale of leased cabin or home sites or city or town lots.

Compiler's Comments

1997 Amendment: Chapter 472 in (4), in third sentence, substituted "lessee with a disability" for "handicapped lessee".

Administrative Rules
ARM 36.25.102 Definitions.
ARM 36.25.129 Sale of cabin sites and city or town lots: application and notice procedures.
ARM 36.25.130 Sale of cabin sites and city or town lots: bidding and final Board determination.
ARM 36.25.131 Sale of cabin sites and city or town lots: improvements.

77-2-319. Conservation easement for certain sales.

Administrative Rules
ARM 36.25.129 Sale of cabin sites and city or town lots: application and notice procedures.

Law Review Articles
Conservation Easements and the Common Law, Dana & Ramsey, 8 Stanford Envtl. L.J. 2-45 (1989).

77-2-321. Sales to be at public auction.

Administrative Rules
ARM 36.25.130 Sale of cabin sites and city or town lots: bidding and final Board determination.

Collateral References
73A C.J.S. Public Lands §§85, 86; 73B C.J.S. Public Lands §184.

77-2-323. Sale procedure and limitation.

Compiler's Comments
1997 Amendment: Chapter 422 in (4) inserted last sentence relating to forfeitures deposited in the state general fund; and made minor changes in style. Amendment effective July 1, 1997.
1983 Amendment: At end of (1)(a), substituted "value determined by the board after appraisal by a qualified land appraiser" for "appraised value".

Collateral References
73A C.J.S. Public Lands §89; 73B C.J.S. Public Lands §184.

77-2-324. Preference to lessee of land.

Compiler's Comments
1989 Amendment: After "shall" substituted "have the option to match the high bid and must" for "if bidding an equal amount"; and inserted second sentence requiring bidding to be reopened if lessee matches high bid and retaining lessee preference right to match highest bid.

Case Notes
Sale to Lessee Meeting High Bid: Lessee of state-owned armory building may meet the high bid and be given preference of purchase only at the time of the sale and while bidding is in progress. State ex rel. Werner v. District Court, 142 M 145, 382 P2d 824 (1963).

Collateral References
73A C.J.S. Public Lands §88.

77-2-325. Settlement for improvements.

Compiler's Comments
2001 Amendment: Chapter 270 in second sentence after "The provisions of 77-6-301 through" inserted "77-6-303 and"; and made minor changes in style. Amendment effective April 20, 2001.

Administrative Rules
ARM 36.25.125 Improvements.
ARM 36.25.131 Sale of cabin sites and city or town lots: improvements.

77-2-326. Time of possession.

Administrative Rules
ARM 36.25.128 Sales.

77-2-327. Certificate of purchase.

Compiler's Comments
1995 Amendment: Chapter 418 in (1), near end of first sentence, substituted "director of the department" for "commissioner of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1981 Amendment: Deleted reference to subsection (1) of 77-2-304 in the last sentence of (1).

Administrative Rules

ARM 36.2.1002 Sale of state lands.

Collateral References

73A C.J.S. Public Lands §§85, 86; 73B C.J.S. Public Lands §182.

63C Am. Jur. 2d Public Lands §115.

77-2-328. Additional rules — deposit of fees.

Compiler's Comments

1997 Amendment: Chapter 422 inserted second sentence relating to fees deposited in state general fund; and made minor changes in style. Amendment effective July 1, 1997.

Administrative Rules

Title 36, chapter 2, subchapter 10, ARM General state land rules.

ARM 36.25.128 Sales.

ARM 36.25.132 Weeds, pests, and fire protection.

Case Notes

Rules for Particular Sale Not Authorized: Although this section authorizes the adoption of general rules for the conduct of sales, it does not permit the state Board of Land Commissioners to adopt rules for each particular sale, and a notice of sale which restricted the sale of a state-owned building to public corporations, agencies, or political subdivisions of the state was void. State ex rel. Werner v. District Court, 142 M 145, 382 P2d 824 (1963).

77-2-329. Terms of payment.

Compiler's Comments

1991 Amendment: Substituted (2) regarding when balance of purchase price is due for former (2) that read: "(2) The balance of the purchase price shall draw interest at the rate set by the board, but in no instance shall the rate be less than 5% per year, payable annually, and the balance of the purchase price itself shall be payable through a period of 33 years on the amortization plan. This plan is defined as being that plan under which part of the principal is required to be paid each time interest becomes due and payable and under which this part payment on the principal increases at each succeeding installment in the same amount that the interest payment decreases so that the combined amount due on principal and interest on each due date remains the same until the loan or bond is paid in full. However, the amount of the last installment may vary from the other installments to the extent resulting from disregarding fractional cents in the previous installments. The balance of the purchase price on town and city lots shall be payable on the amortization plan through a period of 20 years, but the board may at any time fix a shorter period than 20 years for the payment of the balance on town and city lots. Different periods of time may be established for different towns and cities as the best interests of the state demand. The board shall annually review the interest rate prior to December 31 of each year and may review the interest rate at any time the board determines such review is necessary. The interest rate fixed by the board applies to all contracts entered into until the board fixes a different interest rate".

1987 Amendment: Near end of (2) substituted clause allowing Board to review rate when necessary and last sentence allowing application of fixed rate to contracts entered into until Board fixes different rate for "fix the interest rate for all contracts to be entered into during the succeeding year".

Collateral References

73B C.J.S. Public Lands §184.

77-2-332. Procedure in case of default.

Collateral References

73A C.J.S. Public Lands §91; 73B C.J.S. Public Lands §195.

63C Am. Jur. 2d Public Lands §115.

77-2-333. Reinstatement of canceled certificates of purchase.

Administrative Rules

ARM 36.25.117 Renewal of lease or license and preference right.

Case Notes

Right to Reinstatement Not Absolute — Discretion of Board: The right to reinstatement is not absolute; it can only be made upon application by the original purchaser or his heirs, assigns, or devisees. The right of reinstatement is not one which the Board is bound to grant, but it may do so in its discretion, and the Board is powerless to allow reinstatement in any event if the land has been sold in the meantime to another purchaser. Christofferson v. Chouteau County, 105 M 577, 74 P2d 427 (1937).

77-2-334. Assignment of certificate.

Collateral References

73A C.J.S. Public Lands §94; 73B C.J.S. Public Lands §187.
63C Am. Jur. 2d Public Lands §114.

77-2-337. Disposition of sale proceeds.

Collateral References

73A C.J.S. Public Lands §101.

77-2-341. Patents.

Collateral References

63C Am. Jur. 2d Public Lands §115.

77-2-342. Execution of patents.

Compiler's Comments

1995 Amendment: Chapter 418 in (2), near middle, substituted "director of the department" for "commissioner of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Attorney General's Opinions

Conveyance of Real Property Acquired by Foreclosure: The Governor and, in his absence or inability, the Lieutenant Governor are the only proper state officials to execute deeds of conveyance on real property acquired by foreclosure. 36 A.G. Op. 104 (1976).

Collateral References

63C Am. Jur. 2d Public Lands §115.

77-2-343. Patent provisions.

Compiler's Comments

1981 Amendment: Deleted reference to subsection (1) of 77-2-304 in (1).

Collateral References

73A C.J.S. Public Lands §93; 73B C.J.S. Public Lands §190.
63C Am. Jur. 2d Public Lands §117.

77-2-344. Copy of deed or patent as evidence.

Collateral References

63C Am. Jur. 2d Public Lands §115.

77-2-345. Limitation for cancellation of patent.

Collateral References

73A C.J.S. Public Lands §93; 73B C.J.S. Public Lands §§189, 193.
63C Am. Jur. 2d Public Lands §§118, 119.

77-2-351. Sale to or exchange of property with public entity.

Compiler's Comments

1995 Amendment: Chapter 272 inserted second sentence allowing the sale and transfer of certain state land to be used to provide a community service or fulfill a public purpose; inserted fourth sentence defining public entity; and made minor changes in style.

Part 4
Transfer of Federal Land or Easements

Part Compiler's Comments

Code Commissioner Codification: Section 4, Ch. 670, L. 1983, instructed that sections 1 through 3 (now 77-2-401 through 77-2-403) be codified in chapter 1, part 2, of this title. They have instead been codified in chapter 2 as a new part 4 for a more appropriate codification.

Part Law Review Articles

Contracting With the Federal Government: The Dispute Resolution Process, Wittich, 5 Pub. Land L. Rev. 128 (1984).

The Insecurity of Mortgages on Federal Mineral Leases, Bassett, 18 Colo. Law. 447 (1989).

Intelligent Taxable Transfers of Mineral Properties, Thompson, 31 Rocky Mtn. Min. L. Inst. 5-1 (1985).

77-2-401. Sale or transfer of federal land — when hearing required.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), near middle, substituted "director of the department" for "commissioner of state lands"; in (2), in two places, and in (3) substituted "director" for "commissioner"; in (3), after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Code Commissioner Codification: See compiler's comments to chapter 2, part 4, of this title for an explanation of the codification of this section.

77-2-402. Hearing requirements.

Compiler's Comments

1997 Amendment: Chapter 42 near end substituted "director of the department" for "commissioner"; and made minor changes in style. Amendment effective March 12, 1997.

Code Commissioner Codification: See compiler's comments to chapter 2, part 4, of this title for an explanation of the codification of this section.

Statement of Intent: The statement of intent attached to SB 118 (Ch. 670, L. 1983) provided: "A statement of intent is required for this bill because section 2 [77-2-402] delegates authority to the Commissioner of State Lands [now Director of Department of Natural Resources and Conservation] to adopt rules governing the procedure for holding public hearings concerning the sale, exchange, or transfer of certain federal land. It is the intent of the Legislature that the content of notice to interested parties be similar to that required under 2-4-601 for contested cases and be published in at least one regional newspaper distributed in the area of the proposed disposition of federal land. Other procedural requirements should be kept as simple as possible in order to provide the maximum opportunity for public response to the proposed federal action."

77-2-403. Action by director.

Compiler's Comments

1997 Amendment: Chapter 42 in introduction substituted "director of the department" for "commissioner"; and made minor changes in style. Amendment effective March 12, 1997.

Code Commissioner Codification: See compiler's comments to chapter 2, part 4, of this title for an explanation of the codification of this section.

CHAPTER 3
ROCK, MINERAL, COAL, OIL, AND GAS RESOURCES

Chapter Administrative Rules

Title 17, chapter 24, ARM Reclamation.

Chapter Law Review Articles

MONTANA ARTICLES

Crow Tribe v. Montana: New Limits on State Intrusion Into Reservation Rights, New Lessons for State and Tribal Cooperation, Bellis, 50 Mont. L. Rev. 133 (1989).

The Dawning of a New Era: Tribal Self-Determination in Indian Mineral Production, Carroll, 9 Pub. Land L. Rev. 81 (1988).

Drumming Out the Intent of the Indian Mineral Leasing Act of 1938, Carroll, 7 Pub. Land L. Rev. 135 (1986).

Claiming the Cabinets: The Right to Mine in Wilderness Areas, Loop, 7 Pub. Land L. Rev. 45 (1986).

Primer on the Theory and Proof of Discovery of Valuable Mineral Deposits Under the 1872 Mining Law, Frizzell & Kunz, 6 Pub. Land L. Rev. 103 (1985).

The Power of Congress Under the Property Clause: A Potential Check on the Effect of the Chadha Decision on Public Land Legislation, Sullivan, 6 Pub. Land L. Rev. 65 (1985).

Minerals Management in the Western States: The New Federalism and Old Colonialism, Stevens, 6 Pub. Land L. Rev. 49 (1985).

State School Trust Lands and Oil and Gas Royalty Rates, Woodgerd & McCarthy, 3 Pub. Land L. Rev. 119 (1982).

ARTICLES FROM OTHER STATES

Regulating Hardrock Mining: To What Extent Can the States Regulate Mining on Federal Lands?, Crapo, 19 J. Land, Resources, & Envtl. L. 249 (1999).

Vanishing Rights of the Mineral Lessor, McCalmont, 30 Tulsa L.J. 695 (1995).

Royalty Issues on Lands Owned by State or Local Governments, Martin, 1993 Min. L. Series: Rocky Mtn. Min. L. Found. 5-1 (1993).

State Royalty Payment Statutes Governing State and Fee Lands, Bragg & Singletary, 1993 Min. L. Series: Rocky Mtn. Min. L. Found. 7-1 (1993).

Cohabitation of Wilderness and Mining: Can the Marriage Be Saved?, Ruffatto & Ostby, 38 Rocky Mtn. Min. L. Inst. Proc. 11-1 (1992).

Mining Rights on Public Lands, Traynor, 22 Envtl. L. 1135 (1992).

Coping With Mining Law Reform, Alfers, Hubbard, & Hayes, 37 Rocky Mtn. Min. L. Inst. Proc. 12-1 (1991).

Redefining the Relationship Between the Surface Owner and the Mineral Developer, Polston, 12 E. Min. L. Found. 22-1 (1991).

Defending Mining Claims and Mineral Leases in Environmental Suits Against Federal Land Managers, Twelker, 66 Denver U.L. Rev. 205 (1989).

Severance Taxes: A Review of Recent Trends, Zlatkovich, 37 Oil & Gas Tax Q. 779 (1989).

Severance Tax Liability, Olson & Kleckley, 42 Nat'l Tax J. 69 (1989).

Mining and Public Lands Law, Erisman & Cress, Ann. Surv. Colo. L. 153 (1988).

Assessing Abandoned Mining Land Reclamation Fees on Coal, Colby, 89 W. Va. L. Rev. 655 (1987).

Land Use Control of Mining Activity: A Prototype of State and Local Regulation, Rochette, 10 Zoning & Plan. L. Rep. 121 (1987).

Surface Rights of Mineral Owners—What Happens When Judges Make Law and Nobody Listens?, Polston, 63 N.D.L. Rev. 41 (1987).

All That Glitters: Discovering the Meaning of Mineral in the Mining Law of 1872, Braunstein, 21 Land & Water L. Rev. 297 (1986).

Alternatives to Dealing With Distressed and Orphaned Mineral Properties, Himelspach & Spitzer, 32 Rocky Mtn. Min. L. Inst. 7-1 (1986).

Keeping Wilderness Areas Wild: Legal Tools for Management, Edwards, 6 Va. J. Nat. Resources L. 101 (1986).

Water and Mineral Development Conflicts, Anderson & Davis, 32 Rocky Mtn. Min. L. Inst. 9-1 (1986).

Accounting for Reclamation in the Extractive Industry, Johnson & Munter, 34 Oil & Gas Tax Q. 389 (1985).

Maintenance of Mining Leases Beyond Their Primary Terms, Mandell-Rice, 31 Rocky Mtn. Min. L. Inst. 9-1 (1985).

Conflicting Jurisdictions of Federal, State, and Local Authorities: The Federal Preemption Doctrine, Engdahl, 31 Rocky Mtn. Min. L. Inst. 1-1 (1985).

Part 1
Prospecting Permits and Mining Leases

Part Law Review Articles

Wrongful Geophysical Exploration, Rice, 44 Mont. L. Rev. 53 (1983).

Directional Drilling, Subsurface Trespass, and Conversion, McKinnis, 4 J. Min. L. & Pol'y 235 (1988).

Implication of a Covenant to Diligently Develop and Mine in Hard Mineral Leases That Provide for Minimum Rents or Royalties, Bender, 2 J. Min. L. & Pol'y 223 (1986).

Strip Searches: Leasing Minerals Underlying Streets, Highways, Ditches, Railroads, and Water Bodies, Bate, 32 Rocky Mtn. Min. L. Inst. 19-1 (1986).

Part Collateral References

Mines and Minerals *key* 5.

58 C.J.S. Mines and Minerals §129.

77-3-101. Definitions.

Administrative Rules

ARM 36.25.601 Definitions — metalliferous leases.

Collateral References

53A Am. Jur. 2d Mines and Minerals §§4, 5.

77-3-102. Mining leases authorized.

Administrative Rules

ARM 36.2.1001 Leasing or other use of state lands — generally.

ARM 36.25.602 Lands available for mineral leasing.

ARM 36.25.603 Who may lease — qualified mineral lessees.

Collateral References

58 C.J.S. Mines and Minerals §129; 73B C.J.S. Public Lands §197.

53A Am. Jur. 2d Mines and Minerals §120, et seq.; 63C Am. Jur. 2d Public Lands §121.

77-3-103. Prospecting permits authorized.

Administrative Rules

ARM 36.2.1001 Leasing or other use of state lands.

ARM 36.2.1003 Schedule of administrative fees.

ARM 36.2.1004 Homesite and farmyard leases.

77-3-105. Assignment of leases or permits.

Administrative Rules

ARM 36.2.1003 Schedule of administrative fees.

ARM 36.2.1004 Home site and farmyard leases.

ARM 36.25.609 Assignments and transfers of mining leases.

Law Review Articles

Limitations on the Right to Transfer Mineral Leases, Meng, 9 E. Min. L. Found. 12-1 (1988).

Collateral References

53A Am. Jur. 2d Mines and Minerals §128.

77-3-106. Disposition of royalties, fees, and penalties.

Collateral References

Mines and Minerals *key* 5, 6; States *key* 126, 127.

58 C.J.S. Mines and Minerals §129; 73A C.J.S. Public Lands §101; 81A C.J.S. States §228.

Oil and gas royalty as real or personal property. 56 ALR 4th 539.

77-3-111. Applications for mining lease.

Administrative Rules
ARM 36.25.604 Application for metalliferous lease.

77-3-113. Quantity of lands covered by lease.

Administrative Rules
ARM 36.25.602 Lands available for metalliferous leasing.

77-3-114. Restrictions on mining leases on lands already subject to coal, oil, or gas lease.

Administrative Rules
ARM 36.25.602 Lands available for metalliferous leasing.
ARM 36.25.616 Notice of discovery of other minerals.

77-3-115. Lease provisions.

Administrative Rules
ARM 36.25.605 Term of metalliferous lease.
ARM 36.25.606 Rentals.
ARM 36.25.610 Surrender of metalliferous lease.
ARM 36.25.611 Cancellation or termination of metalliferous lease.
ARM 36.25.612 Minimization of disturbance.
ARM 36.25.615 Special conditions and stipulations.

Collateral References
53A Am. Jur. 2d Mines and Minerals §120, et seq.

77-3-116. Royalty provisions.

Administrative Rules
ARM 36.25.607 Metalliferous royalties.

Collateral References
53A Am. Jur. 2d Mines and Minerals §§135 through 140.
Oil and gas royalty as real or personal property. 56 ALR 4th 539.

77-3-118. Restrictions on removal of minerals and gems during preliminary prospecting period.

Administrative Rules
ARM 36.25.616 Notice of discovery of other minerals.

77-3-119. Bonds to state.

Administrative Rules
ARM 36.25.608 Records and reports — metalliferous lease.
ARM 36.25.614 Bonding — metalliferous lease.

77-3-120. Bonds to protect prior purchasers, lessees, or contractees.

Administrative Rules
ARM 36.25.614 Bonding — metalliferous lease.

77-3-130. Limitation on public inspection rights.

Compiler's Comments
1989 Statement of Intent: The statement of intent attached to Ch. 105, L. 1989, provided: "The legislature is extending the rulemaking authority of the board of land commissioners to allow the board to amend its existing mineral leasing rules to provide for protection of confidential information. The legislature intends that the rules be written broadly to cover all information that would legitimately be considered confidential by lessees, including, as appropriate, mineral quality and quantity, mineral location, mineral depth, cost of production, and the extent of the reserves. This information may include economic or engineering data. The legislature also intends that the rules establish a procedure whereby the lessee may notify the department of state lands [now department of natural resources and conservation] of information it considers to be confidential and to be notified whether the department agrees before the lessee submits the

information. Furthermore, the legislature intends that the rules include a process to protect the lessee's interests if the department considers declassification of the information at a future date."

77-3-132. Leasing privileges of permittee.

Compiler's Comments

1999 Amendment: Chapter 18 in (1) deleted second sentence that provided: "The permittee has the preference right to a lease, upon such terms as the board considers just, subject to this part, and in any event the permittee has preference without competitive bidding and upon the most favorable terms permitted under this part to 40 contiguous acres"; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

ARM 36.25.610 Surrender of metalliferous lease.
ARM 36.25.611 Cancellation or termination of metalliferous lease.
ARM 36.25.613 Mineral lessee's surface rights.

Part 2
Nonmetallic Minerals, Excluding Coal, Oil, and Gas

Part Law Review Articles

Energy Law. (Nuclear Power, Oil and Gas), Golden, 1985 Ann. Surv. Am. L. 745 (1986).

77-3-201. Nonmetallic mineral leases authorized.

Administrative Rules

ARM 36.2.1001 Leasing or other use of state lands.

Collateral References

58 C.J.S. Mines and Minerals §129; 73B C.J.S. Public Lands §197.
53A Am. Jur. 2d Mines and Minerals §8; 63C Am. Jur. 2d Public Lands §121.

77-3-202. Fee.

Administrative Rules

ARM 36.2.1003 Schedule of administrative fees.
ARM 36.2.1004 Homesite and farmyard leases.

77-3-204. Royalty provisions.

Collateral References

53A Am. Jur. 2d Mines and Minerals §§135 through 140.
Oil and gas royalty as real or personal property. 56 ALR 4th 539.

77-3-206. Disposition of royalties, fees, and penalties.

Collateral References

73A C.J.S. Public Lands §101.

77-3-208. Stone, gravel, and sand permits for public use.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Administrative Rules

ARM 36.2.1001 Leasing or other use of state lands.
ARM 36.2.1003 Schedule of fees for permits.

77-3-211. Limitation on public inspection rights.

Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 105, L. 1989, provided: "The legislature is extending the rulemaking authority of the board of land commissioners to allow the board to amend its existing mineral leasing rules to provide for protection of confidential information. The legislature intends that the rules be written broadly to cover all information that would legitimately be considered confidential by lessees, including, as appropriate, mineral quality and quantity, mineral location, mineral depth, cost of production, and the extent of the

reserves. This information may include economic or engineering data. The legislature also intends that the rules establish a procedure whereby the lessee may notify the department of state lands [now department of natural resources and conservation] of information it considers to be confidential and to be notified whether the department agrees before the lessee submits the information. Furthermore, the legislature intends that the rules include a process to protect the lessee's interests if the department considers declassification of the information at a future date."

Part 3
Coal

Part Compiler's Comments

Grandfather Clause: Section 7, Ch. 358, L. 1975, relating to coal mining leases on state lands including bidding, terms, lessees, and royalties, read: "Nothing in this act may be construed to impair the obligation of any contract entered into by the board before the effective date of this act." Effective date, July 1, 1975.

Part Administrative Rules

Title 17, chapter 24, subchapter 2, ARM Rules governing The Opencut Mining Act.

Title 17, chapter 24, subchapters 3 through 13, ARM Rules on The Strip and Underground Mine Reclamation Act.

Title 17, chapter 24, subchapter 18, ARM Rules governing The Strip and Underground Mine Siting Act.

Title 36, chapter 25, subchapter 3, ARM Rules on leasing state land for coal mining.

Part Law Review Articles

Reflections on Commonwealth Edison Co. v. Montana, McGrath & Hellerstein, 43 Mont. L. Rev. 165 (1982).

Cabin Creek and International Law—An Overview, Wilson, 5 Pub. Land L. Rev. 110 (1984).

Where Do We Go From Here? The Federal Coal Leasing Amendments Act—Past, Present, and Future, Kalen, 98 W. Va. L. Rev. 1023 (1996).

Natural Resources: Federal Coal Leasing in the Powder River Basin—A Call for Reform, Sollars, 28 Land & Water L. Rev. 115 (1993).

Coalbed Gas Operations From the State Regulatory Perspective, Keefe, 1992 Min. L. Series: Rocky Mtn. Min. L. Found. 6A-1 (1992).

Hard Minerals; State Coal Protection Legislation Versus Title IV of the 1990 Clean Air Act Amendments, Annand & Anderson, 7 Nat. Resources & Env't 46 (1992).

Coal Law Update, McGowan, 12 E. Min. L. Found. 14-1 (1991).

Utilities and Long-Term Coal Agreements, Underwood, 124 Pub. Util. Fort. 32 (1989).

Coal Law Update, McGowan, 9 E. Min. L. Found. 11-1 (1988).

An Overview of the Impact of the Tax Reform Act of 1986 on the Coal, Oil and Gas Industries, Cox & Myre, 2 J. Min. L. & Pol'y 261 (1987).

Assessing Abandoned Mining Land Reclamation Fees on Coal, Colby, 89 W. Va. L. Rev. 655 (1987).

Current Issues Relating to Emergency Federal Coal Leasing, Pariser, 89 W. Va. L. Rev. 593 (1987).

State Taxation of Energy Resources After Commonwealth Edison Co. v. Montana, Barnett, 34 Syracuse L. Rev. 657 (1983).

Part Collateral References

Mining exemption to sales or use tax. 47 ALR 4th 1229.

Exemption, from sales or use tax, of water, oil, gas, other fuel, or electricity provided for residential purposes. 15 ALR 4th 269.

Necessity and sufficiency of environmental impact statements under §102(2)(c) of National Environmental Policy Act of 1969 (42 U.S.C.S. §4332 (2)(C)) in cases involving logging, mining, and related projects. 74 ALR Fed. 702.

What is "mine" under Federal Mine Safety and Health Act of 1977 (30 U.S.C.S. §801, et seq.)? 63 ALR Fed. 415.

A Handbook of the Montana Coal Severance Tax, Report to the Coal Tax Oversight Subcommittee, Mont. Leg. Council (1988).

Report From the Coal Tax Oversight Subcommittee, Interim Reports, Mont. Leg. Council (1976 to present).

77-3-301. Coal leases authorized.

Administrative Rules

ARM 36.2.1001 Leasing or other use of state lands.
ARM 36.25.301 Definitions — coal leasing.
ARM 36.25.320 Records of meetings, applications, and notices — coal leasing.

Collateral References

Mines and Minerals *key* 5.
58 C.J.S. Mines and Minerals §129; 73B C.J.S. Public Lands §197.
53A Am. Jur. 2d Mines and Minerals §120, et seq.; 63C Am. Jur. 2d Public Lands §121.

77-3-302. Lands subject to coal leasing.

Administrative Rules

ARM 36.25.108 Lands available for leasing or licensing — generally.
ARM 36.25.302 Lands available for coal leasing.

77-3-303. Rules relating to coal leasing.

Compiler's Comments

2001 Amendment: Chapter 485 inserted (2) regarding leasing of property interests acquired in Crown Butte land exchange; and made minor changes in style. Amendment effective on occurrence of contingency.

Administrative Rules

ARM 36.2.1001 Leasing or other use of state lands.
Title 36, chapter 25, subchapter 3, ARM Coal leasing rules.

77-3-304. Protection of rights of purchasers or prior lessees.

Law Review Articles

Montana's Statutory Protection of Surface Owners From Strip Mining and Resultant Problems of Mineral Deed Construction, Karell, 37 Mont. L. Rev. 347 (1976).

Collateral References

Surface owner's right of access through solid mineral seam or vein to reach underlying water, etc. 25 ALR 2d 1250.

77-3-305. Limitations on leasing.

Compiler's Comments

1983 Amendment: Substituted existing (1) limiting leases to foreign interests unless reciprocal privileges are provided to U.S. citizens for former (1), which read: "to any corporation the majority stock of which is controlled by interests foreign to the United States, except for those interests within countries whose borders are contiguous to the United States; or".

Purported 1981 Amendment: Section 1, Ch. 538, L. 1981 (SB 367), as introduced, amended 77-3-305. In fact, section 1, as it was finally passed and approved did not amend 77-3-305 but left it exactly as it existed prior to the 1981 legislative session.

77-3-306. Conditions on manner of mining.

Administrative Rules

ARM 36.25.315 Forfeiture, cancellation, and termination of coal leases.
ARM 36.25.317 Operations on state coal leases.

77-3-307. Improvements of former lessee.

Administrative Rules

ARM 36.25.313 Improvements of former coal lessee.

77-3-308. Limitation on public inspection rights.

Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 105, L. 1989, provided: "The legislature is extending the rulemaking authority of the board of land commissioners to allow the board to amend its existing mineral leasing rules to provide for protection of confidential information. The legislature intends that the rules be written broadly to cover all information that would legitimately be considered confidential by lessees, including, as appropriate, mineral

quality and quantity, mineral location, mineral depth, cost of production, and the extent of the reserves. This information may include economic or engineering data. The legislature also intends that the rules establish a procedure whereby the lessee may notify the department of state lands [now department of natural resources and conservation] of information it considers to be confidential and to be notified whether the department agrees before the lessee submits the information. Furthermore, the legislature intends that the rules include a process to protect the lessee's interests if the department considers declassification of the information at a future date."

77-3-312. Leasing procedures.

Administrative Rules

ARM 36.25.302 Lands available for coal leasing.

ARM 36.25.303 Who may lease for coal — qualified lessees.

ARM 36.25.304 Procedures for issue of coal lease.

ARM 36.25.319 Hearings and appeals for coal lessees or prospective coal lessees.

ARM 36.25.321 Fees for application, lease, assignment, and royalties for private use — coal leasing.

77-3-314. Duration of lease.

Collateral References

Implied obligation to develop. 76 ALR 2d 721.

77-3-316. Rental and royalty terms.

Administrative Rules

ARM 36.25.309 Rentals — coal leasing.

ARM 36.25.310 Royalties — coal leasing.

Collateral References

53A Am. Jur. 2d Mines and Minerals §§135 through 140.

77-3-318. Disposition of royalties and other receipts.

Collateral References

73A C.J.S. Public Lands §101.

Part 4
Oil and Gas

Part Administrative Rules

Title 36, chapter 25, subchapter 2, ARM State land leases — oil and gas rules.

Part Case Notes

Natural Gas As Ferae Naturae — No Ownership in Situ: The natural gas underlying state and other lands included in a proposed pooling agreement is considered ferae naturae and may be reduced to ownership by the party who captures it. It is highly fugitive in character, and a well drilled on either class of lands may drain the gas from land surrounding it. There is no actual ownership of gas in situ. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

Part Law Review Articles

Oil and Gas Issue, Vol. 17, No. 1, Mont. L. Rev. (1955).

State School Trust Lands and Oil and Gas Royalty Rates, Woodgerd & McCarthy, 3 Pub. Land L. Rev. 119 (1982).

Applicability of Article 2 of the Uniform Commercial Code to Oil and Gas Contracts, Hardin, 23 Ark. Law. 57 (1989).

Recent Developments—Oil and Gas, Hunter, 34 Loy. L. Rev. 1015 (1989).

The Natural Gas Property Tax-Severance Tax Dilemma: Are They One and the Same?, Haag, 24 Tulsa L.J. 661 (1989).

Environmental Law for the Oil and Gas Practitioner, Wackerbarth, 39 Sw. Legal Found. Inst. on Oil & Gas L. & Tax'n 4-1 (1988).

An Overview of the Impact of the Tax Reform Act of 1986 on the Coal, Oil and Gas Industries, Cox & Myre, 2 J. Min. L. & Pol'y 261 (1987).

Oil and Gas: Defining and Limiting the Mineral Easement From the Surface Owner's Perspective, Newsome, 50 Tex. B.J. 312 (1987).

Valuation of Oil and Gas Interests, Ethridge, 16 Colo. Law. 446 (1987).

Current Developments in Oil and Gas Taxation, Berry, 37 Inst. on Oil & Gas L. & Tax'n (Sw. Legal Found.) 10-1 (1986).

Energy Law. (Nuclear Power, Oil and Gas), Golden, 1985 Ann. Surv. Am. L. 745 (1986).

Lease Maintenance in the Face of Curtailed-Depressed Markets, Battle, 32 Rocky Mtn. Min. L. Inst. 14-1 (1986).

Securities—Oil and Gas Leases: Should They Be Considered Securities?, Luthi, 21 Land & Water L. Rev. 99 (1986).

Creation and Conveyance of Oil and Gas Leasehold Burdens, Hubert & Taylor, 31 Rocky Mtn. Min. L. Inst. 14-1 (1985).

Deductibility of Geological and Geophysical Costs for Purposes of the 90 Percent Net Income Limitation for the Windfall Profit Tax, Russell & Henderson, 34 Oil & Gas Tax Q. 217 (1985).

Environmental Considerations in Permitting, Drilling and Operating Wells, McCowan, 32 Inst. on Min. L. 135 (1985).

Legislative and Regulatory Developments in Oil and Gas Taxation, Bedell, 36 Inst. on Oil & Gas L. & Tax'n (Sw. Legal Found.) 9-1 (1985).

Recent Developments in Nonregulatory Oil and Gas Law, Armour, 36 Inst. on Oil & Gas L. & Tax'n (Sw. Legal Found.) 1-1 (1985).

The Natural Gas Industry After Partial Deregulation, Moody, 36 Inst. on Oil & Gas L. & Tax'n (Sw. Legal Found.) 6-1 (1985).

Handling and Disposal of Wastes Associated With the Exploration, Development, and Production of Oil and Gas, Radford, 35 Inst. on Oil & Gas L. & Tax'n 127 (1984).

Unusual Provisions in Oil and Gas Leases, Scott, 33 Inst. on Oil & Gas L. & Tax'n 139 (1982).

Part Collateral References

Construction and application of "Mother Hubbard" or "cover-all" clause in gas and oil lease or deed. 80 ALR 4th 205.

Duty of oil or gas lessee to restore surface of leased premises upon termination of operations. 62 ALR 4th 1153.

Mining exemption to sales or use tax. 47 ALR 4th 1229.

Gas and oil lease force majeure provisions: construction and effect. 46 ALR 4th 976.

Location of easement of way created by grant which does not specify location. 24 ALR 4th 1053.

Rights and obligations, with respect to adjoining landowners, arising out of secondary recovery of gas, oil, and other fluid minerals. 19 ALR 4th 1182.

Exemption, from sales or use tax, of water, oil, gas, other fuel, or electricity provided for residential purposes. 15 ALR 4th 269.

77-3-401. Oil and gas leases authorized.

Administrative Rules

ARM 36.25.108 Lands available for leasing or licensing — generally.
ARM 36.25.133 Reservation by state to enter on surface leases.
ARM 36.25.203 Lands available for oil and gas leasing.
ARM 36.25.204 Who is qualified for oil and gas leases.
ARM 36.25.217 Operations on leases — prevention of pollution, protection of surface rights.
ARM 36.25.219 Hearings and appeals — lessees or prospective lessees.
ARM 36.25.223 Minimum restrictions on surface activity.
ARM 36.25.224 Additional restrictions — stipulations.
ARM 36.25.225 Compliance with lease stipulations and restrictions.
ARM 36.25.230 through 36.25.237 Seismographic permits.

Law Review Articles

Note: Oil and Gas—Mineral Deeds—Royalty Assignments—Parol Evidence, Borer, 21 Mont. L. Rev. 125 (1959).

Elemental Principles of the Modern Oil and Gas Lease, Brown, 17 Mont. L. Rev. 39 (1955).

Nature of the Landowner's Interest in Oil and Gas, Walker, 17 Mont. L. Rev. 22 (1955).

A Survey of Oil and Gas Law in Montana as It Relates to the Oil and Gas Lease, Sullivan, 16 Mont. L. Rev. 1 (1955).

Oil and Gas Leaseholds and Other Estates, Shepherd, 14 Mont. L. Rev. 1 (1953).

Lease Maintenance for the Twenty-First Century: Old Oil and Gas Law Doesn't Die, It Just Fades Away, Kramer, 41 Rocky Mtn. Min. L. Inst. 15-1 (1995).

Oil and Gas Leases: Play It Safe to Strike It Rich, Lamb, 3 Prob. & Prop. 52 (1989).

To Drill or Not to Drill: Implied Covenants in Oil and Gas Leases, Glynn & Cella, 3 Nat. Resources & Env't 18(4) (1989).

Collateral References

Mines and Minerals *key* 48, 56, 73.

58 C.J.S. Mines and Minerals §§129, 134, 195, 197; 73B C.J.S. Public Lands §197.

63C Am. Jur. 2d Public Lands §121.

Oil and gas royalty as real or personal property. 56 ALR 4th 539.

Oil shale—as within lease for oil and gas rights. 61 ALR 3d 1146.

Recovery in case geophysical or seismograph exploration or survey not authorized. 67 ALR 2d 444.

77-3-402. Rules.

Administrative Rules

ARM 36.2.1001 Leasing or other use of state lands.

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

ARM 36.25.205 Procedures for issuance of lease.

ARM 36.25.207 Form and provisions of lease.

ARM 36.25.220 Record of hearings and notices.

77-3-403. Hearings on questions related to leases.

Administrative Rules

ARM 36.25.214 Forfeiture, cancellation, and termination of oil and gas leases.

ARM 36.25.219 Hearings and appeals.

77-3-404. Limitation on area under single lease.

Administrative Rules

ARM 36.25.203 Lands available for oil and gas leasing.

Case Notes

Pooling Agreements Embracing More Than a Section — Unit Operation: While this section provides that no oil or gas lease issued on state lands shall embrace more than 640 acres, in view of provisions in 77-3-430, it is apparent that the Legislature realized that such a restriction is inconsistent with the principles of unit operation and therefore excepted such unit agreements from the operation of the restriction as to acreage. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

77-3-405. Leased lands to be generally compact and contiguous.

Administrative Rules

ARM 36.25.203 Lands available for oil and gas leasing.

77-3-407. New leases on lands leased prior to February 28, 1953.

Administrative Rules

ARM 36.25.203 Lands available for oil and gas leasing.

Case Notes

Time for Exercise of Preferential Right to Renew: Since this section giving original lessee of mineral interest in state land preferential right to renew does not say when prior lessee shall exercise his right of preference, the matter of fixing the time is left open for action by the state Board of Land Commissioners. State ex rel. Handel Oil Co. v. St., 118 M 465, 167 P2d 844 (1946).

Loss of Preferential Right to Renew: Prior lessee of state oil lands lost its preferential right to renew lease when lessee's representatives who were present at the bidding on the land declined to make any decision as to whether lessee would match highest bid. Prior lessee made no effort to renew the lease until a personal check equal in amount to the bid of the highest bidder was presented at the Board of Land Commissioners' meeting 8 days later. State ex rel. Handel Oil Co. v. St., 118 M 465, 167 P2d 844 (1946).

77-3-408. Certain state officers not to be interested in leases.

Administrative Rules

ARM 36.25.204 Who may lease for oil and gas — qualified lessees.

77-3-409. Misconduct of officers in relation to oil and gas leases.

Collateral References

Bribery *key* 1(1); States *key* 81.

11 C.J.S. Bribery §§1, 2; 81A C.J.S. States §129.

77-3-410. False statements relating to oil and gas leases.

Collateral References

Fraud *key* 68.

37 C.J.S. Fraud §154.

77-3-421. Duration of lease.

Compiler's Comments

1989 Amendment: Inserted (3) relating to extension of the primary term of state oil and gas leases. Amendment effective March 23, 1989.

1983 Amendment: In first sentence of (1), after "gas leases" inserted "entered by the board", and after "granted for" substituted "a primary term of not more than 10 years or less than 5 years" for "a primary term or period of 10 years"; and inserted last sentence of (1) allowing issuance of leases for less than 5 years in certain cases.

Administrative Rules

ARM 36.25.206 Term of lease — extension by drilling operations at end of tenth year.

Case Notes

Term of Leases: The term of a gas or oil lease under this section being 10 years and "as long thereafter as oil or gas in paying quantities is produced" is not in violation of sec. 11 of The Enabling Act requiring that such leases shall be for a "term of years". State ex rel. Johnson v. St. Bd. of Land Comm'rs, 348 US 961, 99 L Ed 750, 75 S Ct 524 (1955), reversing and remanding State ex rel. Jones v. St. Bd. of Land Comm'rs, 128 M 462, 279 P2d 393 (1954).

Collateral References

Mines and Minerals *key* 73 ½, 78(1).

58 C.J.S. Mines and Minerals §198.

What constitutes abandonment of facilities or service under §7(b) of Natural Gas Act (15 U.S.C.S. §717f(b)). 61 ALR Fed. 454.

77-3-422. Lease extension clause.

Administrative Rules

ARM 36.25.206 Term of lease — extension by drilling operations at end of tenth year.

Law Review Articles

Elemental Principles of the Modern Oil and Gas Lease, Brown, 17 Mont. L. Rev. 39 (1955).

Collateral References

Production on one tract as extending term on other tract where one mineral lease conveys oil or gas rights in separate tract for as long as oil or gas is produced. 35 ALR 4th 1167.

"Paying quantities" as used in oil and gas lease. 43 ALR 3d 8.

77-3-423. Annual rental.

Compiler's Comments

1997 Amendment: Chapter 34 in (1), after "leases", deleted "issued on and after July 1, 1975"; in (4), in third sentence, inserted references to a well currently being drilled and to a shut-in well approved by the Department; and made minor changes in style. Amendment effective February 24, 1997.

1989 Amendment: At end of (4), after "terminates", inserted "unless there is a producing well on the lease. Rental paid for any year shall be credited against any royalty that accrues during that year"; and made minor change in punctuation. Amendment effective July 1, 1989.

Applicability: Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

Administrative Rules

ARM 36.25.208 Rentals — oil and gas.

77-3-424. Power to terminate lease in absence of commencement of drilling or payment of delay drilling penalty.

Compiler's Comments

1989 Amendment: Inserted second sentence of (3) that read: "The board shall refund delay drilling penalties paid on a lease for any year in which the lessee commences drilling on that lease"; and made minor changes in phraseology. Amendment effective July 1, 1989.

Applicability: Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

Administrative Rules

ARM 36.25.209 Delay drilling penalties.

Law Review Articles

Remedies for Breach of Implied Covenants in Oil and Gas Leases in Montana, Gordon, 28 Mont. L. Rev. 205 (1967).

Collateral References

Mines and Minerals *key* 78(1), et seq., 79(2).

58 C.J.S. Mines and Minerals §§202, 203.

Right and measure of recovery for breach of obligation to drill exploratory wells. 4 ALR 3d 284.

77-3-425. Dry hole clause.

Compiler's Comments

1989 Amendment: Near end of first sentence, after "resumes", substituted "payment of any delay drilling penalties imposed by the board" for "the payments of penalties in the amounts provided in 77-3-424"; and near beginning of second sentence, after "payment of", inserted "any required". Amendment effective July 1, 1989.

Applicability: Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

Administrative Rules

ARM 36.25.209 Delay drilling penalties.

Collateral References

"Dry hole" as "well" within undertaking to drill well. 15 ALR 3d 450.

77-3-426. Lessee to prevent waste.

Administrative Rules

ARM 36.25.217 Operations on state leases.

Law Review Articles

Application of the Doctrine of Correlative Rights by the State Conservation Agency in Absence of Express Statutory Authorization, Strong, 28 Mont. L. Rev. 205 (1967).

Collateral References

Duty of oil or gas lessee to restore surface of leased premises upon termination of operations. 62 ALR 4th 1153.

Remedy for breach of implied duty of oil and gas lessee to protect against drainage. 18 ALR 4th 147.

Implied duty of oil and gas lessee to protect against drainage. 18 ALR 4th 14.

77-3-427. Provision for offset wells — compensatory royalties.

Compiler's Comments

1989 Amendment: At end of introductory phrase in (2) substituted "following options in lieu of drilling an offset well" for "option of"; inserted (2)(a) that read: "releasing the lands in question"; near beginning of (2)(b), after "lease", deleted "in lieu of drilling an offset well" and substituted "the board" for "it"; and inserted (3) regarding damages upon lease termination. Amendment effective July 1, 1989.

Applicability: Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

1981 Amendment: Added subsection (2) relating to option of allowing compensatory royalties.

77-3-428. Additional development following completion of productive well.

Administrative Rules

ARM 36.25.217 Operations on leases — additional development.

77-3-429. Operating agreements.

Administrative Rules

ARM 36.25.216 Operating agreements.

77-3-430. Pooling agreements and unit operations.

Administrative Rules

ARM 36.25.215 Pooling agreements and unit agreements.

Case Notes

Constitutionality: The provisions of this section authorizing pooling agreements covering private and state school lands do not violate sec. 11 of The Enabling Act or Art. XVII, sec. 2, 1889 Mont. Const. (now Art. X, sec. 11, 1972 Mont. Const.). Section 11 of The Enabling Act has application only where the land as a whole is sold, and not where merely an interest or estate therein is disposed of. Provision in lease as to free use of gas by lessee in development work was not a donation under Art. XIII, sec. 1, 1889 Mont. Const. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

Inclusion of Entire Geologic Structure Not Required: A pooling agreement authorized by this section is not required to include the entire geologic structure in such agreement. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

Natural Gas as Ferae Naturae — No Ownership in Situ: The natural gas underlying state and other lands included in a proposed pooling agreement is considered ferae naturae and may be reduced to ownership by the party who captures it. It is highly fugitive in character, and a well drilled on either class of lands may drain the gas from land surrounding it. There is no actual ownership of gas in situ. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

Protection of Interest of State: An arrangement whereby the state will share in all the natural gas brought to the surface on a certain unified area in proportion to the acreage owned by the state in that area fully protects the rights of the state in securing to it its full share of the gas underlying its lands. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

Purpose of Pooling Agreements: The purpose of agreements for the pooling of acreage for unit operations for the production of oil or gas is to conserve the natural resources of an oil or gas area, to promote its development in an orderly and economical manner to meet market conditions, to avoid waste, and to ensure a more equitable distribution of the proceeds of production. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

Law Review Articles

All Parties to an Oil and Gas Unitization Agreement Not Indispensable to a Suit to Cancel a Lease of the Unit, Foster, 23 Mont. L. Rev. 130 (1961).

Pooling Provisions in Oil and Gas Leases, Fox, 4 J. Min. L. & Pol'y. 345 (1988).

Powers and Problems of Lessee Pooling, Douglass, 34 Inst. on Oil & Gas L. & Tax'n 231 (1983).

Collateral References

Validity of compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit. 37 ALR 2d 434.

77-3-431. Report of lessees.

Administrative Rules

ARM 36.25.217 Operations on leases — reports.

77-3-432. Royalty.

Compiler's Comments

1997 Amendment: Chapter 34 in second sentence, after the second "12 ½% on", deleted "that portion of the average production of" and after "producing well" deleted "not exceeding 3,000 barrels"; and made minor changes in style. Amendment effective February 24, 1997.

1989 Amendment: Near beginning of first sentence, after "consideration therefor", deleted "in addition to the rentals as hereinbefore provided". Amendment effective July 1, 1989.

Applicability: Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

1987 Amendment: At end of section inserted last sentence permitting state to share expenses of transporting oil to market in proportion to its royalty interest.

Applicability: Section 2, Ch. 136, L. 1987, provided: "Section 1 [77-3-432] is applicable to state oil and gas leases existing on [the effective date of this act] [October 1, 1987] and to state oil and gas leases entered into after [the effective date of this act] [October 1, 1987]; however, transportation charges paid before [the effective date] [October 1, 1987] shall not be refunded."

Administrative Rules

ARM 36.25.210 Royalties — oil and gas.

Case Notes

Royalty Rate: When oil lands are leased on a royalty basis with a cash bonus, the bonus constitutes rental for an estate or interest in the land. In leasing oil lands, the Legislature is under obligation to obtain the full market value of the estate or interest disposed of on a rental basis, as well as for the sale of the land itself. State ex rel. Strandberg v. St. Bd. of Land Comm'rs, 131 M 65, 307 P2d 234 (1957).

Law Review Articles

Note: Oil and Gas—Mineral Deeds—Royalty Assignments—Parol Evidence, Borer, 21 Mont. L. Rev. 125 (1959).

State School Trust Lands and Oil and Gas Royalty Rates, Woodgerd & McCarthy, 3 Pub. Land L. Rev. 119 (1982).

Royalty Issues: Take-or-Pay Claims and Division Orders, Smith, 24 Tulsa L.J. 509 (1989).

Oil and Gas Royalties—A Percentage of What?, Maxwell, 34 Rocky Mtn. Min. L. Inst. Proceedings 15-1 (1988).

Royalties on Processed Gas, Seddelmeyer, 36 Inst. on Oil & Gas L. & Tax'n 5-1 (1985).

Royalty Payments—Who Owes How Much to Whom and When?, Legg & Murrah, 35 Inst. on Oil & Gas L. & Tax'n 159 (1984).

Collateral References

Mines and Minerals *key* 5.

58 C.J.S. Mines and Minerals §129.

Oil and gas royalty as real or personal property. 56 ALR 4th 539.

Meaning of, and proper method for determining, market value or market price in oil and gas lease requiring royalty to be paid on standard measured by such terms. 10 ALR 4th 732.

Expenses and taxes deductible by lessee in computing oil and gas royalty. 73 ALR 2d 1056.

Duty to market. 71 ALR 2d 1219.

Construction and effect of provision in mineral lease excusing payment of minimum rent or royalty. 28 ALR 2d 1013.

Royalty—what constitutes. 4 ALR 2d 492.

77-3-433. Shut-in gas royalty.

Compiler's Comments

1997 Amendment: Chapter 34 in first sentence, after "$400 per", substituted "lease" for "well" and after "provided in the lease" deleted "in lieu of such per well rate" and in second sentence, after "production", inserted "in paying quantities"; and made minor changes in style. Amendment effective February 24, 1997.

Administrative Rules

ARM 36.25.210 Royalties — oil and gas.

Collateral References

"Shut-in royalty" payment provisions in oil and gas leases. 96 ALR 2d 345.

77-3-434. Manner of making royalty payment.

Administrative Rules

ARM 36.25.210 Royalties — oil and gas.

77-3-435. Payments due to state — audit — notice — action.

Compiler's Comments

1997 Amendment: Chapter 34 inserted (3) and (4) regarding audit authority of the Department; and made minor changes in style. Amendment effective February 24, 1997.

77-3-436. Disposition of royalties and other money.

Compiler's Comments

1985 Amendment: In (4) after "credited", substituted "to the state general fund unless other disposition is provided by law" for "one-half to the state general fund and one-half to the state permanent revenue fund".

Case Notes

Royalties and Bonuses: The "royalties and bonuses" mentioned in this section are the same royalties and bonuses mentioned in 77-3-432 through 77-3-434 (formerly section 81-1704, R.C.M. 1947) and they become available only as and when the oil is produced and after "such oil . . . is run into any pipeline or storage tank to the credit of the lessee" (77-3-434). Thus the amount bid per acre for a lease, in excess of the minimum annual rental per acre, is not such a bonus but is part of the rental and is placed in the common School Interest and Income Fund to be apportioned and distributed annually to the several school districts as provided in Art. XI, sec. 5, 1889 Mont. Const. (now Art. X, sec. 2, 1972 Mont. Const.). State ex rel. Dickgraber v. Sheridan, 126 M 447, 254 P2d 390 (1953). (See, however, dissenting opinions of Justices Anderson and Angstman in 126 M 447, 254 P2d 390 (1953), on pages 397 and 403 respectively.)

Collateral References

Mines and Minerals *key* 5; States *key* 126, 127.

58 C.J.S. Mines and Minerals §129; 73A C.J.S. Public Lands §101; 81A C.J.S. States §228.

77-3-438. Assignments of leases.

Administrative Rules

ARM 36.25.212 Assignments and transfers.

Law Review Articles

Assignments by the Landowner and the Lessee, Sullivan, 17 Mont. L. Rev. 64 (1955).

Collateral References

58 C.J.S. Mines and Minerals §§129, 195.

77-3-439. Surrender of leases.

Administrative Rules

ARM 36.25.213 Surrender of lease.

77-3-440. Forfeiture and cancellation of leases.

Administrative Rules

ARM 36.25.214 Forfeiture, cancellation, and termination of leases.

Law Review Articles

Oil and Gas: Forfeiture as a Remedy for Flagrant Breach of Express Surface Use Restrictions—Are the Gates Open?, Scheer, 25 Washburn L.J. 406 (1986).

Collateral References

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental strictly on time. 5 ALR 2d 993.

77-3-441. Restriction on new lease following termination of old lease.

Administrative Rules

ARM 36.25.217 Operations on state leases.

77-3-442. Disposition of property of lessee upon termination of lease.

Compiler's Comments

1997 Amendment: Chapter 34 in (2), in first sentence after "the succeeding lessee or", inserted "if there is no succeeding lessee" and after "state" deleted "as the case may be" and inserted second sentence regarding departmental appointment of an appraiser; in (3), at beginning of first sentence, inserted "Unless the department gives written authorization", after "may" inserted "not", and at end deleted "until the value of the casing, equipment, and apparatus which the succeeding lessee or the state desires to have left upon the premises is fixed in the manner

provided in this section and has been paid to him in cash"; and made minor changes in style. Amendment effective February 24, 1997.

Administrative Rules

ARM 36.25.217 Operations on state leases — property remaining at termination.

77-3-443. Reservation in lease for disposition of surface.

Collateral References

What constitutes reasonable and necessary use of the surface by mineral lessee under oil and gas lease. 53 ALR 3d 16.

Liability of oil and gas lessee or operator for injuries to or death of livestock. 51 ALR 3d 304.

77-3-444. Limitation on overriding royalties and payments out of production.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), in introductory clause, substituted "director of the department" for "commissioner"; and made minor changes in style. Amendment effective March 12, 1997.

Filing of Prior Agreements: Section 2, Ch. 157, L. 1985, was not codified because it was temporary. It provided: "The board of land commissioners may require that an agreement which created overriding royalties or payments out of production of oil and gas from state oil and gas leases prior to the effective date of this act be filed by the lessee with the department of state lands [now department of natural resources and conservation] during the 30-day period following the next anniversary date of the lease."

Applicability: Section 6, Ch. 157, L. 1985, was not codified because it was temporary. It provided: "Section 1 [77-3-444] does not apply to overriding royalties or payments out of production agreements entered into before the effective date of this act."

77-3-451. Limitation on public inspection rights.

Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 105, L. 1989, provided: "The legislature is extending the rulemaking authority of the board of land commissioners to allow the board to amend its existing mineral leasing rules to provide for protection of confidential information. The legislature intends that the rules be written broadly to cover all information that would legitimately be considered confidential by lessees, including, as appropriate, mineral quality and quantity, mineral location, mineral depth, cost of production, and the extent of the reserves. This information may include economic or engineering data. The legislature also intends that the rules establish a procedure whereby the lessee may notify the department of state lands [now department of natural resources and conservation] of information it considers to be confidential and to be notified whether the department agrees before the lessee submits the information. Furthermore, the legislature intends that the rules include a process to protect the lessee's interests if the department considers declassification of the information at a future date."

Part 5
Underground Storage of Natural Gas

Part Law Review Articles

Gas Storage Charges: The Next Step in Take-or-Pay Cost Allocation, Nagelhout, 123 Pub. Util. Fort. 60(5) (1989).

Underground Gas Storage: Condemnation Problems Under the Natural Gas Act, Petricoff & Snyder, 9 E. Min. L. Found. 16-1 (57) (1988).

Underground Gas Storage: Opposing Rights and Interests, McGaha, 24 Pub. Land & Resources L. Dig. 46 (1987).

Part Collateral References

Remedy for breach of implied duty of oil and gas lessee to protect against drainage. 18 ALR 4th 147.

Implied duty of oil and gas lessee to protect against drainage. 18 ALR 4th 14.

77-3-501. Lease for underground storage of natural gas authorized.

Case Notes

Constitutionality: This statute is constitutional. State ex. rel Hughes v. St. Bd. of Land Comm'rs, 137 M 510, 353 P2d 331 (1960).

Collateral References

73B C.J.S. Public Lands §197.
63C Am. Jur. 2d Public Lands §121.
Rights and liabilities with respect to natural gas stored in natural reservoir. 94 ALR 2d 543.

77-3-509. Disposition of funds.

Collateral References

73A C.J.S. Public Lands §101.

CHAPTER 4
GEOTHERMAL AND HYDROELECTRIC RESOURCES

Chapter Collateral References

Geothermal steam resources: construction and application of Geothermal Steam Act of 1970 (30 U.S.C.S. §1001, et seq.), pertaining to leases of government lands for development of geothermal steam resources. 40 ALR Fed. 814.

Part 1
Geothermal Resources

Part Compiler's Comments

Severability: Section 13, Ch. 111, L. 1974, was a severability clause.

Part Administrative Rules

Title 36, chapter 25, subchapter 4, ARM State land leases — geothermal rules and regulations.

Part Law Review Articles

Protection of the Geothermal Resource of Yellowstone National Park—A Case Study, Nes, 9 Pub. Land L. Rev. 145 (1988).

Geothermal Law—The Law and the Next 23 Years, Kostant, 37 Rocky Mtn. Min. L. Inst. Proc. 2-1 (1991).

Economic Issues in Federal Geothermal Leasing Procedures, Muraoka & Mead, 27 Nat. Resources J. 675 (1987).

Preemption of State Geothermal Regulation—Federalism Gets Into Hot Water, Perry, 22 Land & Water L. Rev. 97 (1987).

77-4-101. Geothermal leases authorized.

Administrative Rules

ARM 36.25.108 Lands available for leasing or licensing.
ARM 36.25.402 Lands available for leasing — size, contiguity, and numbers of leases.
ARM 36.25.403 Who may lease.
ARM 36.25.417 Records, minutes, and notices open to public inspection.

Collateral References

73B C.J.S. Public Lands §197.
63C Am. Jur. 2d Public Lands §121.
Leases of federal lands for development of geothermal resources. 40 ALR Fed. 814.

77-4-102. Definitions.

Administrative Rules

ARM 36.25.401 Definitions.

77-4-103. Rules.

Administrative Rules
ARM 36.25.404 Procedures for issuance of lease.
ARM 36.25.408 Assignments and transfers of lease.
ARM 36.25.409 Overriding royalty interests.
ARM 36.25.410 Surrender of lease.
ARM 36.25.411 Forfeiture, cancellation, and termination of leases.
ARM 36.25.415 Operations and conduct of geothermal development.
ARM 36.25.418 Fees for application, lease, and transfer or assignment.

77-4-106. Bonding requirements.

Administrative Rules
ARM 36.25.413 Bonding requirements.

77-4-107. Compensation to surface lessee.

Administrative Rules
ARM 36.25.414 Land surface use rights and obligations.

77-4-109. Conflicting leases.

Administrative Rules
ARM 36.25.416 Conflicting leases.

77-4-121. Provisions of the lease.

Administrative Rules
ARM 36.25.407 Diligence — failure of may terminate lease.
ARM 36.25.411 Forfeiture, cancellation, and termination of leases.

77-4-122. Duration of lease.

Administrative Rules
ARM 36.25.405 Term of lease — extension by drilling operations at end of tenth year.

77-4-123. Extension of lease.

Administrative Rules
ARM 36.25.405 Term of lease — extension by drilling operations at end of tenth year.
ARM 36.25.407 Diligence in exploration.

77-4-124. Operating agreements.

Administrative Rules
ARM 36.25.412 Unit or cooperative plans of development or operation.

77-4-125. Pooling agreements and unit operations.

Administrative Rules
ARM 36.25.412 Unit or cooperative plans of development or operation.

77-4-126. Royalties and rentals.

Administrative Rules
ARM 36.25.406 Rentals and royalties — geothermal.
ARM 36.25.409 Overriding royalty interests in assignment or transfer.

77-4-127. Disposition of royalties and other receipts.

Collateral References
73A C.J.S. Public Lands §101.

Part 2
Hydroelectric Resources

Part Law Review Articles
Water: State Water Quality Certification of Federally Licensed Hydropower Projects, Blake, 48 Okla. L. Rev. 817 (1995).

Battle Looms Over Hydroelectric Dam Relicensing, Simpson, 131 Pub. Util. Fort. 50 (1993).

New Policies for Hydro Project Licensing, Billing, Berg, 129 Pub. Util. Fort. 27 (1992).

State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act, Bogardus, 12 Va. Envtl. L.J. 43 (1992).

Privatization of Municipal Hydroelectric Facilities Under Current Law, Lambert & O'Neill, 121 Pub. Util. Fort. 11(7) (1988).

The Electric Consumer Protection Act of 1986: Changes in Hydro Licensing?, Bornong, 23 Gonz. L. Rev. 135 (1988).

Cumulative Impacts of Hydropower Development Under NEPA, Eckberg, 16 Envtl. L. 673 (1986).

The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities, Whittaker, 10 Harv. Envtl. L. Rev. 135 (1986).

Part Collateral References

Electricity *key* 1 ½.

29 C.J.S. Electricity §§6 through 9.

77-4-201. Lease or license of power sites.

Compiler's Comments

2001 Amendment: Chapter 7 in second sentence substituted "electrical energy" for "electric energy"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

Electricity *key* 10; Public Lands *key* 158 ½.

29 C.J.S. Electricity §4; 73B C.J.S. Public Lands §§178, 197.

63C Am. Jur. 2d Public Lands §121.

77-4-210. Joint development with United States.

Compiler's Comments

2001 Amendment: Chapter 7 in (1) near middle substituted "electrical energy" for "electric energy"; and made minor changes in style. Amendment effective October 1, 2001.

CHAPTER 5
TIMBER RESOURCES

Chapter Compiler's Comments

Functions of Department of Natural Resources and Conservation Transferred to Department of State Lands (Now Abolished): Section 1, Ch. 529, L. 1981, provided: "(1) The functions of protecting natural resources from fire in Title 76, chapter 11, part 1; of protection of forest resources in Title 76, chapter 13; of appraising, protecting, and selling state timberlands in Title 77, chapter 5; and of recommending closing lands to hunting and fishing in fire danger areas under 87-3-106 are transferred from the department of natural resources and conservation to the department of state lands [department of state lands now abolished—functions were returned to department of natural resources and conservation].

(2) Unless inconsistent with this act, any reference to "department of natural resources and conservation" in those sections is changed to "department of state lands" [now abolished].

(3) Any corresponding internal references shall be changed by the code commissioner."

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Transition: Section 10, Ch. 529, L. 1981, provided: "The provisions of 2-15-131 through 2-15-137 apply to the transfer of functions under this act."

Chapter Law Review Articles

Standing, Ripeness, and Forest Plan Appeals, Brennan & Clifford, 17 Pub. L. & Resources L. Rev. 125 (1996).

National Forest Planning: An Opportunity for Local Governments to Influence Federal Land Use, Hart, 16 Pub. L. Rev. 137 (1995).

The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute, Tuholske & Brennan, 15 Pub. L. Rev. 53 (1994).

The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead, Wilkinson, 68 U. Colo. L. Rev. 659 (1997).

Understanding Indian Tribal Timber Sales, Hill & Arnett, 9 Nat. Resources & Env't 38 (1995).

Forest Practice Legislation in the United States, 13 Hamline J. Pub. L. & Pol'y 73 (1992).

Let It Burn. (The American Forest: Garden of Eden or Logger's Paradise?), Savage, Bus. & Soc'y Rev. 12 (1988).

Spike the Trees to Save the Forests?, Rose, 18 Envtl. L. 365 (1988).

The New Environmental Forest, Hays, 59 U. Colo. L. Rev. 517 (1988).

Controlling the Fate of America's Forests, Austin, Bus. & Soc'y Rev. 55 (1987).

Keeping Wilderness Areas Wild: Legal Tools for Management, Edwards, 6 Va. J. Nat. Resources L. 101 (1986).

Significant Features of Timber Taxation, Singleton, 34 Oil & Gas Tax Q. 101 (1985).

Chapter Collateral References

Our Montana Environment . . . Where Do We Stand?, Environmental Quality Council, 1996.

Timber Management and Forest Fire Protection Costs in Montana, Report and Recommendations, Joint Interim Subcommittee No. 2, 49th Legislature, Montana Legislative Council (1984).

Timber Taxation in Montana, A Report to the 46th Legislature, Revenue Oversight Committee, Montana Legislative Council (1978).

Part 1
State Forests

77-5-101. Classification of lands as state forests.

Collateral References

63C Am. Jur. 2d Public Lands §17.

77-5-103. Role of department.

Compiler's Comments

1981 Amendment: Changed the department of natural resources and conservation to the department of state lands (now abolished). "Department" means department of state lands (now department of natural resources and conservation). See 77-1-101.

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Collateral References

Woods and Forests *key* 7.

98 C.J.S. Woods and Forests §15.

77-5-104. Firewardens.

Compiler's Comments

1995 Amendment: Chapter 418 in (3)(f), in two places, substituted "director" for "commissioner"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 310 inserted (3)(k) to include county rural fire chiefs; inserted (3)(1) to include employees of the state fire program; and made minor changes in style.

1991 Amendment: In (3)(d) inserted reference to park rangers; and made minor change in style. Amendment effective April 26, 1991.

1985 Amendment: Deleted former (3)(f) that read: "members of the board of natural resources and conservation"; and in (3)(f) substituted "commissioner" for "director of the department".

1981 Amendment: Changed the department of natural resources and conservation to the department of state lands (now abolished) in three places. "Department" means department of state lands (now department of natural resources and conservation). See 77-1-101.

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

77-5-105. Powers of firewardens.

Case Notes

Negligence in Fighting Fire: Where plaintiff's property was damaged by fire retardant dropped from defendant's airplane which was hired to aid in fighting a forest fire and plaintiff could not

show the lack of proper care under the circumstances, the cause failed under the doctrine of "damnum absque injuria" (injury without redressable breach of duty). Stocking v. Johnson Flying Serv., 143 M 61, 387 P2d 312 (1963).

Collateral References

86 C.J.S. Torts §11.

Restatement of Torts §196.

77-5-116. State forest lands — deferral of management prohibited.

Compiler's Comments

Preamble: The preamble attached to Ch. 259, L. 2001, provided: "WHEREAS, no interest in state trust lands or proceeds may be diverted from the trust without payment of the full market value of that use to the trust pursuant to section 11 of the state's Enabling Act and Article X, sections 3 and 11, of the Montana Constitution; and

WHEREAS, the Montana Supreme Court, in Montanans for the Responsible Use of the School Trust v. State, 296 Mont. 402, 989 P.2d 800 (1999), held that state trust land could not be held idle without the production of revenue pending the arbitration of lease improvements and referenced an earlier Supreme Court ruling that declared that a "trustee must act with the utmost good faith towards the beneficiary, and may not act in his own interest, or in the interest of a third person"; and

WHEREAS, Attorney General Robert Woodahl, in an opinion issued on July 7, 1976, 36 A.G. Op. 92, held that in order for the state to avoid a breach of trust under the Enabling Act and the Montana Constitution, the state is required to actually compensate the state school trust with funds for the full appraised value of any state trust lands designated or exchanged for natural areas pursuant to the Montana Natural Areas Act of 1974."

Effective Date: Section 3, Ch. 259, L. 2001, provided: "[This act] is effective on passage and approval." Approved April 16, 2001.

Part 2
Timber Sales and Removal

Part Case Notes

Failure to Distinguish Between Commercially Valuable and Nonvaluable Timber as Firewood on State Lands Violative of Trust Duty of Undivided Loyalty: Pursuant to 77-5-211 (now repealed), the state discretionarily issued free permits for the gathering of dead, down, or inferior wood from school trust lands for use as firewood. The District Court concluded that 77-5-211 (now repealed) authorized the Department of Natural Resources and Conservation to act in violation of the school trust by allowing the Department to give away commercially valuable timber, in violation of its trust duty of undivided loyalty. The state argued on appeal that the District Court's conclusions were incorrect because the Department retained discretion to issue permits and because plaintiff failed to show that dead wood had commercial value in all instances. The Supreme Court affirmed, citing Wild W. Motors, Inc. v. Lingle, 224 M 76, 728 P2d 412, 43 St. Rep. 2030 (1986), in considering the state's duty of undivided loyalty as trustee of school trust lands, noting that a trustee must act with the utmost good faith toward the beneficiary and may not act in the trustee's own interest or in the interest of a third party. In failing to distinguish between commercially valuable timber and timber that lacks commercial value, the statute allows the Department to issue permits to third parties without charging them for any commercially valuable wood that they collect, violating both the mandate that full market value be obtained for school trust lands and the state's trust duty of undivided loyalty. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

Part Collateral References

Necessity and sufficiency of environmental impact statements under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.S. §4332(2)(C)) in cases involving logging, mining, and related projects. 74 ALR Fed. 702.

77-5-201. Sale of timber.

Compiler's Comments

1995 Amendment: Chapter 223 in (3)(a), after "blowdown", inserted "or in cases when the department is required to act immediately to take advantage of access granted by permission of an adjoining landowner"; inserted (3)(b)(i) concerning immediate action; inserted (3)(b)(ii)

concerning access controlled by purchaser; inserted (3)(c) concerning limited time for sales opportunities; and made minor changes in style.

1991 Amendment of Administrative Rule: In Ch. 372, L. 1991, the Legislature directed the Department of State Lands (now Department of Natural Resources and Conservation) to amend ARM 26.6.411 by inserting (2)(a)(iii) to prohibit use of unprocessed timber from state lands as a substitute for unprocessed timber exported from the United States, inserting definition of substitution, and making minor changes in style.

Preamble: The preamble attached to Ch. 372, L. 1991, provided: "WHEREAS, the forest products industry accounts for 46% of the economic base of Montana's seven western counties; and

WHEREAS, the jobs of American mill workers are lost when raw logs are exported overseas; and

WHEREAS, the United States Congress enacted the Forest Resources Conservation and Shortage Relief Act of 1990 to prohibit the export of unprocessed timber originating from federally owned and state-owned lands; and

WHEREAS, the Department of State Lands [now Department of Natural Resources and Conservation] has promulgated rules prohibiting the export of unprocessed timber originating from state-owned lands in Montana; and

WHEREAS, existing law creates a loophole that allows private landowners in Montana to export unprocessed timber from their own lands and then substitute timber purchased from state lands for the exported supply; and

WHEREAS, the decrease in timber available for export from the states of Oregon and Washington may increase the pressure to export unprocessed timber from private lands in Montana."

1983 Amendment: In (3), substituted "1 million" for "200,000".

1981 Amendment: Changed the department of natural resources and conservation to the department of state lands (now abolished). "Department" means department of state lands (now department of natural resources and conservation). See 77-1-101.

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Administrative Rules

ARM 36.11.111 Agreement not to export state logs.

Case Notes

Failure to Include Adequate Cumulative Impacts Analysis — Insufficient Environmental Impact Statement: The District Court held that the environmental impact statement (EIS) prepared for the Middle Soup Creek logging project was insufficient because it did not adequately analyze and discuss the cumulative impacts of the project in accordance with the definitions of cumulative impact and human environment in ARM 36.2.522 or include discussion of reconciliation of the proposed project with the state forest land management plan (SFLMP). The Department of Natural Resources and Conservation (DNRC) argued on appeal that the court failed to comprehend that a new course filter ecological analysis took into account all of the prevailing conditions of the affected lands and therefore incorporated a cumulative effects analysis into the EIS. The DNRC also contended that even though ARM 36.2.529 requires a cumulative impacts analysis, the rule does not dictate a particular methodology. The Supreme Court disagreed. ARM 36.2.529 clearly states that the EIS must contain a description of the cumulative impacts and does not allow a mere analysis implicit within the EIS. The public is not benefited by reviewing an EIS that does not explicitly set forth the actual cumulative impacts analysis and the facts that form the basis for the analysis. Further, ARM 36.2.524 requires consideration of potential conflicts with formal plans, such as the SFLMP. Here, the EIS discussed old growth and fragmentation as concerns, but did not discuss the SFLMP objective to preserve old growth, reduce fragmentation, and protect unique habitat. The District Court did not err when it held that the DNRC violated MEPA as a result of its failure to include an adequate cumulative impacts analysis in the EIS. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

Substantial Economic Change as Basis for Supplemental EIS: The District Court held that a supplemental environmental impact statement (EIS) was required for the Middle Soup Creek logging project in light of changed economic circumstances of the sale. The sale was originally proposed as a revenue source for the school trust, before revenue reestimation revealed that the sale would actually cost the state about $150,000. The state contended that a supplemental EIS was not required absent proof that a reduction in the total timber sale revenue would result in

physical impact to the environment, arguing that ARM 36.2.522 does not compel preparation of a supplemental EIS based on economic impacts alone. The Supreme Court disagreed, noting that nothing in ARM 36.2.533 requires that a substantial change must result in additional environmental impact before a supplemental EIS is required, nor is there a limitation on what may be considered a substantial change. Thus, a substantial economic change in a project can serve as the basis for requiring a supplemental EIS. Here, a timber sale that would ultimately cost the state money rather than raise revenue as originally anticipated was considered a substantial change sufficient to warrant a supplemental EIS, and the state erred in not preparing one. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

77-5-202. Agreement with purchaser — bond.

Compiler's Comments

1989 Amendment: At beginning of (2)(a) inserted exception clause and at end substituted "the potential loss to the state, as determined by the department" for "at least 20% of the estimated value of timber sold"; and inserted (2)(b) relating to required amount of bond.

Collateral References

Size and kind of trees contemplated by contract or deed in relation to standing timber. 72 ALR 2d 727.

Sufficiency of description in standing timber deed or contract. 35 ALR 2d 1320.

77-5-203. Breach of timber sale agreement.

Compiler's Comments

1981 Amendment: Changed the department of natural resources and conservation to the department of state lands (now abolished). "Department" means department of state lands (now department of natural resources and conservation). See 77-1-101.

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Collateral References

Revocation of license to cut and remove timber as affecting rights in respect to timber cut but not removed. 26 ALR 2d 1194.

77-5-204. Sale of timber — fee for forest improvement.

Compiler's Comments

1995 Amendment: Chapter 157 in (1) and (3) substituted "1,000 board feet, when appropriate" for "1,000 feet"; at end of (1) substituted "full market value" for (1)(a) and (1)(b) that read: "(a) $3 per 1,000 feet for white pine, yellow pine, and spruce; or

(b) $1.50 per 1,000 feet for all other timber species"; and deleted (3)(b) through (3)(d) that read: "(b) the condition of the timber relative to risk from fires or other damage;

(c) the timber's distance from the nearest lake, stream, or railroad; and

(d) the timber's value as a protection to a watershed."

1993 Amendment: Chapter 446 in (3), in first sentence before "appraised", deleted "estimated and" and at beginning of second sentence substituted "An appraisal" for "These estimates and appraisals"; in (4) substituted first sentence establishing a forest improvement fee for former language that read: "The board may set fees for brush disposal on state lands. The board may also establish a fee for timber stand improvement on timber cut on state lands"; inserted (4)(a) through (4)(d) regarding uses of fee revenue that may be funded by legislative appropriation; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

1981 Amendment: Changed the department of natural resources and conservation to the department of state lands (now abolished) in two places. "Department" means department of state lands (now department of natural resources and conservation). See 77-1-101.

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Collateral References

Public Lands *key* 16.

73A C.J.S. Public Lands §§13 through 16.

77-5-206. Management of timber by department.

Compiler's Comments

1991 Amendment: In (2) deleted second sentence that required Department to use the Scribner Decimal C log scale for measuring volume for state timber sales.

1981 Amendment: Changed the department of natural resources and conservation to the department of state lands (now abolished) in two places. "Department" means department of state lands [now department of natural resources and conservation). See 77-1-101.

Severability: Section 9, Ch. 529, L. 1981, was a severability section.

Administrative Rules

ARM 36.27.101 Resource development.

77-5-207. Salvage timber program.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 285, L. 1993, provided: "It is the intent of the legislature that the department of state lands [now department of natural resources and conservation] establish and implement an aggressive salvage timber program for state lands that removes dead and dying timber before the timber decays and wood value is lost. However, the direction to establish a salvage timber program in this bill should not take precedence over the timely sale of green timber."

77-5-208. Timber conservation license in lieu of sale.

Compiler's Comments

Saving Clause: Section 2, Ch. 224, L. 1999, was a saving clause.

Effective Date: Section 4, Ch. 224, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 1, 1999.

77-5-221. Definition.

Compiler's Comments

Effective Date: Section 8, Ch. 517, L. 1995, provided that this section is effective July 1, 1995.

Code Commissioner Correction: The Code Commissioner deleted a reference to 77-1-222 pursuant to the authority in sec. 73, Ch. 18, L. 1995.

77-5-222. Determination of annual sustainable yield.

Compiler's Comments

Effective Date: Section 8, Ch. 517, L. 1995, provided that this section is effective July 1, 1995.

77-5-223. Annual sustainable yield as timber sale requirement — review.

Compiler's Comments

Effective Date: Section 8, Ch. 517, L. 1995, provided that this section is effective July 1, 1995.

Part 3
Streamside Management Zones

Part Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 608, L. 1991, provided: "It is the intent of the legislature that the streamside management zone be an area of closely managed activity, but not a zone where timber harvest is excluded. Timber harvest activities must be managed within the zone to achieve objectives relating to water quality, beneficial water uses, management of wildlife habitat, and the long-term stability of the stream system, in addition to timber harvest objectives.

It is the intent of the legislature that the department of state lands [now department of natural resources and conservation] adopt rules to implement the management standards provided for in [section 3] [77-5-303] as enforceable standards for streamside management zones. These standards are to be coordinated with the objectives and guidelines contained in the existing system of voluntary best management practices, which will still guide forest practices outside of the streamside management zone. The department shall adopt rules governing the harvest of timber in streamside management zones to ensure the retention of merchantable and submerchantable timber necessary to maintain the integrity of the streamside management zone. The department

shall also adopt rules under which owners and operators may receive approval for alternative practices for the standards provided in [section 3] [77-5-303].

It is the intent of the legislature that the department develop voluntary, nonenforceable guidelines concerning the selection and retention of trees and vegetation, including snags, for wildlife habitat within the streamside management zone.

It is the intent of the legislature that the department establish an interdisciplinary technical committee to assist the department in adopting rules, developing voluntary guidelines for the management of wildlife habitat, and monitoring the implementation of this bill. The members of the committee should have technical knowledge or expertise in water quality, wildlife management, or forest management and include representatives from the U.S. forest service; U.S. bureau of land management; the Montana departments of health and environmental sciences [now department of natural resources and conservation] and fish, wildlife, and parks; conservation districts; the Montana state university [now Montana state university-Bozeman] extension forestry program; the Montana forest and conservation experiment station; the forest products industry; and the conservation community.

To the extent practical, the department should conduct onsite consultations under [section 4] [77-5-304] in conjunction with consultations or inspections conducted pursuant to Title 76, chapter 13, parts 1 and 4. It is also the intent of the legislature that whenever department personnel in the field notice a probable water quality or 310 permit violation that they notify the appropriate authority.

It is the intent of the legislature that the department, with the assistance of the technical committee, evaluate the implementation of this bill, develop recommendations to address problems, if any, that arise, and report its findings and recommendations to the environmental quality council.

Finally, the legislature recognizes that appropriate limitations on activities in streamside zones, which comprise only a very small percentage of Montana forests, can achieve substantial watershed and wildlife benefits."

Part Administrative Rules

Title 36, chapter 11, subchapter 3, ARM Streamside management zone.

77-5-301. Findings and purpose.

Administrative Rules

ARM 36.11.302 Width of SMZ — marking boundary.
ARM 36.11.304 Equipment operation in SMZ.
ARM 36.11.305 Retention of trees in SMZ — clearcutting.
ARM 36.11.306 Road construction in SMZ.

77-5-302. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 in definition of Department substituted "department of natural resources and conservation provided for in 2-15-3301" for "department of state lands provided for in 2-15-3201"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 320 in definition of timber sale, after "harvest", substituted "or" for "and".

Administrative Rules

ARM 36.11.302 Width of SMZ — marking boundary.
ARM 36.11.310 Site-specific alternative practices.

77-5-303. Standards for forest practices in streamside management zones.

Administrative Rules

ARM 36.11.303 Broadcast burning.
ARM 36.11.304 Equipment operation in SMZ.
ARM 36.11.305 Retention of trees in SMZ — clearcutting.
ARM 36.11.306 Road construction in SMZ.
ARM 36.11.307 Hazardous or toxic materials.
ARM 36.11.308 Side-casting of road material.
ARM 36.11.309 Depositing slash.

77-5-305. Responsibility for compliance — penalties — administrative orders.

Compiler's Comments

1997 Amendment: Chapter 422 inserted (5) relating to fines and penalties deposited in state general fund. Amendment effective July 1, 1997.

77-5-307. Rulemaking.

Administrative Rules

ARM 36.11.310 Site-specific alternative practices.

Part 4
Community and Urban Forestry Program

Part Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 321, L. 1993, provided: "A statement of intent is required for this bill because [section 3] [77-5-403] authorizes the department of state lands [now department of natural resources and conservation] to adopt rules for the implementation of [sections 1 through 4] [Title 77, ch. 5, part 4]. Although implementation by the department is discretionary, it would require the adoption of rules.

At a minimum, the rules must address the following:

(1) the types of trees and vegetative cover best suited to the Montana environment;

(2) instructions for the planting and maintenance of trees and vegetation; and

(3) criteria for the selection of suitable sites for planting."

77-5-402. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 in definition of Department substituted "department of natural resources and conservation provided for in 2-15-3301" for "department of state lands provided for in 2-15-3201". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

CHAPTER 6
AGRICULTURAL, GRAZING, AND OTHER SURFACE LEASES

Chapter Administrative Rules

Title 36, chapter 25, subchapter 1, ARM State land leases — surface management.

Chapter Case Notes

School Trust Land Water Rights Owned by State: In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Chapter Law Review Articles

Public Rangeland Reform: New Prospects For Collaboration and Local Control Using the Resource Advisory Councils, Olinger, 69 U. Colo. L. Rev. 633 (1998).

Cows in Hot Water: Regulation of Livestock Grazing Through the Federal Clean Water Act, Frank, 35 Santa Clara L. Rev. 1269 (1995).

Grazing Rights: Time for a New Outlook, Jackson, 32 Nat. Resources J. 623 (1992).

Hohfeld and Herefords: The Concept of Property and the Law of the Range, Harbison, 22 N.M.L. Rev. 459 (1992).

Rancher Stewardship on Public Ranges: A Recent Court Decision, Huffaker & Gardner, 27 Nat. Resources J. 887 (1987).

Livestock Grazing on the Public Lands: Lessons From the Failure of Official Conservation, Coggins, 20 Gonz. L. Rev. 749 (1984).

Part 1
General Provisions

Part Administrative Rules

Title 36, chapter 25, subchapter 1, ARM State land leases — surface management.

Part Collateral References

What constitutes reasonably necessary use of surface by mineral lessee under oil and gas lease. 53 ALR 3d 16.

Liability of oil and gas lessee or operator for injuries to or death of livestock. 51 ALR 3d 304.

77-6-102. Surface leases authorized.

Compiler's Comments

1985 Amendment: Near end substituted "town lots, city lots, and lands valuable for commercial development" for "town and city lots".

Law Review Articles

The Range Cattle Industry: Its Effect on Western Land Law, Scott, 28 Mont. L. Rev. 155 (1956).

Collateral References

73A C.J.S. Public Lands §§19 through 23, 95 through 100; 73B C.J.S. Public Lands §197.

63C Am. Jur. 2d Public Lands §§30, 121.

77-6-103. Lease of state land to United States for military purposes authorized.

Administrative Rules

ARM 36.25.125 Improvements.

77-6-105. Criteria for determining land to be included in single lease.

Administrative Rules

ARM 36.25.108 Lands available for leasing or licensing — compact bodies.

77-6-108. Who may lease.

Case Notes

No Proscription That Previously Canceled Lessee May Not Bid or May Not Lease State Lands — Written Findings Required When High Bid Rejected: Winchell's state land lease was canceled for gross mismanagement of the leased property. The lease was subsequently reclassified and advertised for bids, and Winchell submitted the high bid. Rather than make written findings as to why the bid was not in the best interests of the state, the Department of State Lands (now Department of Natural Resources and Conservation) relied on ARM 26.3.142(6) to dismiss Winchell's bid out-of-hand. This administrative rule, which purports to give the Department the ability to refuse to even consider a bid, is in derogation of law because there is no statutory proscription disallowing the bid or ability to lease of a person whose lease has been previously canceled. Absent written findings that the high bid was too high for community standards, would cause damage to the land, or would impair long-term productivity, the automatic refusal to consider the bid, based on an overbroad and unlawful administrative regulation, was in excess of the Department's jurisdiction and an abuse of its discretion. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

Unincorporated Association Not Considered Legal Entity Capable of Having Title to Real Property — Lease of State Land Precluded: Montana recognizes two types of associations as legal entities: cooperative associations and agricultural associations. Both of these entities have the statutory authorization to hold real property interests. However, at common law, an unincorporated association is not considered a legal entity capable of acquiring or holding title to real property in the association's name. Therefore, an unincorporated association may not lease state lands in its own name. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

77-6-109. Duration of lease.

Compiler's Comments

1989 Amendment: At beginning inserted exception clause; and made minor changes in phraseology. Amendment effective April 15, 1989.

1985 Amendment: In second sentence substituted "city lots, town lots, and lands valuable for commercial development" for "city and town lots", and increased lease period limitation from 25 to 40 years.

Administrative Rules

ARM 36.25.106 Term of lease or license.

77-6-110. Lease expiration dates.

Compiler's Comments

1989 Amendment: At beginning inserted exception clause. Amendment effective April 15, 1989.

77-6-112. Liens on crops and improvements.

Collateral References

73A C.J.S. Public Lands §§95 through 100.

77-6-113. Lease conditions — cancellation.

Administrative Rules

ARM 36.25.119 Subleasing.

Case Notes

Lease Canceled Due to Overgrazing: The plaintiffs had a land lease with the Department of State Lands (now Department of Natural Resources and Conservation). The Supreme Court held that there was sufficient evidence of overgrazing that mandated the cancellation of the lease and that the cancellation was necessary to do justice to all parties concerned and to protect the interests of the state. Winchell v. St., 241 M 94, 785 P2d 212, 47 St. Rep. 110 (1990).

77-6-114. Lessee responsible for assessments and taxes for weed control.

Compiler's Comments

1985 Amendment: In first sentence, after "noxious weed control", deleted "and weed seed extermination".

Administrative Rules

ARM 36.25.132 Operation agreements — cancellation for failure to control weeds and pests or to provide fire protection.

Case Notes

Holder of Land Under Erroneous Judgment — Offset of Lease Payments: The trial court held that Fix was the owner of a state lease based on an oral agreement to assign the lease. The Supreme Court reversed the decision in Aye v. Fix, 176 M 474, 580 P2d 97 (1978). The rightful assignee of the lease contended it was error to permit Fix to offset from reasonable rental value the lease payments that Fix made to the state. The party to whom property has been awarded under an erroneous judgment may, upon reversal, deduct expenses that he necessarily incurred in the protection of that property and the payment of taxes and liens. The lease payments by Fix were an expense incurred to protect the property and therefore properly deducted from the stipulated rental. Aye v. Fix, 192 M 141, 626 P2d 1259, 38 St. Rep. 578A (1981), remanded on other grounds.

77-6-115. Acquisition of water right by lessee.

Administrative Rules

ARM 36.25.134 Water rights.

Case Notes

No Implied Severance of Water From School Trust Lands: Neither this section, nor the principles of the Water Use Act set forth in 85-2-101, nor the prior appropriation doctrine gives rise to an implied severance of water from land in the school trust land leases or estops the state from claiming title to the water rights on school trust land. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

School Trust Land Water Rights Owned by State: In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

77-6-116. Voluntary termination of lease to allow concurrence with federal conservation reserve program — competitive bidding required.

Compiler's Comments

Effective Date: Section 8, Ch. 555, L. 1989, provided that this section is effective April 15, 1989.

Part 2
Leasing Procedure

77-6-201. Appraisal of grazing lands.

Case Notes

Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

77-6-202. Lease by competitive bidding — full market value required.

Compiler's Comments

1997 Amendment: Chapter 42 at end of third sentence, after "market value", deleted "determined by taking into account recommendations of the state land board advisory council"; and made minor changes in style. Amendment effective March 12, 1997.

1993 Amendment: Chapter 586 inserted third sentence concerning bid below fair market value; and made minor changes in style. Amendment effective July 1, 1993.

Administrative Rules

ARM 36.25.111 Competitive bidding.

ARM 36.25.115 Issuance of lease or license on unleased or unlicensed land and reclassified land.

Case Notes

Market Value of State Land Rights-of-Way Set by Statute at 1972 Levels — Unconstitutionality: The plain language of 77-1-130 requires that full market valuations of right-of-way acreage for historic deeds on state trust lands be based on the median values for the classifications of land at 1972 levels, leaving the Department of Natural Resources and Conservation no choice but to use those levels instead of current market value. The state argued that pursuant to 40 A.G. Op. 24 (1983), the figures in 77-1-130 are merely a minimum above which the Department may charge full market value. However, the statutory language is mandatory rather than discretionary and violates the provisions of the Montana Constitution and The Enabling Act, which require the state to receive full market value for school trust lands, and thus is unconstitutional. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

No Proscription That Previously Canceled Lessee May Not Bid or May Not Lease State Lands — Written Findings Required When High Bid Rejected: Winchell's state land lease was canceled for

gross mismanagement of the leased property. The lease was subsequently reclassified and advertised for bids, and Winchell submitted the high bid. Rather than make written findings as to why the bid was not in the best interests of the state, the Department of State Lands (now department of natural resources and conservation) relied on ARM 26.3.142(6) to dismiss Winchell's bid out-of-hand. This administrative rule, which purports to give the Department the ability to refuse to even consider a bid, is in derogation of law because there is no statutory proscription disallowing the bid or ability to lease of a person whose lease has been previously canceled. Absent written findings that the high bid was too high for community standards, would cause damage to the land, or would impair long-term productivity, the automatic refusal to consider the bid, based on an overbroad and unlawful administrative regulation, was in excess of the Department's jurisdiction and an abuse of its discretion. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

Grazing District — Preference Right Denied to Subleasor: A preference right under 77-6-205 allows a lessee contracting with the Department of State Lands (now Department of Natural Resources and Conservation) to renew his lease by meeting the high bid of other applicants upon expiration of his lease. However, this preference right was held unconstitutionally applied when exercised by a grazing district which did not use the land itself but instead subleased to whomever it wished. The only way full market value can be obtained in such a situation is by pure competitive bidding. Jerke v. Dept. of St. Lands, 182 M 294, 597 P2d 49 (1979).

77-6-203. Bid deposit.

Compiler's Comments

1985 Amendment: Near end of second sentence of (2) inserted "bona fide" before "bidders", inserted last two sentences of (2) providing for forfeiture of bid deposits in some cases; in (3), after "forfeited", deleted "and deposited by the department to the credit of the proper interest and income account in the agency fund"; and inserted (4) providing for crediting of forfeited deposits to the proper trust.

1983 Amendment: At end of section, substituted "agency fund" for "federal and private revenue fund".

Administrative Rules

ARM 36.25.107 Lease and license forms, bid forms, and bonding.

77-6-204. Notification of termination of lease.

Compiler's Comments

1989 Amendment: Near beginning inserted "or is voluntarily terminated under 77-6-116"; near end inserted "or terminated"; and made minor changes in phraseology. Amendment effective April 15, 1989.

Administrative Rules

ARM 36.25.107 Lease and license forms, bid forms, and bonding.

ARM 36.25.121 Cancellation of lease or license.

77-6-205. Renewal leases.

Compiler's Comments

1993 Amendment: Chapter 586 in (1), in second sentence, substituted "full market rental rate established by the board[, taking into account recommendations of the state land board advisory council [now terminated],]" for "rental rate provided by law"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: At end of third sentence of (2), after "best interest", deleted "and must be accompanied by a deposit equal to 20% of the competitive bid in the case of grazing lands and $1 per acre in the case of agricultural lands"; and made minor changes in style.

1989 Amendment: In first sentence of (1), after "state", inserted "or who has voluntarily terminated a lease under 77-6-116" and in two places inserted "or within 30 days following voluntary termination"; inserted (4) relating to voluntary termination of leases under 77-6-116; and made minor change in phraseology. Amendment effective April 15, 1989.

1987 Amendment: In next-to-last sentence of (1) inserted exception relating to 77-6-212.

1985 Amendments: Chapter 488 in (1) in first sentence, after "city lot", inserted "or land valuable for commercial development", and near middle after "renewed for", substituted "a period not to exceed the maximum lease period provided in 77-6-109" for "a 5- or 10-year period".

Chapter 687 inserted (3) allowing cancellation of renewal leases in certain cases.

1983 Amendment: Near beginning of (1), after "who has paid all rentals due from him to the state" deleted "and who has not violated the terms of his lease".

Administrative Rules

ARM 36.25.116 Issuance of lease or license on land currently under lease or license.

ARM 36.25.117 Renewal of lease or license and preference right.

Case Notes

State Land Cabin Site Renewal Policy Not Violative of Obligation to Obtain Full Market Value: Plaintiff contended that 77-1-208 is facially invalid because the use of a cabin site renewal policy that did not employ competitive bidding was calculated to keep cabin site rental rates below full market value. However, nothing in the plain language of 77-1-208 abrogates the mandate that full market value be obtained for school trust lands. Plaintiff failed to show that the statute violates the duty of undivided loyalty or that the preference accorded lessees on cabin site leases on state lands resulted in renewal rates below market value. The statute legislatively establishes a method by which full market value is obtained, which is allowed pursuant to Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979), but the language of 77-1-208 nevertheless requires that full market value be obtained, by whatever method is used, and therefore on its face does not violate the trust. Thus, the District Court correctly held that the renewal preference in 77-1-208 does not violate the school trust requirements of the Montana Constitution or The Enabling Act of 1889. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

State Land Cabin Site Rental Policy Violative of School Trust Obligation to Obtain Fair Market Value: The policy employed by the Department of Natural Resources and Conservation in renting cabin sites on state lands, in a manner that resulted in below-market rentals, violated the state's school trust obligations under the Montana Constitution and The Enabling Act of 1889, even though 77-1-208 is facially valid because it requires that full market value be obtained. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979).

Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

No Obligation of State to Third Parties in Lease of State Lands: Plaintiffs sued the state for negligence based on the Department of State Lands' management of a parcel of leased land, claiming that this section imposed upon the state a duty to the public to investigate potential lessees. The Supreme Court held that the statutory duty is to secure the maximum return to the state with the least injury to the land, but there is no statutorily created obligation to third parties. Sebena v. St., 267 M 359, 883 P2d 1263, 51 St. Rep. 1101 (1994). See also Jeppeson v. Dept. of State Lands, 205 M 282, 667 P2d 428 (1983).

Evidentiary Hearing Allowed on Renewal Lease but Not on New Lease: The only provision for a hearing after a bid is rejected is in the case of the renewal of leases. In that case, the prior leaseholder may exercise the preferential right and request a hearing if the high bid is felt to be excessive. However, when a prior lease was canceled, the former lessee lost the preferential right and the option to request an evidentiary hearing. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

No Proscription That Previously Canceled Lessee May Not Bid or May Not Lease State Lands — Written Findings Required When High Bid Rejected: Winchell's state land lease was canceled for gross mismanagement of the leased property. The lease was subsequently reclassified and advertised for bids, and Winchell submitted the high bid. Rather than make written findings as to why the bid was not in the best interests of the state, the Department of State Lands (now Department of Natural Resources and Conservation) relied on ARM 26.3.142(6) to dismiss

Winchell's bid out-of-hand. This administrative rule, which purports to give the Department the ability to refuse to even consider a bid, is in derogation of law because there is no statutory proscription disallowing the bid or ability to lease of a person whose lease has been previously canceled. Absent written findings that the high bid was too high for community standards, would cause damage to the land, or would impair long-term productivity, the automatic refusal to consider the bid, based on an overbroad and unlawful administrative regulation, was in excess of the Department's jurisdiction and an abuse of its discretion. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

Sublessor Entitled to Preference Right: When a sublessor retained significant responsibility and control over leased land throughout the sublease period, the Supreme Court ruled that he was entitled to his preference right to meet any competitive bid and renew his lease. Steffen v. Dept. of State Lands, 223 M 176, 724 P2d 713, 43 St. Rep. 1636 (1986).

No Preference — Sublease Form Not Filed: Foster held a state lease of grazing land. He applied to renew his lease at $7.50 per AUM (animal unit month), and Skillman applied to lease the land at $18.75 per AUM. Foster, as the current lessee, was entitled to meet the other bid, which he did. It was discovered that Foster had subleased the land without filing a sublease form with the Board of Land Commissioners. The District Court held that Foster was not entitled to a preference and directed the Board of Land Commissioners to cancel the Foster lease and lease the land without a preference right, citing Jerke v. St. Dept. of Lands, 182 M 294, 597 P2d 49 (1979). On appeal, the judgment of the District Court was affirmed. Skillman v. Dept. of State Lands, 188 M 383, 613 P2d 1389, 37 St. Rep. 1320 (1980).

Grazing District — Preference Right Denied to Subleasor: A preference right allows a lessee contracting with the Department of State Lands (now Department of Natural Resources and Conservation) to renew his lease by meeting the high bid of other applicants upon expiration of his lease. However, this preference right was held unconstitutionally applied when exercised by a grazing district which did not use the land itself but instead subleased to whomever it wished. The only way full market value can be obtained in such a situation is by pure competitive bidding. Jerke v. Dept. of St. Lands, 182 M 294, 597 P2d 49 (1979).

Discretion as to Risk: Board of Land Commissioners had discretion to award a 10-year lease to bidder at 33 ⅓% crop share, rather than to another who bid 50%, especially where lessee had farmed the land before and the Board was taking less risk. State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966).

Attorney General's Opinions

Grazing Leases — Duty of Board to Seek Fair Market Value in Establishing Grazing Fees: The Board of Land Commissioners has an affirmative duty under section 10 of The Enabling Act of 1889 and under Art. X, sec. 11, Mont. Const., to obtain the full market value for any grazing lease it enters into. The Legislature may establish a formula for calculating the lease price of state lands where application of the formula results in obtaining fair market value. The formula established by statute based upon the price of beef therefore establishes a minimum lease price, and any interpretation of that statute by the Department of State Lands (now Department of Natural Resources and Conservation) so as to prevent the procurance of fair market value for a lease could result in the statutory formula being held unconstitutional. 40 A.G. Op. 24 (1983). However, see Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, __M__, 989 P2d 800, 56 St. Rep. 1065 (1999), wherein the Supreme Court held that statutory provisions leaving the Department no discretion but to charge less than full market value for certain uses of state lands were unconstitutional.

Right of Lease Violator and Lease Assignee to Preference Right Renewal: Because the language of this section allowing a lessee who has paid his rent and not violated the terms of the lease to renew that lease applies both to renewal by simple renewal and to renewal by preference right, a lessee who has violated the terms of the lease is ineligible for preference right renewal. However, the board may determine that the violation is not serious enough to warrant cancellation and thereby preserve the preference right. As a lawful assignment of a lease under 77-6-208 also transfers the preference right of renewal, an assignee may renew by exercising the preference right as long as the assignee himself has not violated the terms of the lease. 39 A.G. Op. 1 (1981).

Right of Sublessee of State Lands to Exercise Renewal Preference Right — Application to Current Leases: A sublessee of state lands who subleases less than all of the land of the lessee for all or a portion of the term of the original lease is entitled to exercise the renewal preference granted to a lessee only if it can be shown that the renewal by the sublessee is not violative of the purposes of this section, as announced in Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979), that purpose being to further the state policy of sustained yield. Whether the sublease

furthers the state policy can only be determined on a case-by-case review of the facts and terms of the lease. This test to determine compliance with the purposes of 77-6-205 must be applied by the Department of State Lands (now Department of Natural Resources and Conservation) to all subleases at the time of expiration of the primary lease. 39 A.G. Op. 1 (1981).

77-6-206. Withdrawal of lands from leasing.

Administrative Rules

ARM 36.25.109 Reclassification.

Case Notes

Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

77-6-207. Form of lease — bond optional.

Administrative Rules

ARM 36.25.107 Lease and license forms, bid forms, and bonding.

77-6-208. Assignment of leases — subleasing — loss of preference right.

Compiler's Comments

1993 Amendment: Chapter 96 near beginning of (3)(a), after "lessee", inserted "other than a holder of a commercial lease"; inserted (3)(c) allowing a commercial leaseholder to sublease state land for a profit; and made minor changes in style.

1987 Amendment: In (3), in first sentence after "by the state", deleted "or subleases state lands without filing a copy of the sublease with the department and without receiving its approval" and inserted second sentence concerning cancellation; inserted (4) relating to loss of preference right because of subleasing; and inserted (5) to eliminate avoidance of loss of preference by assignment.

Administrative Rules

ARM 36.2.1003 Schedule of administrative fees.
ARM 36.25.110 Minimum rental rates.
ARM 36.25.117 Renewal of lease or license and preference right.
ARM 36.25.118 Assignments.
ARM 36.25.119 Subleasing.
ARM 36.25.120 Pasturing agreements.
ARM 36.25.123 Estates.

Case Notes

Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

Cancellation of Lease for Nonpayment of Rent — Assignment Ineffective: Pursuant to the clear terms of a state land lease, on April 1, 1992, the state automatically terminated a land lease for nonpayment of rent. A purported assignment of the lease in November 1992 was ineffective

because the lease had already been canceled. Sebena v. St., 267 M 359, 883 P2d 1263, 51 St. Rep. 1101 (1994).

Measure of Damages in Eminent Domain Proceeding for Loss of Use of Land Leased From State: In an eminent domain proceeding, the landowner was entitled to compensation for loss of use of land leased from the state only in the amount of her lease payments to the state. This section provides that any sublease of state leased lands may not be upon terms less advantageous to the sublessee than the terms given by the state. Since the landowner herself was not using the land, the only possible compensable loss she suffered was the amount for which she could have subleased the land. St. v. Donnes, 219 M 182, 711 P2d 805, 42 St. Rep. 1938 (1985).

Failure to File Sublease — Knowledge Controls: Aye, the holder of a lease of state lands, executed a sublease to Fix, along with an unenforceable oral promise to assign the lease. Aye then assigned the same lease to Bruski. Section 81-419, R.C.M. 1947 (now this section), at the time of the sublease, provided that a sublease of state land was illegal unless a copy of the sublease had been filed in the state land office and approved by the Commissioner. This statute did not override 70-21-102, which provides that an unrecorded instrument is valid as between the parties and those who have notice thereof. The purpose of this section is to facilitate the management of state lands, but it does not abrogate general principles of property law. The Bruskis were aware of the sublease, as Fix was farming the leased land at the time the lease was assigned to them. Because of this knowledge, the Bruskis had notice and the sublease was valid. Aye v. Fix, 192 M 141, 626 P2d 1259, 38 St. Rep. 578A (1981), remanded on other grounds.

Sharecropping: A sublease providing for a share of crops to a lessee of state lands is not a sublease to another on terms less advantageous to the sublessee than terms given by the state to the lessee. Schneider v. Nelson, 111 M 377, 110 P2d 972 (1940).

Attorney General's Opinions

Right of Lease Violator and Lease Assignee to Preference Right Renewal: Because the language of 77-6-205 allowing a lessee who has paid his rent and not violated the terms of the lease to renew that lease applies both to renewal by simple renewal and to renewal by preference right, a lessee who has violated the terms of the lease is ineligible for preference right renewal. However, the board may determine that the violation is not serious enough to warrant cancellation and thereby preserve the preference right. As a lawful assignment of a lease under this section also transfers the preference right of renewal, an assignee may renew by exercising the preference right as long as the assignee himself has not violated the terms of the lease. 39 A.G. Op. 1 (1981).

77-6-209. Change from grazing lease to agricultural lease.

Administrative Rules

ARM 36.25.109 Reclassification.

77-6-210. Cancellation of leases.

Compiler's Comments

1989 Amendment: Inserted (1)(d) relating to convictions for certain drug offenses.

Preamble: The preamble to Ch. 319, L. 1989, provided: "WHEREAS, the drug problem in Montana is growing and every effort should be made to curb drug traffic in the state; and

WHEREAS, rural areas in Montana are prime drug cultivation and processing areas for marijuana, hashish, and related products; and

WHEREAS, both privately deeded land and land leased from the state that are under the control of one manager, operator, or family should be considered a unit."

Applicability: Section 5, Ch. 319, L. 1989, provided: "[This act] applies to state leases entered into on or after [the effective date of this act]." Effective October 1, 1989.

1987 Amendment: Inserted (1)(b) allowing lease cancellation in certain cases of subleasing; and in (2) substituted "Cancellation of a lease under this section" for "Such cancellation".

Administrative Rules

ARM 36.25.117 Renewal of lease or license and preference right.
ARM 36.25.119 Subleasing.
ARM 36.25.121 Cancellation of lease or license.
ARM 36.25.132 Weeds, pests, and fire protection.
ARM 36.25.146 General recreational use of state lands — license requirement.

Case Notes

Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing

sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

Cancellation of Lease for Nonpayment of Rent — Assignment Ineffective: Pursuant to the clear terms of a state land lease, on April 1, 1992, the state automatically terminated a land lease for nonpayment of rent. A purported assignment of the lease in November 1992 was ineffective because the lease had already been canceled. Sebena v. St., 267 M 359, 883 P2d 1263, 51 St. Rep. 1101 (1994).

Lease Canceled Due to Overgrazing: The plaintiffs had a land lease with the Department of State Lands (now Department of Natural Resources and Conservation). The Supreme Court held that there was sufficient evidence of overgrazing that mandated the cancellation of the lease and that the cancellation was necessary to do justice to all parties concerned and to protect the interests of the state. Winchell v. St., 241 M 94, 785 P2d 212, 47 St. Rep. 110 (1990).

77-6-211. Procedure to cancel lease — appeal.

Administrative Rules

ARM 36.25.121 Cancellation of lease or license.

Case Notes

Cancellation of State Agricultural Lease for Nonpayment — Hearing Not Required — District Court Jurisdiction to Review Cancellation: There is no provision in 77-6-506 requiring the Department to conduct a hearing when canceling a state land lease for nonpayment, nor is a hearing required pursuant to the due process clause of Art. II, sec. 17, Mont. Const. The District Court thus has no jurisdiction to review a lease cancellation for nonpayment under contested case procedures because lease cancellation for nonpayment does not constitute a contested case. However, the District Court does retain inherent jurisdiction to review administrative decisions and erred in deciding that it did not have jurisdiction. The standard of review is whether the agency acted arbitrarily, capriciously, or unlawfully. Johansen v. St., 1998 MT 51, 288 M 39, 955 P2d 653, 55 St. Rep. 211 (1998), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

Attorney General's Opinions

Right of Lease Violator and Lease Assignee to Preference Right Renewal: Because the language of 77-6-205 allowing a lessee who has paid his rent and not violated the terms of the lease to renew that lease applies both to renewal by simple renewal and to renewal by preference right, a lessee who has violated the terms of the lease is ineligible for preference right renewal. However, the board may determine that the violation is not serious enough to warrant cancellation and thereby preserve the preference right. As a lawful assignment of a lease under 77-6-208 also transfers the preference right of renewal, an assignee may renew by exercising the preference right as long as the assignee himself has not violated the terms of the lease. 39 A.G. Op. 1 (1981).

77-6-212. Loss of preference right — cancellation of lease — subleasing — pasturing agreements.

Compiler's Comments

1989 Amendment: Inserted (6) relating to convictions for certain drug offenses.

Preamble: The preamble to Ch. 319, L. 1989, provided: "WHEREAS, the drug problem in Montana is growing and every effort should be made to curb drug traffic in the state; and

WHEREAS, rural areas in Montana are prime drug cultivation and processing areas for marijuana, hashish, and related products; and

WHEREAS, both privately deeded land and land leased from the state that are under the control of one manager, operator, or family should be considered a unit."

Applicability: Section 5, Ch. 319, L. 1989, provided: "[This act] applies to state leases entered into on or after [the effective date of this act]." Effective October 1, 1989.

Preamble: The preamble to Ch. 383, L. 1987, which enacted this section and amended 77-6-205, 77-6-208, and 77-6-210, provided: "WHEREAS, section 77-6-205, MCA, provides an existing lessee of state land a preference right to renew the lease; and

WHEREAS, the Montana Supreme Court in Jerke v. State Department of Lands, 182 Mont. 294, 597 P.2d 49 (1979), held that it is an unconstitutional application of the preference right statute to allow a lessee to exercise a preference right if the lessee subleases the land and does not use it himself; and

WHEREAS, in Skillman v. Department of State Lands, 188 Mont. 383, 613 P.2d 1389 (1980), the Supreme Court applied the rule in Jerke to deny a lessee a preference right to lease state grazing land when the lessee did not himself use such land; and

WHEREAS, state lands are to be held in trust for the people of Montana; and

WHEREAS, allowing the preference right to be exercised by a lessee who subleases the land would be to install the lessee as the trustee of state land; and

WHEREAS, there are situations where a lessee permits another person to use all or a portion of a lease that should not result in the loss of the preference right.

THEREFORE, the Legislature of the State of Montana finds it appropriate to enact legislation to limit the preference right if a lessee subleases state land in certain circumstances."

Saving Clause: Chapter 383, L. 1987, which enacted this section and amended 77-6-205, 77-6-208, and 77-6-210, provided that: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act."

Applicability: Chapter 383, L. 1987, which enacted this section and amended 77-6-205, 77-6-208, and 77-6-210, provided that: "(1) Except as provided in subsection (2), this act does not apply to a lessee who has subleased state land during the term of an existing state lease.

(2) This act applies to a lessee of state agricultural or grazing land if, after the effective date of this act, the lessee enters into an agreement to sublease the land to another person." Effective April 7, 1987.

Administrative Rules

ARM 36.25.117 Renewal of lease or license and preference right.

ARM 36.25.119 Subleasing.

ARM 36.25.120 Pasturing agreements.

77-6-221. Unit of land defined.

Compiler's Comments

Preamble: The preamble to Ch. 319, L. 1989, provided: "WHEREAS, the drug problem in Montana is growing and every effort should be made to curb drug traffic in the state; and

WHEREAS, rural areas in Montana are prime drug cultivation and processing areas for marijuana, hashish, and related products; and

WHEREAS, both privately deeded land and land leased from the state that are under the control of one manager, operator, or family should be considered a unit."

Applicability: Section 5, Ch. 319, L. 1989, provided: "[This act] applies to state leases entered into on or after [the effective date of this act]." Effective October 1, 1989.

Part 3
Improvements

Part Administrative Rules

ARM 36.25.125 Improvements.

Part Case Notes

Valuation of Improvements — Standard of Review — All Factors Including Decision of Arbitrators to Be Reviewed De Novo by Department — Arbitration Act Inapplicable: After the Department of Natural Resources and Conservation (DNRC) awarded a lease to Hagemeister, a three-person panel of arbitrators was appointed by the DNRC to appraise the value of improvements made by the previous lessee, Winchell. Two arbitrators agreed to a value in excess of $20,000, while a third valued the improvements at $1,407.35. The DNRC then conducted its own appraisal, set aside the higher values, and established a value of $1,564 for the improvements. The Winchells appealed the valuation to the District Court pursuant to 77-6-306(4), and the District Court granted summary judgment for the DNRC. The Supreme Court affirmed, holding that: (1) the correct standard for a de novo review of the District Court's judgment is the standard applicable to the review of a case that is not a "contested" case under the Montana Administrative

Procedure Act, the standard applicable in this case being whether the DNRC exceeded its statutory authority under 77-6-306(3) or whether its decision is wholly unsupported by the evidence; (2) even though the District Court applied the wrong standard of review, the standard applicable to a contested case, the District Court reached the correct result; (3) the language in 77-6-303 and 77-6-306(3) and (4), which are to be read together, indicate that the Legislature intended that the DNRC do more than review the paper records of the arbitrators in order to "fix" the value of the improvements, and the DNRC was therefore correct in using an independent valuation procedure conducted by its own appraiser in addition to considering the work of the three arbitrators; and (4) the Uniform Arbitration Act does not apply to this case because that Act establishes a District Court's standard of review in an appellate procedure. Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999).

77-6-302. Compensation for improvements — actual costs.

Compiler's Comments

2001 Amendment: Chapter 270 in (1) at end of first sentence after "the improvements" deleted "at the time the new lessee takes possession"; in (2) inserted second and third sentences regarding initiation of valuation process; inserted (3) regarding removable of movable improvements; and made minor changes in style. Amendment effective April 20, 2001.

1993 Amendment: Chapter 586 in (1) inserted second sentence concerning reasonable value as full market value of improvements; in (2), after "lessee", inserted "is unable to produce records establishing the reasonable value or if the former lessee"; and made minor changes in style. Amendment effective July 1, 1993.

Case Notes

Statute Allowing State Lands to Remain Idle While Lessees Determine Value of Improvements — Unconstitutionality: Under 77-6-305 (now repealed), the value of improvements placed on the leasehold by a former lessee is required to be paid by the new lessee before the new lease may be issued if the former lessee chose not to remove the improvements. The District Court found the provision constitutional even though it might result in less revenue because of delay caused by lease delays, concluding that the Department of Natural Resources and Conservation must have latitude to administer school trust lands. The Supreme Court disagreed, holding that portion of 77-6-305 (now repealed) unconstitutional on its face. The state's discretion to administer the trust is broad, but not unlimited, and must conform to the requirements of the trust. The statute allows trust lands to idle indefinitely while former and new lessees determine the value of the improvements, which is inconsistent with the trust mandate that full market value be received for the lands. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

77-6-303. Determination of compensation.

Case Notes

Professional Appraiser Not Required — Valuation Not Based on Replacement Cost: Inquiry under this section does not require the expertise of a professional appraiser. The credibility and weight to be given to opinion testimony are matters for the District Court's determination in a nonjury proceeding. An opinion on land valuation may be based upon hearsay if it is found to be reliable. This section refers to cost and present condition as starting points for valuation. The District Court did not err in refusing to use replacement cost in its valuation. Evertz v. St., 249 M 193, 815 P2d 135, 48 St. Rep. 637 (1991).

77-6-306. Arbitrators to fix value of improvements.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), in three places, substituted "director" for "commissioner"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 586 in (1), near middle of first sentence after "value", substituted "of the improvements pursuant to 77-6-302" for "thereof" and at end of last sentence, after "fixed", substituted "pursuant to 77-6-302" for "as this part provides"; in (3), in second sentence after "examine the", inserted "records pertaining to the costs of the"; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: In (1), inserted provision for appointment of an arbitrator by the commissioner of state lands when any party refuses to do so; in (2), inserted "for their services"; in (3), inserted "except as provided in subsection (4)"; and inserted (4) allowing judicial review of disputed departmental valuations.

Case Notes

Judicial Review Not Trial De Novo — No Denial of Due Process: In a judicial review, the District Court properly considered all documentation constituting the record below and was not restricted solely to depositions of the former lessee and a Department employee. Judicial review under this section is not a trial de novo. The former lessee was not denied due process when he had the opportunity to present evidence on his behalf, both at the Department review of arbitration proceedings and at the District Court level. Evertz v. St., 249 M 193, 815 P2d 135, 48 St. Rep. 637 (1991).

Part 4
Pledges and Mortgages of Leasehold Interests

77-6-401. Pledge or mortgage of leasehold interest in state lands.

Administrative Rules

ARM 36.25.122 Mortgages and pledges.
ARM 36.25.123 Estates.

77-6-402. Filing with department required.

Administrative Rules

ARM 36.25.122 Mortgages and pledges.
ARM 36.25.123 Estates.

77-6-403. Transfer of lease.

Compiler's Comments

1991 Amendment: In (1), at beginning, inserted exception clause, after "proof" substituted "that a person has acquired through foreclosure or conveyance the pledgor's or mortgagor's leasehold interest" for "of the acquisition of such lease or leasehold interest by any person under or pursuant to such pledge agreement or mortgage", and inserted last two sentences providing requirements for decree of foreclosure to authorize transfer of a lease; inserted (2) allowing Board to determine if assignee is qualified; and made minor changes in style.

Saving Clause: Section 2, Ch. 679, L. 1991, was a saving clause.

Administrative Rules

ARM 36.25.122 Mortgages and pledges.

Collateral References

Effectiveness of pledge as transfer of lease. 53 ALR 2d 1410.

77-6-404. Proof of termination of pledge or mortgage to be filed.

Administrative Rules

ARM 36.25.122 Mortgages and pledges.

Part 5
Rental Provisions

77-6-501. Agricultural leases.

Compiler's Comments

1999 Amendment: Chapter 5 inserted (4) requiring a minimum annual guarantee on a competitive bid greater than a one-third crop share; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 3, Ch. 5, L. 1999, was a saving clause.

Applicability: Section 5(1), Ch. 5, L. 1999, provided: "[Section 1] [amending 77-6-501] applies to all agricultural leases made or renewed on or after [the effective date of this act]." Effective July 1, 1999.

1993 Amendment: Chapter 168 near beginning of (1) inserted exception clause; at beginning of (2) inserted exception clause; inserted (3) authorizing cash lease renewal in cases in which lessee

has made substantial irrigation improvements at lessee's own expense; and made minor changes in style.

1985 Amendment: In (1) at end of second sentence, inserted "or for high production cost methods when these methods would result in more income to the state"; and in (2) at beginning of sentence, substituted "If it is in the best interests of the state" for "In unusual cases", near middle of sentence, before "cases", deleted "unusual", near end of sentence, after "district", inserted "under similar circumstances", and before "conditions of the case" deleted "unusual".

Statement of Intent: The statement of intent attached to HB 70 (Ch. 54, L. 1985) provided: "The purpose of the extension of rulemaking authority contained in section 2 is to allow the department of state lands [now department of natural resources and conservation] and board of land commissioners to amend their surface leasing rules, specifically ARM 26.3.112 [repealed 1987], to reflect the statutory amendments made by this bill."

Administrative Rules

ARM 36.25.110 Minimum rental rates.
ARM 36.25.111 Competitive bidding.
ARM 36.25.114 Disposal of crops.

77-6-502. Grazing leases.

Compiler's Comments

1993 Amendment: Chapter 586 in (1), after "lands must", inserted "[, taking into account recommendations of the state land board advisory council [now terminated],] attain full market value"; in (2) substituted "board" for "legislature"; and made minor changes in style. Amendment effective July 1, 1993.

Applicability: Section 16(3), Ch. 586, L. 1993, provided: "[Sections 8 and 12] [77-6-502 and 77-6-507] apply to leases issued or renewed after July 1, 1993."

Administrative Rules

ARM 36.25.110 Minimum rental rates.

Case Notes

Cancellation of State Agricultural Lease for Nonpayment — Hearing Not Required — District Court Jurisdiction to Review Cancellation: There is no provision in 77-6-506 requiring the Department to conduct a hearing when canceling a state land lease for nonpayment, nor is a hearing required pursuant to the due process clause of Art. II, sec. 17, Mont. Const. The District Court thus has no jurisdiction to review a lease cancellation for nonpayment under contested case procedures because lease cancellation for nonpayment does not constitute a contested case. However, the District Court does retain inherent jurisdiction to review administrative decisions and erred in deciding that it did not have jurisdiction. The standard of review is whether the agency acted arbitrarily, capriciously, or unlawfully. Johansen v. St., 1998 MT 51, 288 M 39, 955 P2d 653, 55 St. Rep. 211 (1998), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

Law Review Articles

Livestock Grazing on the Public Lands: Lessons From the Failure of Official Conservation, Coggins, 20 Gonz. L. Rev. 749 (1984).

77-6-503. Leases of city lots, town lots, and commercial property.

Compiler's Comments

1985 Amendment: Near beginning substituted "town lots, city lots, and land valuable for commercial development" for "town and city lots"; near end after "city property", inserted "or land valuable for commercial development"; and at end increased lease period limitation from 25 to 40 years.

77-6-504. Lease rentals for part year.

Administrative Rules

ARM 36.25.110 Minimum rental rates.

77-6-506. Date when rental due — penalty — cancellation for nonpayment.

Compiler's Comments

1999 Amendment: Chapter 5 in (1) near beginning of third sentence inserted "after July 1, 1999"; in (5) deleted former second sentence that read: "The land is then open for lease to

applicants"; inserted (6) allowing the department to reinstate a lease under certain conditions; inserted (7) regarding availability of a canceled lease that is not reinstated; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 3, Ch. 5, L. 1999, was a saving clause.

Applicability: Section 5(2), Ch. 5, L. 1999, provided: "[Section 2] [amending 77-6-506] applies to all rentals due on or after [the effective date of this act]." Effective July 1, 1999.

1991 Amendment: Inserted (3) extending the $25 penalty for failure to make timely rental payment to all state land leases and licenses not currently subject to the penalty.

Applicability: Section 2, Ch. 140, L. 1991, provided: "[This act] applies to state land lease and license payments due after December 31, 1991."

1989 Amendment: In (1), at end, substituted "before March 1. If the rental is not paid before March 1, a $25 penalty shall be imposed on the lessee. If the full rental and the $25 penalty are not paid by April 1, the entire lease is canceled" for "before March 1, and if not paid by April 1 the entire lease is canceled"; in (2) inserted second sentence relating to rental payment before November 15, in third sentence substituted "full rental and the $25 penalty are" for "rental is", and inserted last sentence relating to rental payments made after November 15; in (3) inserted "and the $25 penalty are"; inserted (5) providing for deposit of penalties; and made minor change in grammar.

1985 Amendment: In (1), at beginning inserted "For grazing leases, the grazing portion of leases containing both agricultural and grazing land, and agricultural leases not based on a crop share", near end before "lease", inserted "entire", and at end deleted "The department shall notify the lessee by letter addressed to the post-office address given in the lease of the cancellation, and the land is then open for lease to other applicants"; inserted (2) providing for cancellation of agricultural leases and the agricultural portion of leases containing both grazing and agricultural land due to nonpayment of rental; inserted (3) requiring notice of impending cancellation to lessee; and inserted (4) requiring notice to lessee of actual cancellation, whereupon the land is open for lease to applicants.

Applicability: Section 2, Ch. 473, L. 1985, provided: "This act applies to all leases of state agricultural lands in effect on the effective date of this act and to all future leases of state agricultural lands."

Severability Clause: Section 3, Ch. 473, L. 1985, was a severability clause.

Administrative Rules

ARM 36.25.112 Payments — when due.

Case Notes

Payment of State Lease Authorized on Day After Holiday: Johansen's rental payment on a state agricultural lease was due on or before December 31. Johansen placed the payment in his rural mailbox on December 29, but for various reasons, the carrier left the payment in the mailbox on the 29th and 30th. There was no mail service on Sunday the 31st, and the post office was closed January 1 for the holiday. On January 2, Johansen took the letter to the post office for mailing, as evidenced by affidavit of the postmaster, but it did not receive a postmark until January 3. The Department canceled the lease for nonpayment. Although the letter did not receive a postmark until January 3, the Department had uncontroverted evidence that Johansen had timely mailed the rental payment. The Department's decision to cancel the lease was arbitrary and capricious, and the District Court's holding that the payment was timely made was affirmed. Johansen v. St., 1999 MT 187, 295 M 339, 983 P2d 962, 56 St. Rep. 731 (1999).

Cancellation of State Agricultural Lease for Nonpayment — Hearing Not Required — District Court Jurisdiction to Review Cancellation: There is no provision in this section requiring the Department to conduct a hearing when canceling a state land lease for nonpayment, nor is a hearing required pursuant to the due process clause of Art. II, sec. 17, Mont. Const. The District Court thus has no jurisdiction to review a lease cancellation for nonpayment under contested case procedures because lease cancellation for nonpayment does not constitute a contested case. However, the District Court does retain inherent jurisdiction to review administrative decisions and erred in deciding that it did not have jurisdiction. The standard of review is whether the agency acted arbitrarily, capriciously, or unlawfully. Johansen v. St., 1998 MT 51, 288 M 39, 955 P2d 653, 55 St. Rep. 211 (1998), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

Lease Rental Affected by Land Reclassification — Writ of Prohibition Proper: Lessees developed a water spreading project on a portion of their state grazing lease, and the Department of State Lands (now Department of Natural Resources and Conservation) reclassified 32 acres of

the lease as agricultural. Lessees later concluded that the project was inadequate for producing a profitable crop at the higher agricultural rental rates. They negotiated to pay back a loan for the project and reverted the land to grazing. After the loan was repaid, there were no other agreements supplementing the original lease. However, the Department subsequently determined that the 32 acres should retain the agricultural classification, sought rental at the agricultural rate, and canceled the lease upon nonpayment. The District Court properly filed a writ of prohibition restraining the Department from canceling the lease, re-leasing the property to other parties, and taking action against lessees for trespass after finding the Department was in excess of its jurisdiction for canceling the lease for nonpayment of agricultural rental when the property was leased for grazing only. Winchell v. Dept. of State Lands, 235 M 10, 764 P2d 1267, 45 St. Rep. 2121 (1988).

Improper to Enjoin Department From Complying With This Section: The Department canceled a lease for nonpayment pursuant to this section. Because of the restrictions on issuance of injunctions set forth in 27-19-103, a court may not issue an injunction to prevent the Department from re-leasing the land. Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983).

77-6-507. Formula for fixing annual rental.

Compiler's Comments

1993 Amendment: Chapter 586 in (2), after "establish the", deleted "minimum" and after "multiplying" substituted "a factor established by the board pursuant to 77-6-502" for "six"; and inserted (5) concerning elements to be considered in establishing rental rate. Amendment effective July 1, 1993.

Applicability: Section 16(3), Ch. 586, L. 1993, provided: "[Sections 8 and 12] [77-6-502 and 77-6-507] apply to leases issued or renewed after July 1, 1993."

1991 Amendment: Near beginning of (2), before "per annum", inserted "minimum" and after "state" deleted "upon the animal-unit-month basis as provided in this section"; deleted introduction to former (3) regarding fixing of a formula for annual rental per section; deleted former (3)(b) through (3)(d) that established minimum annual rental rates for grazing lands; and made minor changes in style.

Attorney General's Opinions

Grazing Leases — Duty of Board to Seek Fair Market Value in Establishing Grazing Fees: The Board of Land Commissioners has an affirmative duty under section 10 of The Enabling Act of 1889 and under Art. X, sec. 11, Mont. Const., to obtain the full market value for any grazing lease it enters into. The Legislature may establish a formula for calculating the lease price of state lands where application of the formula results in obtaining fair market value. The formula established by statute based upon the price of beef therefore establishes a minimum lease price, and any interpretation of that statute by the Department of State Lands (now Department of Natural Resources and Conservation) so as to prevent the procurance of fair market value for a lease could result in the statutory formula being held unconstitutional. 40 A.G. Op. 24 (1983). However, see Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, __M__, 989 P2d 800, 56 St. Rep. 1065 (1999), wherein the Supreme Court held that statutory provisions leaving the Department no discretion but to charge less than full market value for certain uses of state lands were unconstitutional.

Collateral References

Public Lands *key* 158 ½.

73B C.J.S. Public Lands §197.

77-6-508. Effect of competitive bidding.

Compiler's Comments

1993 Amendment: Chapter 586 after "established by the" substituted "board" for "above formula"; and made minor changes in style. Amendment effective July 1, 1993.

Collateral References

Public Lands *key* 158 ½.

73B C.J.S. Public Lands §197.

TITLES 78 AND 79

RESERVED

TITLE 80
AGRICULTURE

CHAPTER 1
DEPARTMENT OF AGRICULTURE

Chapter Law Review Articles

Agricultural Liens Under Revised Article 9, Burnham, 63 Mont. L. Rev. 91 (2002).

The Triumph of Myth Over Principle: The Saga of the Montana Open-Range, Andes, 56 Mont. L. Rev. 485 (1995).

Sustainable Production Agriculture in the Face of Foreign Commodity Dumping: Achieving Effective Antidumping and Countervailing Duty Determinations, Thuesen, 77 N.O.L. Rev. 453 (2001).

What About Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production, Mosel, 27 U. Dayton L. Rev. 133 (2001).

After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm", Lauck, 5 Drake J. Agric. L. 3 (2000).

Are Financial Instruments Issued by Agricultural Cooperatives Securitites?: A Framework of Analysis, Taylor & Reinken, 5 Drake J. Agric. L. 171 (2000).

Recent Developments in Agribusiness Taxation, Maydew, 75 Taxes 155 (1997).

Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future, Zaring, 20 Harv. Envtl. L. Rev. 515 (1996).

Biotechnology, the Environment, and International Agricultural Trade, Barton, 9 Geo. Int'l Envtl. L. Rev. 95 (1996).

Federal Legislative Solutions to Agricultural Nonpoint Source Pollution, Zaring, 26 Envtl. L. Rep. 10128 (1996).

Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws, Semple, 15 Va. Envtl. L.J. 403 (1996).

Farm Chemicals, Soil Erosion, and Sustainable Agriculture, Carpenter, 13 Stan. Envtl. L.J. 190 (1994).

Issues Shaping the Future of Agricultural Law, Hamilton, 19 Wm. Mitchell L. Rev. 271 (1993).

Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill, Malone, 12 Stan. Envtl. L.J. 3 (1993).

The Changing Focus of Government Regulation of Agriculture in the United States, Looney, 44 Mercer L. Rev. 763 (1993).

A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes (Cultural Preservation Symposium), Stayton 59 U. Mo. K.C. L. Rev. 679 (1991).

Adjusting Farm Tenancy Practices to Support Sustainable Agriculture, Hamilton, 12 J. Agric. Tax'n & L. 226 (1990).

Sustainable Agriculture: The Role of the Attorney, Hamilton, 20 Envtl. L. Rep. 10,021 (1990).

A Proper Recognition of the Indispensable Role of the American Farmer—Recommendations of the National Commission on Agricultural Trade and Export Policy, Alagia, 34 S.D.L. Rev. 271 (1989).

Conventional Agriculture Is Sustainable (The Promise of Low Input Sustainable Agriculture), Vroom, 6 Envtl. F. 25(2) (1989).

Tax Considerations of Crop and Livestock Producers Due to Drought, Schmidt & Pearson, 67 Taxes 170 (1989).

A Survey of Governmental Response to the Farmland Crisis: States' Application of Agricultural Zoning, Popp, 11 U. Ark. Little Rock L.J. 515 (1988).

The Dangers of Factory Farming, Miller, Bus. & Soc'y Rev. 41 (1988).

Agriculture as a Resource; Statewide Land Use Programs for the Preservation of Farmland, Duncan, 14 Ecology L.Q. 401 (1987).

Provisions of the Tax Reform Act of 1986 Affecting Farmers: A Bumper Crop of Complex New Rules, Allington, 9 J. Agric. Tax'n & L. 3 (1987).

The Current Status of Agriculture—How Are the Farmer and Rancher Really Doing?, Matthews, 38 Ala. L. Rev. 571 (1987).

The United States Farm Legislation and Its Implications for World Trade, Barnett, 1 Rev. Int'l Bus. L. 177 (1987).

A Farmer's View of the Legal Profession and the Family Farm of Tomorrow, Richards, 34 U. Kan. L. Rev. 651 (1986).

An Examination of Several Aspects of Federal Farm Legislation, Engle, 31 S.D.L. Rev. 341 (1986).

Constraints to Expanded Food Production: A North American Perspective, Pierce & Furuseth, 26 Nat. Resources J. 15 (1986).

Deregulating the Agricultural Industry: A Wise Policy Choice?, Roberts, 12 J. Contemp. L. 49 (1986).

Keeping 'Em Down on the Farm, Fulton, 6 Calif. Law. 28 (1986).

Selected Bibliography on Agricultural Law: 1980-1985, Persyn & Watts, 34 U. Kan. L. Rev. 703 (1986).

Chapter Collateral References

Construction and application of terms "agricultural," "farm," "farming," or the like, in zoning regualtions. 38 ALR 5th 357.

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1987).

Wildlife Damage to Agriculture: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1986).

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Montana's Greenbelt Law: A Report to the 47th Legislature, Revenue Oversight Committee, Montana Legislative Council (1980).

Certification of Agricultural Seeds in Montana: A Report to the 47th Legislature, Study Committee on Seed Certification, Montana Legislative Council (1980).

Preservation of Agricultural Lands—Alternative Approaches: A Report to the 45th Legislature, Subcommittee on Agricultural Lands, Montana Legislative Council (1976).

Regulation of the Sale and Use of Pesticides—Pesticide Statewide Laboratory System: A Report to the 42nd Legislature, Montana Legislative Council (1970).

Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 1
General Provisions

80-1-101. Definition.

Compiler's Comments

Sections Not Codified: Section 3-228.1(6), R.C.M. 1947, was not codified in the MCA because it is redundant with 80-1-101. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 39, L. 1973, as amended by sec. 3, Ch. 43, L. 1977.

Section 3-310(1), R.C.M. 1947, was not codified in the MCA because it is redundant with 80-1-101. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 442, L. 1973, as amended by sec. 1, Ch. 315, L. 1977.

Section 3-3501(5), R.C.M. 1947, was not codified in the MCA because it is redundant with 80-1-101. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 443, L. 1975, as amended by sec. 27, Ch. 13, L. 1977, and by sec. 1, Ch. 362, L. 1977.

80-1-102. Duties of department.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

Law Review Articles

The Family: How Are You Going to Keep Them Down on the Farm?, MacDonald, 35 Mont. L. Rev. 88 (Winter 1974).

Part 2
Farm Statistics

80-1-201. Department of revenue to collect farm statistics.

Collateral References
Taxation *key* 319(1).
84 C.J.S. Taxation §376.

CHAPTER 2
AGRICULTURAL SERVICES

Chapter Collateral References
Creditor's Rights vs. Debtor's Shields: A Report to the 50th Legislature, Joint Interim Subcommittee on Lien Laws, Montana Legislative Council (1986).
Property Tax Delinquencies, Tax Sales, and Tax Deeds: A Report to the 50th Legislature, Revenue Oversight Committee, Montana Legislative Council (1986).
Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).
Montana's Greenbelt Law: A Report to the 47th Legislature, Revenue Oversight Committee, Montana Legislative Council (1980).
Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 1
Rural Rehabilitation

80-2-101. Trust assets of rural rehabilitation corporation — department of agriculture designated to make application.

Compiler's Comments
Federal Act Not Codified: Public Law 499, referred to in this section, was formerly compiled in the United States Code as Title 40, sec. 440 through 444. These sections are now omitted because the law has been executed. See the codification comment at U.S.C., Title 40, sec. 436 through 444.

Administrative Rules
ARM 4.3.101 Funding for rural development loans — assets.
ARM 4.3.102 Use of rural development loans funds.

Collateral References
Agriculture *key* 2.
3 C.J.S. Agriculture §19.

80-2-102. Agreements with United States secretary of agriculture authorized.

Compiler's Comments
Repeal of Federal Act: The Bankhead-Jones Farm Tenant Act referred to in 80-2-102 was originally codified at 7 U.S.C. 1000, et seq. Title I, II, and IV of the Act, referenced in 80-2-102(1), were repealed by Pub. L. No. 87-128, Title III, sec. 341(a), on August 8, 1961. Section 341(a) also provided that reference to any provision of the Bankhead-Jones Farm Tenant Act superseded by any provision of Title III of Pub. L. No. 87-128 shall be construed as referring to the appropriate provision of such title.
1985 Amendment: Inserted (2) relating to program funding.

Collateral References
Agriculture *key* 3.
3 C.J.S. Agriculture §19.

80-2-103. Administration of trust assets.

Compiler's Comments
2001 Amendment: Chapter 34 near middle after "deposit in the" substituted "state special revenue fund" for "expendable trust fund". Amendment effective July 1, 2001.

1999 Amendment: Chapter 389 near middle after "trust fund" deleted "and are statutorily appropriated, as provided in 17-7-502"; deleted second sentence that read: "Expenditures for actual and necessary expenses required for the efficient administration of this part must be made from temporary appropriations, as described in 17-7-501(1) or (2), made for that purpose"; and made minor changes in style. Amendment effective July 1, 1999.

1989 Amendment: At end inserted provision that expenditures for administration of this part must be from temporary appropriations made for that purpose; and made minor changes in punctuation and phraseology. Amendment effective July 1, 1989.

1985 Amendment: Near middle of section, after "trust fund and", inserted "shall be statutorily appropriated as provided in 17-7-502 to be".

1983 Amendment: In middle of section, substituted "expendable trust fund" for "federal and private grant clearance fund".

Administrative Rules

ARM 4.3.101 Funding for rural development loans — assets.
ARM 4.3.102 Use of rural development loans funds.
Title 4, chapter 3, subchapter 2, ARM Junior agriculture loan rules.
Title 4, chapter 3, subchapter 4, ARM Student loan rules.
Title 4, chapter 3, subchapter 6, ARM Rural assistance loan program.

80-2-104. Powers of department — claims and obligations — property acquired at foreclosure.

Administrative Rules

Title 4, chapter 3, subchapter 5, ARM Rules for participation loans for rural individuals.

80-2-106. Rules.

Administrative Rules

Title 4, chapter 3, subchapter 2, ARM Junior agriculture loan rules.
Title 4, chapter 3, subchapter 4, ARM Student loan rules.
Title 4, chapter 3, subchapter 5, ARM Rules for participation loans for rural individuals.
Title 4, chapter 3, subchapter 6, ARM Rural assistance loan program.

Part 2
Hail Insurance

Part Administrative Rules

Title 4, chapter 4, ARM State Board of Hail Insurance rules.

Part Case Notes

Crop Adjusters as Employees, Not Independent Contractors — Administrative Findings Improperly Reversed: The Unemployment Insurance Division of the Department of Labor and Industry, a Department hearings office, and the Board of Labor Appeals successively determined that crop adjusters were employees of American Agrijusters Co. (American) for unemployment insurance tax purposes. The District Court reversed, holding that the crop adjusters were independent contractors. The Supreme Court applied the four-part test used in Sharp v. Hoerner Waldorf Corp., 178 M 419, 584 P2d 1298 (1978), to determine whether a right of control existed sufficient to give rise to an employer-employee relationship. The factors do not constitute a balancing test, however, so employee status may be established on the strength of evidence under one of the factors standing alone. Here, American exercised a right of control over the means and methods by which crop adjusters completed their job assignments through training, supervision, and review of completed job assignments. Further, payment by a unit of time and the right to terminate the work relationship without liability also evidenced employment status. The District Court erred in finding that crop adjusters were independent contractors, and the Supreme Court reversed. Am. Agrijusters Co. v. Dept. of Labor and Industry, 1999 MT 241, 296 M 176, 988 P2d 782, 56 St. Rep. 948 (1999). See also 3 Larson & Larson, Larson's Workers' Compensation Law §§61.04, 61.06, 61.07 (1999).

State Auditor as Member of Hail Board — No Conflict of Interest: The State Auditor as ex officio Commissioner of Insurance is required to approve the form of all hail insurance policies issued in Montana and at the same time is required by law to sit as a member of the Board of Hail Insurance (Hail Board). The State Auditor is not compensated for service on the Hail Board, nor is there any compensation from any source for such duties. Thus, the Supreme Court held that the

State Auditor as ex officio Commissioner of Insurance is not financially interested in the Hail Board within the meaning of 2-2-102. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

State Auditor as Member of Hail Board — Not Dual Office Holding: The State Auditor is a constitutional office with "such duties as are provided by law" (Art. VI, sec. 4, Mont. Const.). One of these prescribed duties is being a member of the Board of Hail Insurance established under 2-15-3003. The State Auditor does not hold dual offices by carrying out legislatively imposed duties. The only limitation on the Legislature in prescribing such duties is that the duties may not pertain to the Legislative or Judicial Branch of government. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

Part Attorney General's Opinions

Hail Insurance Levy Not a Tax: A hail insurance levy is a contract obligation, not a tax, although administered as a tax. 34 A.G. Op. 43 (1972).

Part Law Review Articles

A Comparison of Crop Insurance in the United States and Canada, Elrifi, 13 J. Agric. Tax'n & L. 99 (1991).

80-2-201. Powers and duties of board of hail insurance.

Compiler's Comments

2001 Amendment: Chapter 574 in (4) near end after "risk to all" substituted "persons" for "taxpayers"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: At end of (1), after "business" deleted "at the state capitol in the office of the director of agriculture, who is secretary of the board"; in (4), at beginning substituted "shall use any appropriate means of communication to inform Montana producers of the purposes, scope, and benefits of this part" for "shall prescribe a special form outlining the purposes, scope, and benefits of this part", and at end, deleted ", the form to be submitted by the agent of the department of revenue in each county at the time in which the regular assessments of property are made by the agents to each farmer in each county in the state engaged in growing of crops subject to injury or destruction by hail. Each such farmer taxpayer shall signify on such forms whether he desires to become subject to the provisions of this part or not."

Administrative Rules

Title 4, chapter 4, ARM State Board of Hail Insurance rules.

Collateral References

Insurance *key* 13.1; States *key* 71.

81A C.J.S. States §§120 through 129.

Determination of amount payable on loss to growing crop under policy insuring against loss or injury. 20 ALR 3d 924.

Constitutionality of crop insurance statutes. 113 ALR 739.

Construction of hail insurance policy. 4 ALR 1298, supplemented by 7 ALR 373; 35 ALR 267; and 129 ALR 1068.

80-2-202. Compensation of chairman and officers.

Collateral References

States *key* 60, 62.

81A C.J.S. States §104.

80-2-203. Participation in program — fee.

Compiler's Comments

2001 Amendment: Chapter 574 throughout section substituted reference to person for reference to taxpayer and references to fee for references to tax; and in (1) in second sentence after "suitable" substituted "fees" for "levies". Amendment effective July 1, 2001.

1993 Special Session Amendment: Chapter 27 in (2), in two places, substituted "department of revenue" for "county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1993 Amendment: Chapter 451 in second sentence of (2) substituted "12:01 a.m." for "noon" and after "day" inserted "immediately"; and made minor changes in style. Amendment effective April 21, 1993.

Administrative Rules

ARM 4.4.306 Application for insurance.
ARM 4.4.316 Liability on all crops.
ARM 4.4.317 Request for insurance on hail damaged grain.

Attorney General's Opinions

Hail Insurance Levy Not a Tax: A hail insurance levy is a contract obligation, not a tax, although administered as a tax. 34 A.G. Op. 43 (1972).

80-2-204. Duty of department of revenue — election of benefits of law.

Compiler's Comments

2001 Amendment: Chapter 574 throughout section substituted "person" for "taxpayer"; in second sentence after "liable for the" substituted "fee" for "tax levies"; in third sentence after "liable for the" substituted "fees" for "taxes levied"; in fourth sentence after "tender payment" substituted "in cash, of the fee levied" for "of the tax levied" and after "insurance" deleted "to protect the lessee's crops, in cash"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Special Session Amendment: Chapter 27 at beginning of first sentence substituted "The department of revenue shall" for "It shall be the duty of the agent of the department of revenue in each county in the state"; in second sentence, after "policies", deleted "on forms provided for such purpose"; in fourth sentence substituted "may make the election" for "shall elect if such lands shall be subject to the tax levies herein provided for and the crops grown thereon protected" and at end deleted "whereupon such crops shall become eligible to the benefits and protection afforded by this part for hail insurance"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1983 Amendment: Near beginning of first sentence before "to explain", substituted "upon request" for ", at the time in which the annual assessment of property is made,"; and near middle of first sentence after "afforded thereby and to", substituted "issue insurance policies" for "request each such taxpayer to certify".

80-2-205. What crops subject to provisions of law.

Compiler's Comments

2001 Amendment: Chapter 574 near beginning of first sentence after "all" substituted "persons" for "taxpayers" and at end substituted "fees for hail insurance have been imposed" for "taxes for hail insurance will have been levied"; and made minor changes in style. Amendment effective July 1, 2001.

Administrative Rules

ARM 4.4.303 Insured crops.
ARM 4.4.304 Hay crops.

80-2-206. Cash payment.

Compiler's Comments

2001 Amendment: Chapter 574 at end of last sentence substituted "deposited with the state treasurer" for "promptly turned over to the county treasurer, who shall furnish the insured with a current receipt and place the money in the hail insurance fund"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Special Session Amendment: Chapter 27 in first sentence substituted "department of revenue" for "county assessor"; in last sentence substituted "department of revenue" for "assessor"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

80-2-207. Delinquent fees — application by delinquent — crop lien.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) near beginning after "delinquent" substituted "fees" for "taxes" and near end after "application" deleted "in the event of a maximum levy"; in (2) in first sentence after "delinquent" substituted "fees" for "taxes" and in last sentence at end substituted "sent a bill to the grain grower for the proper amount due for hail insurance under the provisions

of this part" for "cause an assessment for the proper amount to be made on the property tax record in the same manner provided for in the case of other special levies or assessments"; in (3) after "delinquent" substituted "amount" for "account or accounts"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Special Session Amendment: Chapter 27 in (2), in four places, substituted references to Department of Revenue for references to county assessor; in last sentence of (2) substituted "property tax record" for "assessment rolls"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

80-2-208. Maximum insurance.

Attorney General's Opinions

Authority to Increase Maximum Coverage: The Board of Hail Insurance has authority to increase the maximum coverage on each nonirrigated acre of grain for the 1978 hail season from $12 to $18 only if its reserve fund contains a minimum of $3 million after payment of administrative expenses, interest owed on registered warrants, and claims for losses sustained during the 1977 hail season. 37 A.G. Op. 51 (1977).

80-2-209. Reinsurance.

Compiler's Comments

2001 Amendment: Chapter 574 in last sentence after "hail insurance" substituted "fees" for "levies"; and made minor changes in style. Amendment effective July 1, 2001.

80-2-221. Fee for hail insurance.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) at beginning substituted "A fee is imposed" for "A tax is hereby authorized and directed to be levied"; in (2) near middle of first sentence after "recommend a" substituted "fee to be imposed" for "levy to be made" and in last sentence near end after "personal" deleted "assessment"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: Deleted former (3) and (4), which read: "(3) It is hereby provided, however, that such tax may not exceed in any one year $2.40 per acre on lands sown to grain crops on nonirrigated lands, $4.80 per acre on irrigated lands, or $2.40 per acre on lands producing hay crops.

(4) If the tax required to pay the estimated losses, interest on warrants, and costs of administration is less than $1.20 per acre on lands sown to grain crops on nonirrigated lands and $2.40 per acre on irrigated lands and a proportionate amount on lands sown to hay crops, the board of hail insurance must recommend a tax levy sufficient to raise the full amount thereof."

Attorney General's Opinions

Hail Insurance Levy Not a Tax: A hail insurance levy is a contract obligation, not a tax, although administered as a tax. 34 A.G. Op. 43 (1972).

80-2-222. Board to establish amount of rates — disposition of funds.

Compiler's Comments

2001 Amendment: Chapter 574 in (2) near middle after "determined and" substituted "imposed" for "levied"; in (4) substituted "establishing the rates provided in this section" for "making the levy provided in this section and 80-2-223"; in (5) near middle substituted "current year's rates than were estimated when the rates were established" for "current year's levies than were estimated when the levy was made" and near end substituted "persons" for "farmers"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 69 inserted (3) granting the Board of Hail Insurance spending authority, statutorily appropriating Board funds, and requiring administrative expenditures by temporary appropriation; in (6), in two places, substituted reference to enterprise fund for reference to expendable trust fund; and made minor changes in style. Amendment effective February 22, 1993.

1983 Amendments: Chapter 281, in (5), substituted "expendable trust fund" for "agency fund" in two places.

Chapter 691 made the following changes: in (1), deleted former last sentence, which read: "The highest of these rates shall be the same as the maximum established herein and the lowest may not

be less than $1.20 per acre on lands sown to grain crops and a proportionate amount on lands sown to hay crops."; in (2) before "the rates for the year shall be determined", deleted "in any year when the requirements of the hail insurance law as herein provided do not require a levy of the maximum rates as established, then"; and near end of (3)(c) after "hail insurance law", deleted "during or subsequent to the year 1919".

Administrative Rules

ARM 4.4.311 Receipt of refund.

Attorney General's Opinions

Board Authority to Withhold Refund: The state Board of Hail Insurance has the authority to withhold refunds on delinquent hail insurance levies. 34 A.G. Op. 43 (1972).

80-2-224. Fee — notice — when payable.

Compiler's Comments

2001 Amendment: Chapter 574 in first sentence near beginning substituted "the fee" for "such assessment" and near middle substituted "department of revenue" for "county treasurer"; substituted second sentence concerning paying fee to department of revenue for "The assessment shall be payable at the office of the county treasurer of each respective county"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: In first sentence, substituted "in the same manner and at the same time as notices of property taxes due" for "in the same manner as are all other notices of taxes due".

Attorney General's Opinions

Statute of Limitations for Collection of Past-Due Levy: An 8-year statutory period of limitations applies to the collection of past-due levies. Any levies that have been delinquent more than 8 years should be canceled and written off pursuant to section 82-110, R.C.M. 1947 (now 17-4-107). 34 A.G. Op. 43 (1972).

80-2-225. Real estate lien — creation.

Compiler's Comments

2001 Amendment: Chapter 574 in first sentence near beginning substituted "hail insurance fees" for "tax levies", after "each" substituted "person" for "taxpayer", and at end substituted "must be collected by the department of revenue" for "must be entered in the property tax record and collected by the officers charged with such duties in the manner and form as are other property taxes"; in second sentence near beginning substituted "fees" for "levies" and at end substituted "imposed" for "levied in the same manner as are other property taxes"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Special Session Amendment: Chapter 27 in first sentence substituted "property tax record" for "tax roll"; deleted last two sentences that read: "The lien may in no way affect mortgages that are of record on March 14, 1917. The lien of any mortgage filed subsequent to March 14, 1917, shall be subsequent to any lien for hail insurance hereafter levied thereon"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Section Not Codified: Sections 16-2101 through 16-2104, R.C.M. 1947, pertaining to release of liens on county seed grain loans and cancellation of defaulted seed grain contracts, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to sec. 1 through 3, Ch. 121, L. 1935, and sec. 1, Ch. 120, L. 1945.

Attorney General's Opinions

Unpaid Hail Insurance Levy — Lien Against Land or Crops: If a taxpayer insured under the provisions of Title 80, ch. 2, part 2, owns unencumbered lands, unpaid hail insurance levies become a lien upon his lands. If a taxpayer does not own unencumbered lands or does not pay cash, then unpaid hail insurance levies become a lien against his crops. 34 A.G. Op. 43 (1972).

80-2-226. Crop lien — when created — assessment.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) in first sentence near beginning substituted "fee" for "levy" and at end of last sentence substituted "all applicable persons insured" for "all insured except those owning unencumbered land or those who have paid cash for hail insurance"; and made minor changes in style. Amendment effective July 1, 2001.

Section Not Codified: Sections 16-2101 through 16-2104, R.C.M. 1947, pertaining to release of liens on county seed grain loans and cancellation of defaulted seed grain contracts, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to sec. 1 through 3, Ch. 121, L. 1935, and sec. 1, Ch. 120, L. 1945.

Attorney General's Opinions

Unpaid Hail Insurance Levy — Lien Against Land or Crops: If a taxpayer insured under the provisions of Title 80, ch. 2, part 2, owns unencumbered lands, unpaid hail insurance levies become a lien upon his lands. If a taxpayer does not own unencumbered lands or does not pay cash, then unpaid hail insurance levies become a lien against his crops. 34 A.G. Op. 43 (1972).

Law Review Articles

The Ownership of Growing Crops: The Continuing Struggle Between Property Law and the Uniform Commercial Code, Schneider, 8 J. Agric. Tax'n & L. 99 (1986).

80-2-228. Reserve fund.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) in two places substituted "fee" for "levy"; in (2) in second sentence substituted "may" for "shall"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 69 in (3) substituted reference to enterprise fund for reference to expendable trust fund; and made minor changes in style. Amendment effective February 22, 1993.

1989 Amendment: In (3), at end, deleted "and is statutorily appropriated as provided in 17-7-502 to the board for the purpose of paying costs of administration, interest, and losses of the program"; and made minor change in phraseology. Amendment effective July 1, 1989.

1985 Amendment: In (3) substituted present language providing for statutory appropriation under 17-7-502 for "The reserve hereby created shall be deposited in an expendable trust fund, and the board is hereby granted the power to draw from its moneys in the fund such amounts as it considers necessary for the purpose of paying costs of administration, interest, and losses".

1983 Amendments: Chapter 281, in (3), substituted "an expendable trust fund" for "the agency fund".

Chapter 691 made the following changes: deleted former (2), which read: "The reserve fund may not exceed $4 million prior to January 1, 1976. On January 1, 1976, and thereafter, the maximum permissible reserve fund shall be established as set forth in subsection (3) of this section."; and at beginning of (4) before "The board" deleted "Whenever there are no unpaid losses for prior years and whenever in any one year the cost of administration, interest, and losses for the current year is less than the sum of 60 cents per acre on nonirrigated grains and a proportionate amount on irrigated grains and other crops,"; and at end of (4) after "by the board" inserted "for the current year pursuant to 80-2-221".

Attorney General's Opinions

Authority to Increase Maximum Coverage: The Board of Hail Insurance has authority to increase the maximum coverage on each nonirrigated acre of grain for the 1978 hail season from $12 to $18 only if its reserve fund contains a minimum of $3 million after payment of administrative expenses, interest owed on registered warrants, and claims for losses sustained during the 1977 hail season. 37 A.G. Op. 51 (1977).

80-2-229. Withdrawal of crop in case of destruction through other means.

Compiler's Comments

2001 Amendment: Chapter 574 near end of first sentence after "regular" substituted "fee" for "levy"; and made minor changes in style. Amendment effective July 1, 2001.

Administrative Rules

ARM 4.4.309 Filing of application for reduction and schedule.

80-2-230. Collection of fees — release of lien.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 257 in (1) at beginning of first sentence inserted "Subject to subsection (2)", in second sentence substituted "The county treasurer shall remit money in the fund to the department of revenue, as provided under 15-1-504" for "and remit the same to the state treasurer in the same manner as provided by law for the remittance of other moneys due to the state", and deleted former third sentence that read: "All county treasurers shall

use due diligence in making the collections of the levies provided herein"; and made minor changes in style. Amendment effective July 1, 2001. The amendment by Ch. 574 rendered the amendment by Ch. 257 void. Because Ch. 574 transferred collection of fees from the county treasurer to the department of revenue, the code commissioner has not codified the language concerning remittance of fees to the department of revenue as provided under 15-1-504.

Chapter 574 substituted (1) concerning collection of fees by department of revenue for "The county treasurer in each county in the state shall collect all levies made under this part in the same manner as other property taxes are collected and shall keep all moneys collected by him or for him for hail insurance in a separate fund to be known as the hail insurance fund and remit the same to the state treasurer in the same manner as provided by law for the remittance of other moneys due to the state. All county treasurers shall use due diligence in making the collections of the levies provided herein. Also the board may furnish assistance needed at any time in making collections or may take over the collection of any levy at any time, depositing any collections therefrom with the treasurer of the county where the levy therefor was made"; in (2) near beginning substituted "fees, whether imposed" for "levies, whether levied" and at end substituted "the fees are imposed" for "such levies are made"; in (3) near beginning substituted "department of revenue" for "treasurer"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

Attorney General's Opinions

Statute of Limitations for Collection of Past-Due Levy: An 8-year statutory period of limitations applies to the collection of past-due levies. Any levies that have been delinquent more than 8 years should be canceled and written off pursuant to section 82-110, R.C.M. 1947 (now 17-4-107). 34 A.G. Op. 43 (1972).

Unpaid Hail Insurance Levy — Lien Against Land or Crops: If a taxpayer insured under the provisions of Title 80, ch. 2, part 2, owns unencumbered lands, unpaid hail insurance levies become a lien upon his lands. If a taxpayer does not own unencumbered lands or does not pay cash, then unpaid hail insurance levies become a lien against his crops. 34 A.G. Op. 43 (1972).

80-2-231. Foreclosure of lien.

Compiler's Comments

2001 Amendment: Chapter 574 in first sentence in two places substituted reference to department of revenue for reference to county treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Attorney General's Opinions

Statute of Limitations for Collection of Past-Due Levy: An 8-year statutory period of limitations applies to the collection of past-due levies. Any levies that have been delinquent more than 8 years should be canceled and written off pursuant to section 82-110, R.C.M. 1947 (now 17-4-107). 34 A.G. Op. 43 (1972).

80-2-232. Department of revenue's duty — warrants — transfers to state general fund.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) at beginning substituted "department of revenue" for "state treasurer"; substituted (2) allowing department to retain 2% of fees for administrative costs for former text that read: "Upon warrants drawn by order of the board, the state treasurer shall pay out of the board's enterprise fund to the county treasurer of each county where state hail insurance coverage is in force 2% of the gross annual levies made and collected in that county under this part for the use of the county as the board of county commissioners may determine"; in (3) near end substituted "fees imposed" for "levies made"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 69 throughout section substituted reference to enterprise fund for reference to expendable trust fund; in (1), in first sentence, inserted clause requiring money to be held in trust for hail insurance programs; and made minor changes in style. Amendment effective February 22, 1993.

1983 Amendments: Chapter 281 made the following changes: in (1), at end of first sentence, substituted "expendable trust fund" for "agency fund" and deleted "and may from time to time transfer to the earmarked revenue fund such sums as the board of hail insurance may deem necessary and proper to pay the expenses of administration"; in second sentence substituted first "expendable trust fund" for "agency fund" and second "expendable trust fund" for "account in the

earmarked revenue fund", and deleted last sentence, which read: "If at any time more funds are in the earmarked revenue fund than the board estimates are needed for administrative expenses, the state treasurer may on the order of the board transfer such funds back to the agency fund as the board may direct."; and in (2) and (3), substituted "expendable trust fund" for "account in the agency fund".

Chapter 691, near middle of (2), changed "1%" to "2%"; and near end of (3), changed "2%" to "1.5%".

80-2-241. Report of losses.

Compiler's Comments

1983 Amendment: Near beginning of section, substituted "14 days" for "3 days"; and inserted last sentence requiring that costs be charged to claimant for adjustment due to late reporting of loss.

Administrative Rules

ARM 4.4.316 Liability on all crops.

80-2-242. Appraisers — appointment — qualifications — duties.

Compiler's Comments

1983 Amendment: In (1), near beginning changed "board of hail insurance" to "department of agriculture", and at end deleted "and shall be selected from names submitted by regularly organized farmers societies in the various counties. If the recommendations are not made as provided above, then the board shall select the appraisers from men actively engaged in farming or men who have had practical experience in farming as heretofore provided."; in (4) after "the board may", deleted "in case of emergency appoint more than three appraisers in any county. Also it may"; and made minor changes in phraseology.

Administrative Rules

ARM 4.4.310 Special crops reduction.

80-2-243. Disputed appraisal.

Compiler's Comments

1983 Amendment: In third and fourth sentences of (1), increased bond from $10 to $25; and in third and fourth sentences of (2), increased bond from $25 to $50.

Administrative Rules

ARM 4.4.308 Reappraisal.

ARM 4.4.319 Disputed appraisal.

Case Notes

Board of Arbitrators: The members of a board of arbitrators must be disinterested parties and are more than mere appraisers (exercising a power judicial in nature, the basis of whose decision is not limited to information gained from inspection only, but they may hear evidence including that of the parties). Where arbitration was prevented by the naming of an improper person on the board, judgment was reversed, the cause dismissed, and the board ordered to name a proper person as arbitrator. Crosby v. St. Bd. of Hail Ins., 113 M 470, 129 P2d 99 (1942).

Exclusive Remedy: Under this section, providing the sole and exclusive statutory remedy available to an insured who is dissatisfied with the award of appraisers, an action against the Board of Hail Insurance is not available. Crosby v. St. Bd. of Hail Ins., 113 M 470, 129 P2d 99 (1942).

80-2-244. Payment of losses.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) in second sentence in two places substituted "fee" for "tax"; in (2) at end of second sentence substituted "fee was imposed" for "tax was assessed", in fifth sentence after "current" substituted "fees" for "levy", and near end of last sentence after "borrow" deleted "as needed from any person, bank, or corporation such sum or sums of"; in (3) in last sentence near middle substituted "the fees imposed for the current year together with delinquent fees" for "levies as made for taxes for the current year together with such delinquent taxes"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: At end of (1), deleted "and shall make settlement within 40 days from the time loss is sustained by paying, either by registered warrant or otherwise if funds are

immediately available, 50% of the total loss as agreed upon, less the maximum rate of assessment. The balance shall be paid at the expiration of the hail season."; and at end of second sentence of (2) after "irrigated lands", deleted ", and $24 per acre on hay crops".

Administrative Rules

ARM 4.4.301 Adjustment of hail loss.
ARM 4.4.302 At least 5% loss needed.
ARM 4.4.305 Provisions of coverage.
ARM 4.4.312 Process of payment for losses.
ARM 4.4.313 Losses exceeding the levy for that year.
ARM 4.4.315 Liability to cease for Board.
ARM 4.4.318 Paying 100% when loss shows at least 95% or above actual loss.

80-2-245. Benefits exempt from execution.

Collateral References

Exemptions *key* 37.
35 C.J.S. Exemptions §§26, 31.

CHAPTER 3
HORTICULTURE
STANDARDS, STORAGE, AND MERCHANDISING

Chapter Administrative Rules

Title 4, chapter 12, subchapter 22, ARM Control of apples.
Title 4, chapter 12, subchapter 23, ARM Grading of cherries.
Title 4, chapter 12, subchapter 26, ARM Wholesalers and itinerant merchants.
Title 4, chapter 12, subchapter 35, ARM Grading of certified seed potatoes.

Chapter Law Review Articles

Earthy Pleasures: Gardeners Enjoy the Many Fruits of Their Labors, Chanen, 83 A.B.A. J. 94 (1997).

Trademark Law for Specialty Fruits and Vegetables, Centner, 10 J. Agric. Tax'n & L. 3 (1988).

Chapter Collateral References

Sales: what is "entrusting" goods to merchant dealer under UCC §2-403. 59 ALR 4th 567.

Constitutionality of statutes relating to grading, packing, or branding of farm products. 73 ALR 1445.

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1987).

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 3
Montana Produce Act

Part Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 553, L. 1993, provided: "A statement of intent is required for this bill because the following sections extend additional rulemaking authority to the department of agriculture's present authority to regulate horticulture and farm produce:

(1) The definition of "produce" in [section 2] [80-3-302] is intended to allow the department to establish by rule what products constitute produce and are subject to the Montana Produce Act.

(2) [Section 6(3)] [80-3-306(3)] is intended to allow the department to establish a penalty matrix that sets out the kinds of administrative penalties applicable to violations of the Montana Produce Act and delineate the degrees of penalty that may be assessed for initial and subsequent administrative violations.

(3) [Section 10(1)] [80-3-314(1)] is intended to grant the department the discretion to set and adjust the produce assessment fee, within the statutory range, to cover the department's assessment costs."

Severability: Section 16, Ch. 553, L. 1993, was a severability clause.

Transition: Section 17, Ch. 553, L. 1993, provided: "In order to implement the provisions of the produce dealer license established in [section 12] [80-3-321] on a calendar year basis, the department shall issue a new 1993 produce dealer license to any licensee who has paid the license fee for 1993. The state treasurer shall transfer $50 of the 1993 fee to the produce account established in [section 4] [80-3-304]. All remaining license fees must be refunded to the licensee at the time the new license is issued."

Effective Date — Retroactive Applicability: Section 18, Ch. 553, L. 1993, provided: "[This act] [Title 80, ch. 3, part 3] is effective on passage and approval [approved April 28, 1993] and applies retroactively, within the meaning of 1-2-109, to produce dealer licenses issued and fees collected on and after January 1, 1993."

80-3-302. Definitions.

Administrative Rules

ARM 4.12.1429 Products designated as produce — produce unit quantified.

80-3-303. Powers and duties of department.

Administrative Rules

ARM 4.12.2206 Apples — Montana grades defined.
ARM 4.12.2310 Montana sweet cherry grade standards.
ARM 4.12.2311 Sweet cherries — Montana grades defined.
ARM 4.12.2615 Verification of "Montana-grown" produce or produce "grown" in Montana.

80-3-306. Penalties.

Administrative Rules

ARM 4.12.1425 Civil penalties — enforcement for produce.
ARM 4.12.1426 Civil penalties — matrix for produce.

80-3-314. Reporting requirements — assessment fees — exceptions.

Administrative Rules

ARM 4.12.1428 Assessment fees on all produce.

80-3-315. Shipping point inspection — fees.

Administrative Rules

ARM 4.12.1427 Shipping point inspection fees.

CHAPTER 4
AGRICULTURAL COMMODITIES

Chapter Administrative Rules

Title 4, chapter 12, subchapter 10, ARM Grain rules.
Title 4, chpater 12, subchapter 38, ARM Commercial mustard seed rules.
Title 4, chapter 13, subchapter 10, ARM State Grain Laboratory Division — rules.

Chapter Case Notes

Distribution of Bond Proceeds — Two Separate Grain Purchasing Businesses Conducted by Same Entity: In 1980, a grain purchasing company was determined by the state to be conducting two separate and independent grain purchasing businesses in Montana. In 1981, the company was required to execute two bonds under the provisions of Title 80, ch. 4, part 2. One bond secured a group of farmers under a $195,000 grain dealer-public warehouse operator bond. The second bond secured a group of independent grain dealers under a $20,000 grain merchandiser-track buyer bond. Upon subsequent bankruptcy of the company, the District Court properly distributed the bond proceeds by determining the intention of the parties when the bonds were purchased. In affirming the lower court, the Supreme Court noted that the statutory provisions under which the

bonds were issued were ambiguous, illogical, and antiquated, leading both to this case and to repeal of the statutes in 1983. St. v. A.B.N. Ranch, 230 M 449, 750 P2d 1079, 45 St. Rep. 343 (1988).

Judicial Notice: The law presumed that the Commissioner of Agriculture (now the Department of Agriculture) performed his official duty as required by 80-4-224 (prior to repeal in 1983) and that the form of warehouse receipt used and issued by plaintiff was in the form prescribed by law and the rules of the Commissioner of Agriculture of which law and official acts this court may take judicial notice. N. Mont. Mustard Growers' Co-op v. Britton, 128 M 553, 280 P2d 1078 (1955).

Mustard Seed as Grain: Mustard seed is a grain and was subject to the provisions of 80-4-229 and 80-4-230 (both repealed in 1983). N. Mont. Mustard Growers' Co-op v. Britton, 128 M 553, 280 P2d 1078 (1955).

Waiver of Storage: Plaintiff delivered a quantity of grain to an elevator. Three months later he sold it to the elevator company; at that time, while section 3-217, R.C.M. 1947 (80-4-223, MCA, repealed in 1983), required the warehouse operator to charge storage and 80-4-222 (repealed in 1983) prescribed the penalty for failure to do so, none was charged when the sale was made. In an action to recover the balance of the sale price due, the buyer contended that no storage having been charged, the contract of sale was invalid as against public policy. The court held that the contract of storage, one of bailment, and the contract of sale were separate and distinct contracts, and in the absence of proof that the waiver of storage was an inducement for the sale, the latter transaction was valid. Spurgeon v. Imperial Elevator Co., 99 M 432, 43 P2d 891 (1935).

Bailment: An operator of a grain elevator is a public warehouse operator; delivery of grain for storage constitutes a bailment, and as bailee the operator must, under the Montana law, at all times keep on hand in bonded warehouses sufficient grain to make redelivery on all storage receipts and may not sell or deliver it out of storage except as provided by law. The operator may not use it for purposes of speculation on the market. Whorley v. Patton-Kjose Co., Inc., 90 M 461, 5 P2d 210 (1931).

Chapter Attorney General's Opinions

Exemption — Out-of-State "Annex": A grain merchandising facility located 900 feet within the Montana border could not be classified as an "annex" of a North Dakota operation and exempted from licensing and grain storage obligations under 80-4-202 (repealed in 1983). 36 A.G. Op. 89 (1976).

Bonding Requirement Exemption: A warehouse operator licensed under the United States Warehouse Act could not be required to execute a warehouse operator's bond under 80-4-205 (repealed in 1983). 36 A.G. Op. 36 (1975).

Federal Act Exempt From State Law: The charges for grain storage that a warehouse operator, licensed under the United States Warehouse Act, may impose cannot be regulated by state law. However, state law remains effective as to persons licensed under the United States Warehouse Act in those areas that are not regulated by the act, i.e., those activities not confined to the storage of grain. 36 A.G. Op. 36 (1975).

Lack of State Power to Initiate Suit on Behalf of a Citizen Absent Some Specially Conferred Standing: Section 80-4-234 (repealed in 1983) requiring intervention by the Montana Department of Agriculture on behalf of grain producers was not applicable where the injury was caused by a person licensed under the United States Warehouse Act. 36 A.G. Op. 36 (1975).

Chapter Law Review Articles

The NAFTA Durum Dispute and the Canada Grain Act: A Case Study in Institutional Development, Benson, 5 Const. F. 81 (1994).

Why Own the Farm if You Can Own the Farmer (and the Crop)?, Contract Production and the Intellectual Property Protection of Grain Crops, Hamilton, 73 Neb. L. Rev. 48 (1994).

Forward Transportation Contracting and Futures: An Option for Grain Shippers?, Baumel & Kober, 58 Transp. Practitioners J. 150 (1991).

Grain Elevator Insolvency: State Law and Bankruptcy Law Considerations (Colorado), Connolly & Beach, 19 Colo. Law. 635(4) (1990).

Grain Elevator Bankruptcies: How Can the Grain Producer Be Better Protected?, 31 U. Kan. L. Rev. 157 (1982).

Chapter Collateral References

Constitutionality of statutes relating to grading, packing, or branding of farm products. 73 ALR 1445.

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1987).

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 4
Agricultural Commodities Generally

Part Administrative Rules

Title 4, chapter 12, subchapter 10, ARM Grain rules.

Title 4, chapter 12, subchapter 38, ARM Commercial mustard seed rules.

Title 4, chapter 13, subchapter 10, ARM State Grain Laboratory Division — rules.

Part Case Notes

Construction of Bond: In construing a mustard seed contractor bond, it was necessary to consider 80-4-311 (repealed in 1983) as part of the bond itself. Kohles v. St. Paul Fire & Marine Ins. Co., 144 M 395, 396 P2d 724 (1964).

Purpose: The purpose of 80-4-311 (repealed in 1983) was to benefit those farmers who have sold their crops "in advance of harvest". Kohles v. St. Paul Fire & Marine Ins. Co., 144 M 395, 396 P2d 724 (1964).

Recovery on Bond: Plaintiff who, prior to the repeal of 80-4-311 in 1983, sold and delivered mustard seed to company which went bankrupt could not recover on a mustard seed contractor bond when he had the seed on hand and in storage when he contracted for sale. The seed was not planted or harvested in such year nor was it a growing crop during that year. Kohles v. St. Paul Fire & Marine Ins. Co., 144 M 395, 396 P2d 724 (1964).

80-4-402. Definitions.

Compiler's Comments

2001 Amendment: Chapter 168 inserted definition of bailment; in definition of commodity dealer in (a) after "exchange" inserted "bailment"; and made minor changes in style. Amendment effective March 30, 2001.

Saving Clause: Section 4, Ch. 168, L. 2001, was a saving clause.

1997 Amendment: Chapter 76 in definition of agricultural commodity, after "grain", substituted "oil seed crops, seed, or other crops" for "beans, safflower, sunflower seeds, tame mustards, rapeseed, flaxseed, leguminous seed, or other small seed, and other agricultural commodities"; in definition of delayed payment contract, in first sentence, substituted "purchase price" for "sale price"; in definition of depositor, after "person who", inserted "delivers an agricultural commodity to a commodity dealer for sale"; inserted definition of FGIS; in definition of grain, after "Act", deleted "7 U.S.C. 71 through 87"; inserted definition of grain standards; substituted official agricultural commodity inspections for grain inspections as defined term and at end substituted "agricultural commodities" for "grain"; substituted official agricultural commodity samplers for official grain samplers as defined term; deleted definition of official grain standards that read: ""Official grain standards" means the standards of quality and condition of grain that establish the grades defined by the Grain Standards Act"; substituted official agricultural commodity weighers for official grain weighers as defined term and at end substituted "agricultural commodity" for "grain"; inserted definition of purchase price; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

1995 Amendment: Chapter 337 in definition of commodity dealer inserted (f) exempting person who buys agricultural commodities exclusively for feeding of livestock from licensure as commodity dealer; and made minor changes in style. Amendment effective April 7, 1995.

1993 Amendment: Chapter 452 in definition of delayed payment contract (formerly credit sale contract), near beginning of first sentence after "means a", inserted "written" and near end, before "or price-later contracts", inserted "no-price-established contracts" and inserted second sentence that read: "A delayed payment contract does not include those contracts in which the parties intend payment to be made immediately upon determination of weights and grades"; inserted definition of purchase contract; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: In definition of commodity dealer, at the end of (c), inserted language concerning exceeding $30,000 exemption; at the end of definition of Grain Standards Act deleted "as that act reads on July 1, 1983"; and made minor changes in style.

Severability: Section 11, Ch. 299, L. 1991, was a severability clause.

1985 Amendments: Chapter 55 in (4)(b) substituted "a person who buys agricultural commodities from a licensed commodity dealer or who does not purchase more than $30,000 worth of agricultural commodities from producers during a licensing year" for "a person who buys or handles less than $10,000 worth of agricultural commodities in a licensing year".

Chapter 578 inserted (3) defining bond.

Collateral References

Warehousemen *key* 3.

80-4-403. Rules — adoption.

Compiler's Comments

Statement of Intent: The statement of intent attached to Ch. 539, L. 1983, provided: "A statement of intent is required for this bill because of the general rulemaking authorization in section 3 [codified as this section] and various other specific authorizations located throughout the remainder of the bill.

The Legislature intends that under the general authorization the Department of Agriculture have authority to adopt any rules it may from time to time consider necessary to properly implement the general provisions and the respective sections relating to public warehousing, commodity dealing, and grain standards.

The Legislature further intends in those sections containing specific rulemaking authorization that rules will be adopted implementing the language, requirements, and procedures stated therein."

Administrative Rules

ARM 4.12.1018 through 4.12.1022 and 4.12.1025 through 4.12.1029 Public warehouse license — reports — bond — receipts — contracts — warehouse shortage remedies.

ARM 4.13.1001A Grain fee schedule.

80-4-404. Terms of licenses — renewals.

Administrative Rules

ARM 4.12.1018 Term of licenses — expiration.

80-4-405. Maximum bond amount.

Compiler's Comments

1997 Amendment: Chapter 76 inserted last sentence in (1) requiring one asset deficiency amount when the public warehouse operator is a licensed commodity dealer; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Attorney General's Opinions

Bonding Requirement Exemption: A warehouse operator licensed under the United States Warehouse Act could not be required to execute a warehouse operator's bond under 80-4-205 (repealed in 1983). 36 A.G. Op. 36 (1975).

80-4-407. Reports to the department.

Administrative Rules

ARM 4.12.1019 Reports to Department.

80-4-409. Confidentiality of records.

Compiler's Comments

1997 Amendment: Chapter 76 in (2) extended reference to include part 7; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

80-4-415. Creation of commodity dealer/public warehouse operators account — deposit of funds.

Compiler's Comments

Effective Date: Section 21, Ch. 452, L. 1993, provided: "[This act] is effective July 1, 1993."

80-4-416. Deposit of deficiency funds and liquidation funds.

Compiler's Comments

Effective Date: Section 21, Ch. 452, L. 1993, provided: "[This act] is effective July 1, 1993."

80-4-420. Producer's lien.

Compiler's Comments

Effective Date: Section 21, Ch. 452, L. 1993, provided: "[This act] is effective July 1, 1993."

80-4-421. License suspension and revocation — renewal.

Compiler's Comments

1997 Amendment: Chapter 76 throughout section, in three places, extended references to parts 4 and 7; in (1)(c) inserted "after considering Title 37, chapter 1, part 2"; inserted (1)(k) regarding failure to satisfy a judgment entered as a result of a violation of the chapter; in (1)(l), after "department", inserted "pursuant to parts 4 through 7"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Administrative Rules

ARM 4.12.1020 Financial statements — filing date.

80-4-422. Delayed payment or purchase contracts.

Compiler's Comments

1993 Amendment: Chapter 452 near middle of (1) and (2), before "contract", substituted "purchase" for "credit sale"; in (2)(a), after "seller's", inserted "and purchaser's"; in (2)(f), before "contract", substituted "delayed payment" for "credit sale"; in first sentence of (3), before "contract", substituted "purchase" for "credit sale" and near middle substituted "agricultural commodities are delivered to and in physical control of the purchaser" for "contract is executed", in fourth sentence, near beginning, substituted "commodity dealer's or warehouse operator's" for "warehouseman's" and near middle, before "contracts", substituted "delayed payment" for "credit sale", and near middle of sixth sentence, before "contracts", substituted "purchase" for "credit sale"; inserted (4) clarifying that a contract that does not satisfy certain conditions is considered a sale; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: Inserted (2)(f) requiring contract for agricultural commodities sold by credit sale contract to contain notice of financial risk in form adopted by Department; and made minor changes in style. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 518, L. 1991, provided: "A statement of intent is required for this bill because 80-4-422(2)(f) requires the department of agriculture to adopt rules regarding the form of a notice of financial risk required to appear on credit sale contracts for the sale of agricultural commodities. It is intended that the warning appear on the face of the contract, in boldface type, and be in substantially the following form:

NOTICE TO SELLER OF FINANCIAL RISK

The seller recognizes that in the event of foreclosure or bankruptcy, this contract is equivalent to an unsecured loan to the purchaser. The seller and any of the seller's creditors should be advised of the financial risks involved in this contract."

Applicability: Section 2, Ch. 518, L. 1991, provided: "[This act] . . . applies to credit sale contracts for agricultural commodities entered into after July 1, 1991."

Administrative Rules

ARM 4.12.1029 Contract form required of seed dealers.
ARM 4.12.1030 Notice to sellers of financial risk.

80-4-425. Action on bond by persons injured — liability of surety — statute of limitations.

Compiler's Comments

1993 Amendment: Chapter 452 inserted first sentence of (1) requiring that all claims be made through the Department, in second sentence, after "may", substituted "file a complaint with the department" for "take action against the bond in his own name to recover damages caused by the breach", and substituted remainder of subsection regarding Department investigation procedures for former language that read: "The director shall then make demand upon the warehouseman or the commodity dealer and his surety for payment of damages. If the damages are not promptly paid, the director shall commence an action on the bond to enforce payment of damages"; deleted former first sentence of (2) that read: "Liability of the surety upon the bond is limited to the amount of the bond"; inserted (3) regarding surety liability; and made minor changes in style. Amendment effective July 1, 1993.

Administrative Rules

ARM 4.12.1021 Bond conditions — cancellation.
ARM 4.12.1022 Certificates of deposit or other bond equivalents.
ARM 4.12.1026 Loss of receipts — conditions of reissue.
ARM 4.12.1028 Warehouse shortage — remedies.

80-4-427. Injunction.

Compiler's Comments

1993 Amendment: Chapter 452 inserted fourth sentence allowing filing in First Judicial District Court; and made minor changes in style. Amendment effective July 1, 1993.

1987 Amendment: At end of section changed "80-4-429" to "80-4-428".

80-4-428. Penalty for operating without a license — misrepresentation.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

80-4-429. Penalty.

Compiler's Comments

2001 Amendment: Chapter 168 in (4) substituted "80-4-402(5)(b)(vi)" for "80-4-402(4)(f)". Amendment effective March 30, 2001.

Saving Clause: Section 4, Ch. 168, L. 2001, was a saving clause.

1997 Amendment: Chapter 76 in (1), in three places, extended references to part 7 and at end, after "misdemeanor", deleted "and is punishable by imprisonment in a county jail not to exceed 6 months or by a fine of not more than $1,000, or both"; in (4) near middle, substituted "producer" for "commodity dealer"; inserted (5) providing that a person knowingly delivering an agricultural commodity containing a nitrogen fertilizer added to harvest grain, a substance not registered or approved by federal or state law, or a registered or approved substance not used or applied according to label directions is guilty of a felony; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

1995 Amendment: Chapter 337 inserted (4) setting penalty for failure to pay amounts due to commodity dealer by person exempt from licensure as commodity dealer. Amendment effective April 7, 1995.

1993 Amendment: Chapter 452 near middle of (2), before "contract", substituted "purchase" for "credit sale"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: Inserted (3) designating as felonies certain acts of commodity dealer or warehouseman (now warehouse operator).

Severability: Section 11, Ch. 299, L. 1991, was a severability clause.

Part 5
Agricultural Commodity Warehouse Operators

Part Administrative Rules

Title 4, chapter 12, subchapter 10, ARM Grain rules.

Title 4, chapter 13, subchapter 10, ARM State Grain Laboratory Division — rules.

Part Collateral References

What constitutes "transfers in settlement or realization of a lien or other security interest" within UCC §6-103(3) of Bulk Sales Transfers Act. 86 ALR 4th 1104.

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place. 76 ALR 4th 883.

Sales: what is "entrusting" goods to merchant dealer under UCC §2-403. 59 ALR 4th 567.

80-4-501. License necessary to operate public warehouse.

Compiler's Comments

1997 Amendment: Chapter 76 in second sentence in (1), after "requirement", inserted "and other requirements in parts 4 through 6 that regulate the activities of a warehouse operator" and inserted third sentence providing that provisions of parts 4 through 7 apply to a federally licensed warehouse operator in business as a commodity; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Attorney General's Opinions

Exemption — Out-of-State "Annex": A grain merchandising facility located 900 feet within the Montana border could not be classified as an "annex" of a North Dakota operation and exempted from licensing and grain storage obligations under 80-4-202 (repealed in 1983). 36 A.G. Op. 89 (1976).

Collateral References

Warehousemen *key* 6.

93 C.J.S. Warehousemen and Safe Depositaries §5.

80-4-502. Licenses to warehouse operator — issuance — renewal — conditions precedent.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

1989 Amendment: In (1)(f) inserted last two sentences relating to additional bonding if current assets are equal to or greater than liabilities. Amendment effective March 20, 1989.

Administrative Rules

ARM 4.12.1020 Financial statements — filing date.

80-4-503. Fees of department.

Compiler's Comments

1993 Amendment: Chapter 452 near beginning of (1), after "fee", substituted "of $232 for each warehouse owned or operated by the warehouse operator" for "based on the number of warehouses owned by the warehouseman, according to the following schedule:

For each warehouse listed in the application:

Capacity in Hundredweight	Rate
0 to 25,000	$ 35
25,001 to 50,000	60
50,001 to 125,000	85
125,001 to 250,000	110
250,001 to 375,000	135
over 375,000	160";

deleted former (2) that read: "The department shall collect a fee of $50 for each initial licensing inspection of a warehouse or station"; substituted present (2) allowing a fee increase by rule for former (3) that read: "The department shall collect a fee of $25 for each amendment of a license"; substituted present (4) regarding deposit of fees for former (5) that read: "All fees must be deposited into the state treasury and credited to the general fund account"; and made minor changes in style. Amendment effective July 1, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 452, L. 1993, provided: "A statement of intent is required for this bill because 80-4-503 and 80-4-602 grant to the department of agriculture the authority to set license fees outside the statutory scale established in those sections. It is intended that the department, as part of the ongoing administration of the commodity dealer and public warehouse operator program, evaluate the amount of revenue generated by license fees and adjust the fees as necessary within the statutory maximum to ensure proper operation of the program."

1987 Amendment: In (1) increased license fees by $10 in each category.

Administrative Rules

ARM 4.12.1024 License fees for commodity dealers and public warehouses.

80-4-504. Bond of applicant for license — additional bond — additional obligations.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

1985 Amendment: In first sentence of (1) inserted "or its equivalent, as established by department rule".

Administrative Rules

ARM 4.12.1021 Bond conditions — cancellation.

ARM 4.12.1022 Certificates of deposit or other bond equivalents.

Attorney General's Opinions

Bonding Requirement Exemption: A warehouse operator licensed under the United States Warehouse Act could not be required to execute a warehouse operator's bond under 80-4-205 (repealed in 1983). 36 A.G. Op. 36 (1975).

Collateral References

Warehousemen *key* 18, 22.

93 C.J.S. Warehousemen and Safe Depositaries §15.

80-4-505. Amount of bond — cancellation.

Compiler's Comments

1993 Amendment: Chapter 452 in (4) deleted second sentence that read: "The aggregate liability of the surety may in no event exceed the sum of the bond"; and made minor changes in style. Amendment effective July 1, 1993.

1985 Amendment: In second sentence of (4), after "aggregate" deleted "annual", deleted third sentence of (4) that read: "A continuous bond shall obligate a new penal sum with the commencement of each licensing year"; in (5) increased the notice period from 30 to 60 days and after "canceled" inserted remainder of subsection explaining surety liability in the event of cancellation.

Administrative Rules

ARM 4.12.1021 Bond conditions — cancellation.
ARM 4.12.1022 Certificates of deposit or other bond equivalents.

Collateral References

Warehousemen *key* 18, 22.
93 C.J.S. Warehousemen and Safe Depositaries §15.

80-4-506. Net asset requirements.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

1985 Amendment: Inserted (3) explaining asset valuation and providing an exception.

80-4-521. Duties of warehouse operator — content of records.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Collateral References

Warehousemen *key* 7.
93 C.J.S. Warehousemen and Safe Depositaries §7.
Tort liability of warehouseman for theft by servant. 15 ALR 2d 847.

80-4-522. Schedule of charges — posting.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Case Notes

Waiver of Storage: Plaintiff delivered a quantity of grain to an elevator. Three months later he sold it to the elevator company; at that time, while section 3-217, R.C.M. 1947 (80-4-223, MCA, repealed in 1983), required the warehouse operator to charge storage and 80-4-222, MCA (repealed in 1983), prescribed the penalty for failure to do so, none was charged when the sale was made. In an action to recover the balance of the sale price due, the buyer contended that no storage having been charged, the contract of sale was invalid as against public policy. The court held that the contract of storage, one of bailment, and the contract of sale were separate and distinct contracts, and in the absence of proof that the waiver of storage was an inducement for the sale, the latter transaction was valid. Spurgeon v. Imperial Elevator Co., 99 M 432, 43 P2d 891 (1935).

Attorney General's Opinions

Federal Act Exempt From State Law: The charges for grain storage that a warehouse operator, licensed under the United States Warehouse Act, may impose cannot be regulated by state law. However, state law remains effective as to persons licensed under the United States Warehouse

Act in those areas that are not regulated by the act, i.e., those activities not confined to the storage of grain. 36 A.G. Op. 36 (1975).

Collateral References

Warehousemen *key* 27.

93 C.J.S. Warehousemen and Safe Depositaries §61.

80-4-523. Required receipt of agricultural commodities according to capacity.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Collateral References

Warehousemen *key* 9.

78 Am. Jur. 2d Warehouses §§8, 40 through 50.

Liability of warehouseman for deterioration of goods due to improper temperature. 92 ALR 2d 1298.

Storage contract as a bailment of chattels or lease of place where chattels are stored. 138 ALR 1137.

Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied with statutory conditions necessary to become a public warehouseman. 108 ALR 928.

Deposit of grain without obligation to return identical grain as a bailment or a sale. 54 ALR 1166.

80-4-524. Discrimination in charge by warehouse operator prohibited.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

80-4-525. Scale weight tickets — form — issuance.

Compiler's Comments

1993 Amendment: Chapter 452 in (3), after first sentence, substituted remainder of present section regarding depositor's title for former second sentence that read: "The retention of scale weight tickets in lieu of warehouse receipts by the owner of the grain is at the owner's risk"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: Deleted former (5) concerning required wording on combination scale weight ticket and warehouse receipt; and deleted (7) concerning surrender of scale weight ticket exchanged for warehouse receipts.

Severability: Section 11, Ch. 299, L. 1991, was a severability clause.

80-4-526. Warehouse receipts — written terms.

Compiler's Comments

2001 Amendment: Chapter 168 in (3)(c) inserted "provided for in Title 30, chapter 7, part 2, that do not conflict with this part"; and made minor changes in style. Amendment effective March 30, 2001.

Saving Clause: Section 4, Ch. 168, L. 2001, was a saving clause.

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

80-4-527. Warehouse receipt — issuance — cancellation.

Compiler's Comments

1993 Amendment: Chapter 452 near beginning of (7), after "grower", deleted "and conducts such an enterprise"; inserted (12) regarding cancellation of warehouse receipts; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: In (8), near middle of first sentence after "given", inserted "upon request"; and inserted (11) concerning issuance of warehouse receipts when storage is charged.

Severability: Section 11, Ch. 299, L. 1991, was a severability clause.

Administrative Rules

ARM 4.12.1025 Agricultural seed warehouse receipts — written terms.

80-4-528. Penalty for unlawful issue of warehouse receipts.

Collateral References

Warehousemen *key* 36.

78 Am. Jur. 2d Warehouses §49.

80-4-529. Partial withdrawal of agricultural commodities — adjustment or substitution of receipt — duties of warehouse operator.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

80-4-530. Shipment of stored grain to a terminal grain warehouse outside the state.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

80-4-531. Duty to deliver stored agricultural commodities — weights and inspections — modifying agreements — damages.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

1989 Amendment: Inserted (2) relating to official inspection entitlement; inserted (3) establishing class X or Y weight entitlement or alternatives; and inserted (4) regarding binding storage agreements.

Case Notes

Bailment: An operator of a grain elevator is a public warehouse operator; delivery of grain for storage constitutes a bailment, and as bailee the operator must, under the Montana law, at all times keep on hand in bonded warehouses sufficient grain to make redelivery on all storage receipts and may not sell or deliver it out of storage except as provided by law. The operator may not use it for purposes of speculation on the market. Whorley v. Patton-Kjose Co., Inc., 90 M 461, 5 P2d 210 (1931).

80-4-532. Delivery of grain from different warehouse.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4

through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Collateral References

Warehousemen *key* 25(7).

80-4-533. Loss of receipts — conditions of reissue.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Administrative Rules

ARM 4.12.1026 Loss of receipts — conditions of reissue.

80-4-534. Cancellation of insurance — suspension of license.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

80-4-536. Termination of storage contract — sale of agricultural commodities for charges — notice required.

Compiler's Comments

1997 Amendment: Chapter 76 in (2) inserted third sentence authorizing a warehouse operator to apply for an encumbrance if a warehouse receipt is not returned, in fourth sentence inserted "who are subject to the provisions of subsection (3)", and at end of last sentence substituted "license year" for "storage period"; inserted (3) regarding termination of storage contracts on agricultural commodities evidenced by a warehouse receipt within 3 license years; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Administrative Rules

ARM 4.12.1027 Date of termination of storage contracts evidenced by warehouse receipts.

Collateral References

Warehousemen *key* 25(4), 27, 29, 34.

80-4-537. Examination of stored agricultural commodities.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

80-4-538. Warehouse shortage — remedies.

Compiler's Comments

1993 Amendment: Chapter 452 near middle of (7) substituted reference to First Judicial District Court for reference to District Court of the county in which the warehouse is located; in (8), after "recovered", inserted "at the discretion of the department from the assets of the licensee, from the agricultural commodities held by the licensee under warehouse receipt, or", before "district" inserted "the first judicial", and after "court" deleted "or recovered at the same time and as part of the seizure action filed under subsection (3)(a)"; at end of (9) substituted "part" for "section"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: Inserted (1) concerning receipt holder's claim when warehouse operator stores agricultural commodities of different kinds; in (3) inserted clause allowing Department to petition for an order in District Court of the First Judicial District, Lewis and Clark County; and in (8) changed internal reference.

Severability: Section 11, Ch. 299, L. 1991, was a severability clause.

Administrative Rules

ARM 4.12.1022 Certificates of deposit or other bond equivalents.

ARM 4.12.1028 Warehouse shortage — remedies.

80-4-539. Inspection by the department.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

Part 6
Agricultural Commodity Dealers

80-4-601. Commodity dealer license requirements — financial responsibility.

Compiler's Comments

1989 Amendment: In (3)(g) inserted last two sentences relating to additional bonding if current assets are equal to or greater than liabilities and deleted the following and inserted it at end of (4): "Assets must be shown at original cost less depreciation, except that upon written request filed with the department, the director may allow asset valuations in accordance with a competent appraisal. In determining total net assets, credit may be given for insurable property, such as buildings, machinery, equipment, and merchandise inventory, only to the extent that such property is protected by insurance against loss or damage by fire. The insurance must be in the form of lawful policies issued by one or more insurance companies authorized to do business and subject to service of process in suits brought in this state." Amendment effective March 20, 1989.

1985 Amendment: In (3)(g) combined third and former fourth sentences substituting "except that upon" for "Upon", and inserted last two sentences allowing credit only for certain property insured by Montana-authorized companies.

Administrative Rules

ARM 4.12.1020 Financial statements filing date.

ARM 4.12.1021 Bond conditions — cancellation.

ARM 4.12.1022 Certificates of deposit or other bond equivalents.

Attorney General's Opinions

Exemption — Out-of-State "Annex": A grain merchandising facility located 900 feet within the Montana border could not be classified as an "annex" of a North Dakota operation and exempted from licensing and grain storage obligations under 80-4-202 (repealed in 1983). 36 A.G. Op. 89 (1976).

80-4-602. License fees.

Compiler's Comments

1997 Amendment: Chapter 76 in (1), after "$232", inserted "per facility". Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

1993 Amendment: Chapter 452 at beginning of (1) inserted exception clause, after "fee" inserted "of $232", and after "license" deleted former fee schedule based on hundredweight (see 1991 MCA for schedule text); substituted (2) allowing an increase in fees by rule for former language that read: "Each applicant shall also pay a fee of $25 for each truck operated by it in the operation of its business as a commodity dealer"; inserted (3) establishing a fee for a commodity dealer who is licensed as a seed dealer; at end of (4) substituted "commodity dealer/public warehouse operators account" for "general fund"; and made minor changes in style. Amendment effective July 1, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 452, L. 1993, provided: "A statement of intent is required for this bill because 80-4-503 and 80-4-602 grant to the department of agriculture the authority to set license fees outside the statutory scale established in those sections. It is intended that the department, as part of the ongoing administration of the commodity dealer and public warehouse operator program, evaluate the amount of revenue generated by license fees and adjust the fees as necessary within the statutory maximum to ensure proper operation of the program."

1987 Amendment: In (1) increased license fees by $10 in each category.

Administrative Rules

ARM 4.12.1024 License fees for commodity dealers and public warehouses.

80-4-604. Bonding requirement amounts — cancellation.

Compiler's Comments

1993 Amendment: Chapter 452 deleted second sentence of (1) that read: "The aggregate liability of the surety may not exceed the sum of the bond"; deleted former second sentence of (3) that read: "The liability of the surety covers purchases made by the commodity dealer during the time the bond is in force"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: In last sentence of (1), before "liability", deleted "annual"; in (2), at beginning, deleted "Unless set by department rule" and deleted former third sentence authorizing Department to establish by rule a greater percentage for bond.

Severability: Section 11, Ch. 299, L. 1991, was a severability clause.

1985 Amendment: In (1), in first sentence, after "bond", inserted "or its equivalent, as established by department rule" and deleted last sentence that read: "A continuous bond shall obligate a new penal sum with the commencement of each licensing year"; in first sentence of (2), after "producer", deleted "or warehouseman"; in (3) increased notice period from 30 to 60 days in two places and at end of last sentence after "notice", inserted remainder of subsection explaining surety liability in the event of cancellation.

Administrative Rules

ARM 4.12.1021 Bond conditions — cancellation.

ARM 4.12.1022 Certificates of deposit or other bond equivalents.

Attorney General's Opinions

Bonding Requirement Exemption: A warehouse operator licensed under the United States Warehouse Act could not be required to execute a warehouse operator's bond under 80-4-205 (repealed in 1983). 36 A.G. Op. 36 (1975).

80-4-608. Payment of purchase price — definitions.

Compiler's Comments

1993 Amendment: Chapter 452 inserted second sentence of (1) that read: "Title to agricultural commodities sold to a commodity dealer under this section transfers to the commodity dealer upon physical delivery of the commodity"; and made minor changes in style. Amendment effective July 1, 1993.

80-4-612. Commodity dealer defaults — remedies.

Compiler's Comments

1993 Amendment: Chapter 452 inserted (3) and (4) regarding recovery of Department expenses. Amendment effective July 1, 1993.

Severability: Section 11, Ch. 299, L. 1991, was a severability clause.

80-4-613. Records.

Compiler's Comments

Severability: Section 11, Ch. 299, L. 1991, was a severability clause.

80-4-614. Claims on bond by injured person.

Compiler's Comments
Severability: Section 11, Ch. 299, L. 1991, was a severability clause.

Part 7
Inspection and Grading

Part Administrative Rules
Title 4, chapter 12, subchapter 10, ARM Grain rules.
Title 4, chapter 13, subchapter 10, ARM State Grain Laboratory Division — rules.

80-4-701. Official agricultural commodity inspectors, samplers, and weighers — designation of seasonal inspection points — assignment of inspectors.

Compiler's Comments
1997 Amendment: Chapter 76 in two places substituted reference to agricultural commodity for "grain". Amendment effective July 1, 1997.
Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Collateral References
Inspection *key* 4, 5.

80-4-702. Qualifications of official agricultural commodity inspectors, samplers, and weighers.

Compiler's Comments
1997 Amendment: Chapter 76 in two places, after "Official", substituted "agricultural commodity"for "grain"; near end, after "selling of", inserted "agricultural commodities"; and made minor changes in style. Amendment effective July 1, 1997.
Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Collateral References
Inspection *key* 4.

80-4-703. Penalty for misconduct.

Compiler's Comments
1997 Amendment: Chapter 76 in two places in (1) and in (2) substituted references to agricultural commodity for "grain"; in (3) substituted "official agricultural commodity inspector, sampler, or weigher" for "officer"; and made minor changes in style. Amendment effective July 1, 1997.
Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Collateral References
Inspection *key* 7; Weights and Measures *key* 8.

80-4-704. Establishment of standard agricultural commodity grades.

Compiler's Comments
1997 Amendment: Chapter 76 in (1), near beginning of first sentence, substituted "may" for "shall" and after "all" substituted "agricultural commodities for which a United States department of agriculture grade has not been established and that are bought by commodity dealers and stored" for "all grain", in second sentence, after "grade", inserted "and dockage" and substituted "agricultural commodities" for "grain", and inserted third sentence providing that any reference to a grade includes a reference to a protein analysis if analysis affects purchase price; in (2), in two places, substituted references to agricultural commodity for references to grain; and made minor changes in style. Amendment effective July 1, 1997.
Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Administrative Rules
ARM 4.13.1003 Standards for grading hulless barley.
ARM 4.13.1008 Standards for grading cultivated buckwheat.

80-4-705. Rules governing dockage — sample inspection.

Compiler's Comments

1997 Amendment: Chapter 76 in two places, in second sentence, substituted purchase price for references to price to be paid; in third sentence substituted "agricultural commodities" for "grain"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Administrative Rules

ARM 4.13.1003 Standards for grading hulless barley.

ARM 4.13.1008 Standards for grading cultivated buckwheat.

80-4-706. Special inspection of agricultural commodities.

Compiler's Comments

1997 Amendment: Chapter 76 throughout section substituted references to agricultural commodities for "grain"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

80-4-708. Examination of agricultural commodity cars or trucks at destination.

Compiler's Comments

1997 Amendment: Chapter 76 in two places in (1), in (2), and in four places in (3) substituted references to agricultural commodity for "grain"; in two places in (1) and in (2), after "doors", inserted "or lids"; and in three places in (1) and two places in (3), after references to car, inserted references to truck. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

80-4-709. Protein testing laboratory.

Administrative Rules

ARM 4.13.1004 Barley protein.

ARM 4.13.1005 Malting barley germination.

ARM 4.13.1006 Chit.

ARM 4.13.1007 Starch strength.

80-4-711. Agricultural commodity sampling — appeal procedure.

Compiler's Comments

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Effective Date: Section 25, Ch. 76, L. 1997, provided that this section is effective July 1, 1997.

80-4-721. Fees for inspection, testing, and weighing agricultural commodities — disposition — investment.

Compiler's Comments

1997 Amendment: Chapter 76 in (1), (2), and (3) substituted "agricultural commodities" for "grain"; deleted former (2) that read: "Payment of the fees referred to in subsection (1) must be divided equally between the warehouse operator and the holder of the warehouse receipt"; deleted former (3) that read: "(3) Those fees or proceeds are a lien upon the grain until paid"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

1989 Amendment: Inserted (2) providing for equal division of fees between the warehouse operator and holder of the warehouse receipt.

1983 Amendment: In (4) and (5), substituted "state special revenue fund" for "earmarked revenue fund" in four places.

Administrative Rules

ARM 4.13.1001A Grain fee schedule.

Collateral References

Inspection *key* 6; Weights and Measures *key* 8.

80-4-722. Records of inspection.

Compiler's Comments

1997 Amendment: Chapter 76 in three places in (1), in (1)(b), in (1)(c), in two places in (2), in two places in (3), and in (4) substituted references to agricultural commodity for "grain"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

Collateral References

Weights and Measures *key* 1 through 3.

94 C.J.S. Weights and Measures §3.

80-4-724. Coloration of agricultural commodities treated with injurious or toxic substances — exception.

Compiler's Comments

1997 Amendment: Chapter 76 in three places in first sentence in (1) substituted "agricultural commodity" for "grain" and inserted second sentence providing that the subsection does not apply to the application of pesticides to agricultural commodities; inserted (2) providing that a person who fails to comply with the section is subject to penalty; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

80-4-725. Sale or offering for sale of treated product prohibited.

Compiler's Comments

1997 Amendment: Chapter 76 in four places substituted "agricultural commodity" for "grain"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 23, Ch. 76, L. 1997, was a severability clause.

80-4-726. Copies of grades and rules to be furnished and displayed by warehouse operators.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

CHAPTER 5
AGRICULTURAL SEED

Chapter Law Review Articles

Legal Ownership of Plant Genetic Resources — Fewer Options for Farmers, Gustad, 18 Hamline L. Rev. 459 (1995).

Brown Bagging It—Free Lunch for Farmers, Cantor, 75 J. Pat. & Trademark Off. Soc'y 754 (1993).

Chapter Collateral References

Constitutionality of statutes relating to grading, packing, or branding of farm products. 73 ALR 1445.

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1987).

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Certification of Agricultural Seeds in Montana: A Report to the 47th Legislature, Study Committee on Seed Certification, Montana Legislative Council (1980).

Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 1
Seed Labeling — Licensing — Certification

Part Compiler's Comments

Arbitration Study: Section 15, Ch. 345, L. 1999, provided: "Arbitration study. During the 1999-2000 interim, the department of agriculture shall conduct a study of the concept of arbitration as it applies to the seed industry. With input from the industry, the department shall investigate the feasibility of a department-sponsored arbitration program to assist in settling damage claims between seed buyers and seed sellers and report to the legislature regarding the results of the study. If an arbitration program is determined to be feasible, the department shall make recommendations to the 57th legislature regarding any legislation necessary to implement the arbitration concept. The study report and legislative recommendations, if any, must be presented to the legislature by September 1, 2000."

Part Administrative Rules

ARM 4.12.3002 Seed handling and labeling procedures.

80-5-120. Definitions.

Compiler's Comments

2001 Amendment: Chapter 407 in definition of prohibited noxious weed seeds at end substituted "as defined in 7-22-2101(8)(a)(i)" for "under 7-22-2101(7)(a)(i)"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 345 inserted definitions of advertisement, bulk, conditioning, dormant, genuine grower declaration, germination, hard seeds, inert matter, kind, lot, mixture, pure live seed, pure seed, stop sale, treated, type, variety, and viable; deleted definition of bin-run seed sales that read: ""Bin-run seed sales" means seed sales from one farmer to another farmer with seeds sold "as is", without guaranty or analysis"; in definition of controlling the pollination deleted former second sentence that read: "Hybrid designations must be treated as variety names"; in definition of hybrid at end of first sentence in (c) inserted exception clause and inserted second and third sentences prohibiting hybrid destination of crosses of second generation of subsequent generations and requiring that hybrid designation be treated as variety names; substituted definition of labeling for former definition that read: ""Labeling" means to affix, before offering the seed for sale, on the exterior of the container in a conspicuous place a label written or printed in the English language that has not been altered, giving the information required under this chapter"; deleted former definition of name of the state in which the seed was grown that read: ""Name of the state in which the seed was grown" means any of the several states of the United States or a foreign country"; deleted former definition of percentage of germination that read: ""Percentage of germination" means the percentage of seeds that show normal sprouts as evidence of vitality when the seeds are subjected to the proper moisture and temperature conditions with proper aeration for the customary length of time for each specific kind of seed, as specified in the rules for seed testing adopted by the association of official seed analysts"; deleted former definition of percentage viability that read: ""Percentage viability" means the percentage of live seed capable of producing a normal seedling under optimum growing conditions, after all forms of dormancy have been overcome, if present"; in definition of prohibited noxious weed seeds after "seeds of" substituted "plant species designated as noxious weeds under 7-22-2101(7)(a)(i)" for former text that read: "perennial plants that not only reproduce by seed but also may spread by underground roots, stems, and other reproductive parts and that, when well established, are highly destructive and difficult to control in this state by ordinary good cultural practice. Prohibited noxious weed seeds include the seeds of:

(a) leafy spurge (Euphorbia esula);

(b) Russian knapweed (Centaurea repens); and

(c) plants that are designated by rule of the department as prohibited noxious weeds"; substituted "Restricted weed seeds" for "Restricted noxious weed seeds", after "seeds" deleted "and bulbets", after "plant" inserted "that may adversely affect agriculture or the environment and that are", and deleted former provisions that read: "The term includes the seeds of:

(a) spotted knapweed (Centaurea maculosa); and

(b) dyers woad (Isatis tinctoria)"; in definition of seed conditioning plant after "business" inserted "whether a permanent or portable facility" and substituted "that conditions seeds" for "that repackages, conditions, blends, treats, or otherwise manipulates agricultural seeds"; in definition of seed dealer substituted "a person who sells seeds" for "any person who offers for sale, sells, or barters agricultural seeds"; in definition of seed labeler after "labels to" deleted

"agricultural" and substituted "required in 80-5-123" for "required in 80-5-102, when such seed is distributed in Montana"; in definition of vegetable seeds at end inserted "or herbs"; in definition of weed seeds after "seeds" deleted "or bulbets"; and made minor changes in style. Amendment effective July 1, 1999.

1987 Statement of Intent: The statement of intent attached to Ch. 373, L. 1987, provided: "This bill requires a statement of intent because section 1 [80-5-120] and 80-5-105 [renumbered 80-5-134], as amended, require the department of agriculture to adopt rules defining noxious weed seeds.

It is the intent of the legislature that the department establish rules for prohibited or restricted noxious weed seeds for the purpose of implementing Title 80, chapter 7, part 8, and Title 7, chapter 22, part 21. The legislature intends that noxious weed seeds be classified into two categories, prohibited noxious weed seeds and restricted noxious weed seeds. The characteristics of the two categories are as follows:

(1) "Prohibited noxious weed seeds" means seeds of perennial plants that not only reproduce by seed but also may spread by underground roots, stems, and other reproductive parts and which, when well established, are highly destructive and difficult to control in this state by ordinary good cultural practice.

(2) "Restricted noxious weed seeds" are seeds of weeds that are very objectionable in fields, lawns, and gardens of this state that can be controlled by good cultural practices.

The legislature intends that seeds designated as noxious weed seeds under current statutes need not be identical to seeds classified as noxious weed seeds under rules adopted by the department. However, the department shall include the seeds of leafy spurge and Russian knapweed in the prohibited noxious weed seeds category. In addition, the department shall designate the seeds of spotted knapweed and dyers woad as restricted noxious weed seeds. Thus, except as otherwise provided under this act, the Montana department of agriculture shall determine which noxious weed seeds must be prohibited and which noxious weed seeds should be restricted and at what levels."

80-5-123. Label requirements for agricultural, vegetable, flower, and indigenous seeds.

Compiler's Comments

2001 Amendment: Chapter 567 inserted (1)(e) requiring label notification of the requirement for alternative dispute resolution; and made minor changes in style. Amendment effective October 1, 2001.

Saving Clause: Section 14, Ch. 567, L. 2001, was a saving clause.

Effective Date: Section 18, Ch. 345, L. 1999, provided that this section is effective July 1, 1999.

Administrative Rules

ARM 4.12.3002 Seed handling and labeling procedures.

80-5-124. Exemptions.

Compiler's Comments

Effective Date: Section 18, Ch. 345, L. 1999, provided that this section is effective July 1, 1999.

80-5-125. Exchange of seed between labelers.

Compiler's Comments

1987 Amendment: In second sentence of (1), after "container", inserted "of seed", after "carry" deleted "appropriate", and after "designation" deleted "and shall be accompanied by mechanical analysis for each lot so involved"; and inserted (2) requiring a lot number and a complete label.

80-5-126. Analysis by seed laboratory — reports.

Compiler's Comments

1987 Amendment: Near beginning changed name to "seed laboratory" from "grain and seed laboratory"; deleted requirement to "inspect" seeds; in third sentence made the annual report discretionary rather than mandatory; and deleted former last two sentences that read: "The laboratory and the department shall have free access at all reasonable hours to all premises or structures to make examination of any seeds or any other premises of a warehouse, elevator, or railway company. Upon tendering payment at the current value, the department may take any sample of seeds."

Administrative Rules

ARM 4.12.3402 Seed laboratory analysis fees.

Collateral References

Inspection *key* 4, 5.

3 Am. Jur. 2d Agriculture §§52, 53, 55.

80-5-127. Testing of submitted samples.

Compiler's Comments

1987 Amendment: At beginning of section, after "The", deleted "grain and"; after "analyze any" inserted "official"; and at end of section, after "department", inserted language relating to Federal Seed Act and procedural guidelines.

80-5-128. Laboratory testing of samples — fees.

Compiler's Comments

1999 Amendment: Chapter 345 at end of third sentence after "under" substituted "this chapter" for "80-5-102 through 80-5-105 and 80-5-107 through 80-5-113"; and made minor changes in style. Amendment effective July 1, 1999.

1987 Amendment: In first sentence, after "request the", deleted "grain and"; in second sentence, after "rates", substituted "established by rule of the department as recommended by the agricultural experiment station" for "determined jointly by the department and the director of the grain and seed laboratory"; and in third sentence, after "collected by the", deleted "grain and" and at end, after "under", changed "80-5-101" to "80-5-102".

Administrative Rules

ARM 4.12.3402 Seed laboratory analysis fees.

80-5-129. Certificate of test presumptive evidence.

Compiler's Comments

1987 Amendment: Near beginning of section, before "seed laboratory", deleted "grain and".

80-5-130. Licensing — application — fee.

Compiler's Comments

1999 Amendment: Chapter 345 at beginning of (1) substituted "facilities located in the state that condition agricultural seed" for "seed conditioning plants" and after "each" deleted "plant before doing business in this state"; at beginning of (3) substituted current language regarding name and address on seed label for "All seed labelers and growers who labor or affix written claims to their seed"; inserted (3)(c) excluding Montana grower labeling seeds of labeler's own production with gross annual sales value of $5,000 or less from licensing requirements; in (4)(b) substituted current language regarding gross sales value of $1,000 or less a year for "a Montana certified seed grower when selling certified seed from his own production"; in (4)(c) substituted "a person selling seed only to a Montana-licensed seed dealer, labeler, or conditioner" for "a grain producer when making bin-run seed sales"; inserted (4)(d) excluding Montana grower selling own production with gross annual sales value of $5,000 or less from licensing requirements; deleted former (5) that read: "(5) Each person selling seed from a location other than the licensed place must be listed on the application for license"; deleted former (6) that read: "(6) The department shall set by rule the period for which a license is issued under this section"; deleted former (7) that read: "(7) The department may establish by rule minimum standards for equipment and handling procedures for facilities to be licensed"; in former (8) deleted second and third sentences that read: "The fee must include the cost of application for a license and must be nonrefundable. The department may by rule establish license fees which bear a reasonable relationship to the cost of administering this part"; in (5)(a) after "Each" substituted "type of license for an in-state person" for "Each license"; inserted (5)(b) through (5)(e) outlining various licenses fees; in (6)(c) substituted "required by department rule" for "the application is for a seed dealer's license"; in (7) before "seed" inserted "agricultural"; in (7)(a)(i) and (7)(a)(ii) substituted "seed dealer" for "seller"; and made minor changes in style. Amendment effective July 1, 1999.

Termination Provision Repealed: Section 1, Ch. 149, L. 1991, repealed sec. 5, Ch. 446, L. 1989, which terminated the 1989 amendments to this section July 1, 1991. Effective March 25, 1991.

1989 Amendment: Inserted (10) relating to information required on bill of lading for seed shipments. Amendment effective April 5, 1989, and terminates July 1, 1991.

Preamble: The preamble to Ch. 446, L. 1989, provided: "WHEREAS, the growth and spread of noxious weeds in the State of Montana has become one of the single greatest natural threats to the state's agricultural industry and economy; and

WHEREAS, this threat frequently materializes when seeds shipped into this state contain unlawful noxious weed seeds which become planted with agricultural seed crops before the Department of Agriculture has the knowledge and opportunity to embargo the shipment; and

WHEREAS, the Legislature of the State of Montana finds it appropriate to use existing Department of Highways [now Department of Transportation] personnel and the facilities in the Gross Vehicle Weight Division to obtain bills of lading on all seed shipments into the state and forward the bills of lading to the Montana Department of Agriculture in order to enhance its enforcement capabilities."

1987 Amendment: Near beginning of (1), after "plants", deleted "and seed labelers", after "department" inserted "for each plant", after "however, a" deleted "Montana certified", after "conditioning" deleted "or labeling certified", and deleted former last sentence that read: "Bin run seed sales from one farmer to another are exempt from this part"; deleted former (2), (3), and (6) that read: "(2) All licenses are issued on a fiscal-year basis and expire on June 30 of each year.

(3) Application for license is made in a manner and on forms provided by the department. A nonresident shall file a written power of attorney designating the secretary of state as his agent, and the power of attorney shall be so prepared and in such form as to render effective the jurisdiction of the courts of the state of Montana over the nonresident applicant. A nonresident who has a duly appointed resident agent upon whom process may be served as provided by law is not required to designate the secretary of state as his agent. The department shall be furnished with a certified copy of the designation of the secretary of state or of a resident agent.

(6) Failure on the part of a licensee to comply with the rules issued under the authority of this section is sufficient cause for cancellation of a license by the department, provided the licensee is given a reasonable opportunity to correct inadvertent and nonrecurring deficiencies"; inserted (2) requiring posting of fees and license designation; inserted (3) requiring licensing of seed labelers and growers and providing certain licensing exceptions; inserted (4) requiring licenses for seed sellers and distributors and providing certain licensing exceptions; inserted (5) requiring listing of each person selling seed from a location other than the licensed place; inserted (6) allowing the Department to set the period of license issuance by rule; in (7), after "licensed", deleted "and may carry out inspections during normal business hours to determine that these standards are being adhered to"; in (8) inserted second sentence allowing the Department to set license fees commensurate with administrative costs; and inserted (9) setting out application requirements.

1983 Amendments: Chapter 464, twice in (1), changed "processing" to "conditioning"; and in first sentence of (1), changed "section" to "part".

Chapter 539 made the following changes: near beginning of (1), deleted "seed buyers, and public agricultural seed warehouses" before "shall obtain"; in (2) deleted "A license may cover any or as many as all four activities: processing plant, seed labeler, seed buyer, and public agricultural seed warehouse"; and deleted (7), which read: "The department may by rule establish bonding and insurance requirements for each class of license."

Administrative Rules

Title 4, chapter 12, subchapter 30, ARM Seed warehouse rules.

ARM 4.12.3005 Posting of license.

ARM 4.12.3008 License year.

80-5-131. Assessment on sales into Montana — reporting — rulemaking.

Compiler's Comments

Effective Date: Section 18, Ch. 345, L. 1999, provided that this section is effective July 1, 1999.

80-5-132. Deposit of funds — seed account.

Compiler's Comments

1999 Amendment: Chapter 345 in second sentence in (1) after "license" inserted "assessment, filing" and inserted third sentence regarding deposit of gifts, grants, cost-share funds, and other funds consistent with chapter purpose. Amendment effective July 1, 1999.

1993 Amendment: Chapter 602 substituted present section creating seed account and providing for deposit of funds in the account for former section that read: "All money collected under the provisions of this part shall be deposited to the general fund." Amendment effective July 1, 1993.

80-5-133. Inspection.

Compiler's Comments

1999 Amendment: Chapter 345 at beginning substituted "Consistent with the responsibilities of this chapter, authorized representatives of the department, upon presentation of department-issued credentials" for "To enforce this chapter, the department" and after "times" inserted "or under emergency conditions"; in second sentence after "may" inserted "inspect or investigate", after "review" inserted "and copy", and after "seed" inserted "or licensing requirements"; at beginning of third sentence deleted "The department may take any sample of seeds as may be required"; and made minor changes in style. Amendment effective July 1, 1999.

80-5-134. Prohibitions.

Compiler's Comments

1999 Amendment: Chapter 345 at beginning of (1) after "person" deleted "firm, corporation, partnership, or association"; deleted former chart in (1)(b) regarding maximum number of seeds allowed per pound (see 1999 Session Law for former text); deleted former (1)(d) that read: "(d) the germination of vegetable seed at the time of packaging was equal to or above standards prescribed in the Federal Seed Act, 7 U.S.C. 1551 through 1610, amended October 15, 1967, with subsequent revisions"; in (1)(f) substituted language regarding certificate of plant variety protection for former (6) that read: "(6) is labeled with a variety name for which a U.S. certificate of plant variety protection has been issued or applied for under the provisions of the Plant Variety Protection Act (7 U.S.C. 2321, et seq.) without the authority of the owner of the variety or" and at end after "mixture" deleted "by or with approval of the owner of the variety"; inserted (1)(g) prohibiting sale or transport of seed with false or misleading labeling; inserted (1)(h) prohibiting sale or transport of seed that has been falsely or misleadingly advertised; inserted (2) outlining illegal activities; and made minor changes in style. Amendment effective July 1, 1999.

1987 Amendment: Near end of introduction, after "any", deleted "agricultural, vegetable, or flower"; in (2), after "excess of", inserted "either"; inserted (2)(a) providing for limiting numbers of noxious weed seeds by Department rule; in (2)(b), under "Common name", "Species", and "Number of seeds per pound", inserted "dyers woad (Isatis tinctoria) 0", under "Common name", "Species", and "Number of seeds per pound", deleted former classifications that read:

"dodder	(Cuscuta spp.)	18
blue lettuce	(Lactuca pulchella)	27
St.-Johnswort	(Hypericum perforatum)	27
oxeye daisy	(Chrysanthemum leucanthemum)	90
hoary alyssum	(Berteroa incana)	9
buckhorn plantain	(Plantago lanceolata)	90
chickweed	(Stellaria spp.)	9
curly dock	(Rumex crispus)	45",

and under "Number of seeds per pound", after "wild oats (Avena fatua) 45", inserted "(per pound of grass seed) 9 (per pound of cereal seed)"; and deleted former (5) that read: "(5) is represented in any manner to be for lawn seeding purposes, unless it contains at least 50% pure seed of fine-textured perennial species which shall be specified by rules under this part. However, grass mixtures which do not contain 50% pure seed of fine-textured perennial grasses may be sold. When these grass mixtures are contained in packages of 25 pounds or less, they shall carry the statements: "Not recommended for a fine-textured perennial turf. Satisfactory for a temporary ground cover or where coarse grass is not objectionable." A definition of fine-textured varieties to be adopted in the rules is as follows:

(a) bluegrasses—all varieties except Canada bluegrass (Poa compressa), annual bluegrass (Poa annua), and rough bluegrass (Poa trivialis);

(b) chewings red fescue and all improved varieties;

(c) creeping red fescue and all improved varieties;

(d) bentgrass—all varieties;

(e) fine-textured ryegrasses".

1987 Statement of Intent: The statement of intent attached to Ch. 373, L. 1987, provided: "This bill requires a statement of intent because section 1 [80-5-120] and 80-5-105 [renumbered 80-5-134], as amended, require the department of agriculture to adopt rules defining noxious weed seeds.

It is the intent of the legislature that the department establish rules for prohibited or restricted noxious weed seeds for the purpose of implementing Title 80, chapter 7, part 8, and Title 7, chapter

22, part 21. The legislature intends that noxious weed seeds be classified into two categories, prohibited noxious weed seeds and restricted noxious weed seeds. The characteristics of the two categories are as follows:

(1) "Prohibited noxious weed seeds" means seeds of perennial plants that not only reproduce by seed but also may spread by underground roots, stems, and other reproductive parts and which, when well established, are highly destructive and difficult to control in this state by ordinary good cultural practice.

(2) "Restricted noxious weed seeds" are seeds of weeds that are very objectionable in fields, lawns, and gardens of this state that can be controlled by good cultural practices.

The legislature intends that seeds designated as noxious weed seeds under current statutes need not be identical to seeds classified as noxious weed seeds under rules adopted by the department. However, the department shall include the seeds of leafy spurge and Russian knapweed in the prohibited noxious weed seeds category. In addition, the department shall designate the seeds of spotted knapweed and dyers woad as restricted noxious weed seeds. Thus, except as otherwise provided under this act, the Montana department of agriculture shall determine which noxious weed seeds must be prohibited and which noxious weed seeds should be restricted and at what levels."

Administrative Rules

ARM 4.12.3010 Prohibited noxious weed seeds.

ARM 4.12.3011 Restricted noxious weed seeds.

80-5-135. Screenings — restrictions on movements.

Compiler's Comments

1987 Amendment: In (1) changed "80-5-101" to "80-5-120"; and in (2), after "department", substituted "may adopt" for "has authority to issue".

1983 Amendment: In lead-in, changed "processing" to "conditioning".

Administrative Rules

ARM 4.12.3004 Handling of screenings.

80-5-136. Administration — stop sale order — violation — cancellation of license — enforcement.

Compiler's Comments

1999 Amendment: Chapter 345 inserted (1) requiring department to administer and enforce chapter and adopted rules; inserted (2) authorizing department to issue and enforce stop sale orders to seed owner or custodian and providing criteria pertaining to stop sale order; in two places in (4)(b) inserted "plus costs of prosecution"; and made minor changes in style. Amendment effective July 1, 1999.

1993 Amendment: Chapter 602 substituted (2) concerning violation or aiding in a violation for "Any person convicted of violating the provisions of this part or rules promulgated under the authority of this part is guilty of"; inserted (2)(a) regarding assessment of an administrative civil penalty; inserted (3) requiring establishment of a penalty matrix; and made minor changes in style. Amendment effective July 1, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 602, L. 1993, provided: "A statement of intent is required for this bill because rulemaking authority is granted in 80-5-207 [renumbered 80-5-136] to the department of agriculture to adopt rules regarding administrative civil penalties for violations of the agricultural seed laws. It is intended that the department establish a penalty matrix that sets out the kinds of administrative penalties applicable to violations of the agricultural seed laws and delineate the degrees of penalty that may be assessed for initial and subsequent administrative violations."

1987 Amendment: Substituted (1) (see 1987 Session Law for text) for former language that read: "The department may cancel any license issued by it when the provisions of this part have been violated by the holder of the license."

Administrative Rules

ARM 4.12.3012 Civil penalties — enforcement.

ARM 4.12.3013 Civil penalties — matrix.

80-5-137. Cooperation and agreements.

Compiler's Comments

Effective Date: Section 18, Ch. 345, L. 1999, provided that this section is effective July 1, 1999.

80-5-139. Rules — promulgated by department.

Compiler's Comments

1999 Amendment: Chapter 345 inserted (2) outlining subjects for rulemaking; inserted (3) authorizing department to adopt rules related to operation of state seed laboratory, procedures for submitting seed samples, and rates charged for analysis; and made minor changes in style. Amendment effective July 1, 1999.

Administrative Rules

ARM 4.12.3002 Seed handling and labeling procedures.

ARM 4.12.3008 License year.

80-5-140. Application of sections.

Compiler's Comments

1999 Amendment: Chapter 345 near end after "Montana certified" inserted "or "one year off certified""; and made minor changes in style. Amendment effective July 1, 1999.

80-5-141. Rules by Montana state university-Bozeman — certification agencies.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

80-5-144. Unlawful use of certification — penalty.

Compiler's Comments

1999 Amendment: Chapter 345 in middle after "Montana certified" inserted "or "one year off certified""; and made minor changes in style. Amendment effective July 1, 1999.

Part 2
Licensing
(Renumbered and Repealed)

Part Administrative Rules

Title 4, chapter 12, subchapter 30, ARM Seed warehouse rules.

Part Collateral References

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place. 76 ALR 4th 883.

Sales: what is "entrusting" goods to merchant dealer under UCC §2-403. 59 ALR 4th 567.

Part 3
Certification
(Renumbered)

Part Collateral References

Certification of Agricultural Seeds in Montana: A Report to the 47th Legislature, Study Committee on Seed Certification, Montana Legislative Council (1980).

Interim Report on Seed Certification, Montana Legislative Council (1979).

Part 4
Seed Potato Disease Control Act

Part Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 610, L. 1989, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of agriculture. It is the intent of the legislature that the department adopt rules to implement the quarantine provision contained in [section 3] [80-5-403] and the publication provision contained in [section 4] [80-5-404]. These rules should include but are not limited to procedures for:

(1) notification to growers of the provisions of [this act];

(2) inspection of imported seed potatoes, including the setting of inspection fees, if necessary;

(3) the quarantine of noncertified seed potatoes brought into the state;

(4) restrictions on the use of quarantined seed potatoes;
(5) disposition of the quarantined seed potatoes; and
(6) publication in counties where seed potatoes are grown of the prohibition on the planting of noncertified seed potatoes."

80-5-402. Definitions.

Compiler's Comments
1997 Amendment: Chapter 59 inserted definition of commercial purpose; and made minor changes in style.

Administrative Rules
ARM 4.12.1432 Preventing spread of late blight disease of potatoes (solanum tuberosum L.).

80-5-403. Imported seed potatoes — restrictions — exceptions.

Compiler's Comments
1997 Amendment: Chapter 59 in (1), in introductory clause after "commercial", deleted "or agricultural"; in (1)(b), at beginning, substituted "subject to inspection" for "inspected"; deleted former (1)(b) that read: "(b) seed or commercial potatoes, equipment, machinery, bags, or containers known to be diseased or contaminated with bacterial ring rot, nematode, or tuber moth may not be brought into this state"; in (2) substituted "subsection (1)" for "this section"; in (3) substituted language concerning diseased or contaminated material not being brought into state for "The department shall quarantine seed potatoes imported into the state in violation of this section. The department shall adopt rules governing quarantines and regulating the use or disposition of quarantined seed potatoes"; and made minor changes in style.

80-5-404. Planting noncertified seed potatoes prohibited — exceptions.

Compiler's Comments
1997 Amendment: Chapter 59 in (1), near middle after "unlawful", deleted "after January 1, 1990"; in (1)(b), at beginning, substituted "subject to inspection" for "inspected"; deleted former (2) that read: "The provisions of this section apply only to counties where Montana certified seed potatoes are produced and certified by Montana state university-Bozeman during the preceding crop year as provided for in 80-5-301 through 80-5-305. On or before November 15 of each year, the department shall compile from official certification records at Montana state university-Bozeman a list of counties affected by this section and shall publish the provisions of this section throughout those counties"; and made minor changes in style.
Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

80-5-405. Enforcement — penalty.

Compiler's Comments
1997 Amendment: Chapter 59 inserted (2) allowing the Department to issue orders for potatoes in violation of part; inserted (3) allowing the Department to adopt rules governing the quarantine of potatoes; and made minor changes in style.

Part 5
Agricultural Seed Contract
Alternative Dispute Resolution

Part Compiler's Comments
Saving Clause: Section 14, Ch. 567, L. 2001, was a saving clause.
Effective Date: This part is effective October 1, 2001.

CHAPTER 6
APICULTURE

Chapter Administrative Rules
Title 4, chapter 12, subchapter 1, ARM Apiculture rules.

Chapter Law Review Articles

The Honey Bee and the Law: Who's Responsible for Injuries Inflicted by Stinging Bees?, Williams, 66 L. Inst. J. 1108 (1992).

Chapter Collateral References

Beekeeping regulation: validity and construction. 55 ALR 4th 1223.

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 1
Registration — Apis Bees

80-6-101. Definitions.

Compiler's Comments

2001 Amendment: Chapter 7 deleted former definition of queen apiary that read: ""Queen apiary" means an apiary or premises in which queen bees are reared or kept for sale or gift." Amendment effective October 1, 2001.

1993 Amendment: Chapter 491 in definition of bee diseases, after "means", deleted "American or European foulbrood, sacbrood, bee paralysis, bee parasites, or other" and inserted second sentence requiring Department to designate by rule specific bee diseases subject to regulation under parts 1 through 3 of this chapter. Amendment effective July 1, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 491, L. 1993, provided: "A statement of intent is required for this bill because additional rulemaking authority is extended to the department of agriculture's present authority to regulate apiculture in the following sections:

(1) The definition of "bee diseases" in 80-6-101(2) is intended to allow the department to establish by rule what specific diseases of bees are subject to regulation.

(2) Section 80-6-303(2) is intended to grant the department the authority to establish a penalty matrix that sets out the kinds of administrative penalties that are applicable to violations of Montana apiculture law and to delineate the degrees of penalty that may be assessed for initial and subsequent administrative violations."

1991 Amendment: Added bee parasites to definition of bee diseases; in definition of landowner, in first sentence before "use", deleted "actual"; and made minor changes in style. Amendment effective February 1, 1991.

Severability: Section 4, Ch. 9, L. 1991, was a severability clause.

1987 Amendment: Inserted definition of pest.

1981 Amendment: Inserted definitions of department, family unit, general apiary, hobbyist apiary, hobbyist beekeeper, landowner, landowner apiary, and pollination apiary.

Administrative Rules

ARM 4.12.108 Hourly inspection fee.

ARM 4.12.111 Regulated bee diseases.

80-6-102. Registration.

Compiler's Comments

1987 Amendment: In (6) inserted "or pests"; and in (9) inserted reference to $10 fee.

1987 Statement of Intent: The statement of intent attached to Ch. 198, L. 1987, provided: "A statement of intent is required for this bill because it provides the department of agriculture authority to adopt rules for administration of this act.

It is the intent of the legislature that the department establish rules for the detection of pest honeybees by using the most efficient, scientifically acceptable method of identifying pests.

It is further the intent of the legislature that the department establish by rule a fee structure for laboratory services. The department should set fees to correspond with the costs of providing services. These costs include both direct and indirect costs, plus expenses associated with operation of the laboratory authorized under section 9 [80-6-311].

In setting fees, the department may take into consideration the economic difficulties of the apiary industry and may reduce fees as may be necessary to promote increased use of services. The department may provide services at less than cost if alternative funding is available or if the economic conditions of the industry require the reduction of charges.

In addition, it is the intent of the legislature that the department establish by rule an effective method for conducting quarantines to prevent the entry and spread of harmful honeybee pests and

diseases, such as Africanized honeybees and honeybee mites. It is contemplated that the department quarantine any apiary where pest honeybees or any contagious or infectious diseases are present and, during the quarantine, prevent the removal from the apiary of any bees or equipment."

1981 Amendment: Added the last two sentences of (1) on class registration of apiaries; added material in (3)(d) after "which the apiary is located" relating to initial applications; inserted (3)(f) requiring information as to which class of apiary registration is being applied for; made change in grammar in (3)(g); added "and the class of apiary authorized by the registration" at the end of (4); inserted (10) providing for a penalty for failure to register an apiary; and inserted (11) explaining the effect of this section on registration issued prior to October 1, 1981.

Administrative Rules

ARM 4.12.105 Delineating honey producing seasons and registration periods.

Attorney General's Opinions

Administrative Standards: The Department of Agriculture may refuse to grant a permit for an apiary when there would be a danger of the spread of disease or when it would interfere with the proper feeding and honey flow of established registered apiaries. 36 A.G. Op. 84 (1976).

80-6-103. Changing locations — enlarging or selling apiaries.

Compiler's Comments

1981 Amendment: Inserted (3) providing exceptions to enlargement of apiaries beyond the number of hives authorized by registration; substituted "herein allowed is guilty of a misdemeanor and" for "authorized under a certificate of registration" in (4); inserted "set forth" after "penalties" in (4).

Administrative Rules

ARM 4.12.102 Apiary, located by permission.

ARM 4.12.103 New locations of apiaries.

80-6-104. Apiaries — termination of rights — abandonment.

Compiler's Comments

1987 Amendment: In (2), near beginning, inserted "or pest"; near end of first sentence inserted "or any apiary not registered in accordance with 80-6-102"; and near beginning of second sentence inserted "pest-infected or".

Administrative Rules

ARM 4.12.104 Limitations of colonies.

ARM 4.12.105 Delineating honey-producing seasons and registration periods.

80-6-105. Registration fees.

Compiler's Comments

1993 Amendment: Chapter 491 in (1) doubled amount of registration fees based on total number of colonies owned or possessed; and made minor changes in style. Amendment effective July 1, 1993.

1987 Amendment: In (1) reorganized fee schedule by eliminating classes from 11 to 50 colonies, 201 to 300 colonies, 1,001 to 2,000 colonies, and 3,001 to 4,000 colonies and increased applicable fees to $10 from $5, to $25 from $20, to $70 from $60, to $100 from $90, to $140 from $130, and to $200 from $150.

80-6-111. General apiary registrations.

Compiler's Comments

1987 Amendment: Near beginning of (1) inserted "pests".

80-6-114. Hobbyist apiary registrations.

Compiler's Comments

1987 Amendment: Near middle of (1)(d) inserted reference to "pests".

Part 2
Inspection and Certification — Apis Bees

80-6-201. Apiaries — powers and duties of the department.

Compiler's Comments

1991 Amendment: Inserted (4) allowing Department to enter into agreements in carrying out Montana bee policy; and made minor changes in style. Amendment effective February 1, 1991.

Severability: Section 4, Ch. 9, L. 1991, was a severability clause.

1987 Amendment: In introductory clause of (1) inserted "pests and"; in (1)(b), after "contaminated", inserted "with disease or pests"; in (1)(c), near beginning, inserted reference to "pests"; inserted (1)(d) allowing the Department to establish by rule interior and exterior quarantines; at end of (1)(e) inserted "or pests"; and inserted (3) allowing departmental provision of disease and pest inspection, sampling, and laboratory analysis services and allowing fees therefor.

1987 Statement of Intent: The statement of intent attached to Ch. 198, L. 1987, provided: "A statement of intent is required for this bill because it provides the department of agriculture authority to adopt rules for administration of this act.

It is the intent of the legislature that the department establish rules for the detection of pest honeybees by using the most efficient, scientifically acceptable method of identifying pests.

It is further the intent of the legislature that the department establish by rule a fee structure for laboratory services. The department should set fees to correspond with the costs of providing services. These costs include both direct and indirect costs, plus expenses associated with operation of the laboratory authorized under section 9 [80-6-311].

In setting fees, the department may take into consideration the economic difficulties of the apiary industry and may reduce fees as may be necessary to promote increased use of services. The department may provide services at less than cost if alternative funding is available or if the economic conditions of the industry require the reduction of charges.

In addition, it is the intent of the legislature that the department establish by rule an effective method for conducting quarantines to prevent the entry and spread of harmful honeybee pests and diseases, such as Africanized honeybees and honeybee mites. It is contemplated that the department quarantine any apiary where pest honeybees or any contagious or infectious diseases are present and, during the quarantine, prevent the removal from the apiary of any bees or equipment."

Administrative Rules

Title 4, chapter 12, subchapter 1, ARM Apiculture rules.

80-6-202. Inspection of bees or used beekeeping equipment transported interstate.

Compiler's Comments

1991 Amendment: In six places throughout section inserted reference to bees with regard to materials and equipment; in first sentence of (1), before "certified", inserted "under a compliance agreement or"; at beginning of (2)(b) inserted "Inspection fees for persons without a valid Montana compliance agreement"; inserted (2)(b)(iii) requiring inclusion of inspection fees at an hourly rate for persons without a compliance agreement; inserted (2)(c) establishing inspection fees for persons who have a compliance agreement; inserted (2)(d)(iii) requiring payment of an hourly rate for inspection of bees and materials from other states; and made minor changes in style. Amendment effective February 1, 1991.

Severability: Section 4, Ch. 9, L. 1991, was a severability clause.

1987 Amendment: In first and last sentence of (1) inserted "being apparently pest- and" before "disease-free" and in third sentence inserted "inspected and found to be apparently free of pests and diseases or until it has been"; and in (2) increased fee to $50 from $20 in two places and inserted reference to "pests" before "contagious or infectious disease".

Administrative Rules

ARM 4.12.106 Inspection of apiary equipment.
ARM 4.12.107 Inspection of pesticides damages.
ARM 4.12.108 Hourly inspection fee.

Part 3
General Provisions — Apis Bees

80-6-301. Orders effective until reversed or modified by court.

Administrative Rules

Title 4, chapter 12, subchapter 1, ARM Apiculture rules.

80-6-303. Penalty.

Compiler's Comments

1993 Amendment: Chapter 491 substituted (1)(a) and (1)(b) providing that a person violating or aiding in the violation of parts 1 through 3 or rules adopted under parts 1 through 3 is subject to either or both an administrative civil penalty not exceeding $1,000 to be deposited in the general fund or if the offense is a misdemeanor, a fine of not less than $25 or more than $500 or imprisonment in the county jail not exceeding 1 year, or both, for former language that read: "A person violating parts 1 through 3 is guilty of a misdemeanor and shall be fined not less than $25 or more than $500 or imprisoned in the county jail not exceeding 1 year or both fined and imprisoned"; inserted (2) requiring Department to establish by rule a penalty matrix scheduling types of penalties, amounts of penalties for first and subsequent violations, and any other matters necessary for administration of civil penalties and subjecting issuance of civil penalty to contested case procedures of Title 2, chapter 4, part 6; and inserted (3) providing that this part may not be construed as requiring the Department or its representatives to report violations of this part if public interest is best served by suitable notice or warning. Amendment effective July 1, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 491, L. 1993, provided: "A statement of intent is required for this bill because additional rulemaking authority is extended to the department of agriculture's present authority to regulate apiculture in the following sections:

(1) The definition of "bee diseases" in 80-6-101(2) is intended to allow the department to establish by rule what specific diseases of bees are subject to regulation.

(2) Section 80-6-303(2) is intended to grant the department the authority to establish a penalty matrix that sets out the kinds of administrative penalties that are applicable to violations of Montana apiculture law and to delineate the degrees of penalty that may be assessed for initial and subsequent administrative violations."

Administrative Rules

ARM 4.12.109 Civil penalties — enforcement.

ARM 4.12.110 Civil penalties — matrix.

80-6-311. Bee laboratory authorized.

Compiler's Comments

1987 Statement of Intent: The statement of intent attached to Ch. 198, L. 1987, provided: "A statement of intent is required for this bill because it provides the department of agriculture authority to adopt rules for administration of this act.

It is the intent of the legislature that the department establish rules for the detection of pest honeybees by using the most efficient, scientifically acceptable method of identifying pests.

It is further the intent of the legislature that the department establish by rule a fee structure for laboratory services. The department should set fees to correspond with the costs of providing services. These costs include both direct and indirect costs, plus expenses associated with operation of the laboratory authorized under section 9 [80-6-311].

In setting fees, the department may take into consideration the economic difficulties of the apiary industry and may reduce fees as may be necessary to promote increased use of services. The department may provide services at less than cost if alternative funding is available or if the economic conditions of the industry require the reduction of charges.

In addition, it is the intent of the legislature that the department establish by rule an effective method for conducting quarantines to prevent the entry and spread of harmful honeybee pests and diseases, such as Africanized honeybees and honeybee mites. It is contemplated that the department quarantine any apiary where pest honeybees or any contagious or infectious diseases are present and, during the quarantine, prevent the removal from the apiary of any bees or equipment."

Part 11
Alfalfa Leaf-Cutting Bees

Part Compiler's Comments

1987 Statement of Intent: The statement of intent attached to Ch. 310, L. 1987, provided: "It is the specific intent of the legislature that the department of agriculture shall establish standards for tolerances of pathogens and parasites and may establish standards for predators and nest destroyers that threaten alfalfa leaf-cutting bees. These standards should specify the parameters for the certification, importing, and quarantining of bees. The standards should be based upon scientific and economic considerations. The department also should establish the necessary procedures for registration, certification, quarantining, sampling, importing, and other functions designated in the act. These procedures should be reasonable and be based upon scientifically sound practices or logical administrative management. It is further the intent of the legislature that the department establish fees for services on a cost basis. The department shall consider both direct and indirect cost in determining the proper fee structure."

Part Administrative Rules

Title 4, chapter 12, subchapter 12, ARM Alfalfa leaf-cutting bee rules.

80-6-1101. Short title.

Compiler's Comments

1987 Amendment: Before "Act" inserted "Management".

80-6-1102. Definitions.

Compiler's Comments

1997 Amendment: Chapter 4 in definition of committee substituted reference to Montana Alfalfa Seed Committee established in 2-15-3004 for reference to Alfalfa Leaf-Cutting Bee Committee established in 2-15-3005. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 4, L. 1997, provided: "WHEREAS, the Legislature finds that the alfalfa seed industry and the alfalfa leaf-cutting bee industry are closely related; and

WHEREAS, the Legislature also finds that it is in the best interest of the people of the State of Montana to promote economy in government regulation of industry; and

WHEREAS, it is the intent of the Legislature to combine with the Montana Alfalfa Seed Committee the duties, responsibilities, and representation of the Alfalfa Leaf-Cutting Bee Committee and to grant the Montana Alfalfa Seed Committee the authority to administer the Alfalfa Leaf-Cutting Bee Management Act and the Alfalfa Seed Industry Act."

Transition: Section 4, Ch. 4, L. 1997, provided:"(This act] merges the alfalfa leaf-cutting bee committee into the Montana alfalfa seed committee and revises the membership of the Montana alfalfa seed committee to accommodate the merger. Because there are now incumbents holding positions on both committees, the legislature intends for the governor to make membership adjustments when necessary on and after [the effective date of this act] [effective July 1, 1997], in accordance with 2-15-3004 as amended by [this act]."

1995 Amendment: Chapter 57 deleted definition of custom pollinator that read: ""Custom pollinator" means a registered bee grower who for the purpose of pollination moves bees onto property not owned or leased by him"; deleted definition of emergency situation that read: ""Emergency situation" means a situation that requires the untimely movement of bees to a new food source. A situation may include drought, flood, hail damage, and other similar situations as defined by committee rule"; deleted definition of unrestricted area that read: ""Unrestricted area" means an area where a person may use new or used drilled boards, imported used laminates, or any similar material in the rearing of bees"; and made minor changes in style. Amendment effective February 10, 1995.

1989 Amendment: In definition of certification substituted "committee" for "department"; inserted definition of chalkbrood; in definition of committee, after "bee", deleted "advisory"; inserted definitions of custom pollinator and emergency situation; in definition of equipment, after "means", deleted "grooved boards" and after "apparatus" inserted "except nesting materials"; in definition of nesting materials, after "means", deleted "equipment" and after "laminates" inserted "drilled boards"; in definition of predator, after "organism", inserted "or insect" and after "bees" inserted "or nests"; inserted definition of unrestricted area; in definition of wild trap, after "means to", inserted "intentionally"; and made minor changes in form. Amendment effective March 20, 1989.

1987 Amendment: Deleted former (4) defining custom pollinator; inserted definitions of nest destroyer and predator; in (9), after "organism", deleted "parasitic or otherwise"; and in (12), after "owned", inserted "or leased".

1983 Amendment: Inserted (4) defining department.

80-6-1103. Committee responsibilities — adoption of rules.

Compiler's Comments

1989 Amendment: Throughout section changed "department" to "committee"; in (6)(b), after "equipment", inserted "and nesting material"; in (6)(c), after "equipment", inserted "or nesting material"; in (6)(d), after "equipment", inserted "or nesting material"; inserted (7) relating to abandoned nesting material or bees; and made minor changes in phraseology and punctuation. Amendment effective March 20, 1989.

1987 Amendment: In (3) inserted language concerning adoption of rules establishing standards for the presence of predators and nest destroyers and after "imported" inserted "quarantined"; inserted (4) allowing the Department to provide information and services relating to alfalfa leaf-cutting bees and alfalfa seed production; in (6)(a), after "inspect", inserted "equipment" and after "bees" deleted "or equipment that may be diseased or contaminated by parasites"; inserted (6)(b) allowing the Department to establish quarantines to regulate entry of bees and equipment; in (6)(c), after "contaminated", substituted "levels exceeding importation or quarantine" for "with pathogens at a level exceeding certification"; in (6)(d), after "destruction", inserted "or removal" and after "equipment that" substituted "does not meet importation or quarantine standards" for "is infected or contaminated with parasites or pathogens and that does not meet certification standards"; in (7)(a) substituted "bees" for "diseased or parasitic bee or equipment or otherwise possesses any bee" and after "quarantine" deleted "for not more than 30 days"; in (7)(b), after "quarantine", deleted "or order to hold bees upon the failure to detect disease in any official sample of bees, as provided by department rule, or on equipment and" and after "equipment are" deleted "possessed"; and made minor changes in phraseology.

1983 Amendment: In (5)(b), after "order to hold bees" inserted "upon the failure to detect disease in any official sample of bees, as provided by department rule, or on equipment and"; and after "bees and equipment" deleted "are disease-free and".

Administrative Rules

ARM 4.12.1220 Purpose of rules.

ARM 4.12.1221 Registration procedures and fees.

ARM 4.12.1224 Alfalfa leaf-cutting bees — certification procedures and fees.

80-6-1104. Advisory duty of committee.

Compiler's Comments

1989 Amendment: At end substituted "under this part" for "by the department". Amendment effective March 20, 1989.

1987 Amendment: Substituted periodic meetings for requirement of meeting at least once a year.

80-6-1105. Alfalfa leaf-cutting bees — certification.

Compiler's Comments

1989 Amendment: Throughout section changed "department" to "committee"; near middle of introductory clause in (2) substituted "a fee set by rule" for "the certification fee set by department rule"; in (2)(a) substituted "certified" for "registered"; at end of second sentence of (3) deleted "and sex ratio"; in (5), before "fee", substituted "an appropriate" for "a certification"; near beginning of (6) inserted "by rule" and deleted last sentence that read: "Applications for certification received after the date specified shall be assessed a penalty equal to 10% of the applicable certification fee but not exceeding $50"; and made minor change in phraseology. Amendment effective March 20, 1989.

1987 Amendment: After (1) substituted existing language (see 1987 Session Law for text) for "No person may import, possess, or control alfalfa leaf-cutting bees in the state of Montana unless the bees are certified annually, as provided in this section"; in (2) inserted "rule"; in (3), in second sentence, substituted "analyzed" for "inspected", after "parasites" inserted "predators, nest destroyers, live larvae count, and sex ratio", in third sentence, after "If", deleted "no pathogens or parasites in excess of", and after "certified" deleted "as to the appropriate class"; inserted (4) allowing bees to be certified to be stored in containers which can be officially sealed; and made minor changes in phraseology.

1983 Amendment: At end of (3), substituted "certified as to the appropriate class" for "reported disease-free"; in (4), substituted "meets certification standards" for "is disease-free"; in (5), substituted "certification" for "recertification"; and at end of (5), inserted "but not exceeding $50".

Administrative Rules

ARM 4.12.1224 Official certification procedures and fees.

ARM 4.12.1225 Bee sampling procedure for the certification of bees.

80-6-1106. Bee laboratory authorized.

Compiler's Comments

1989 Amendment: In two places substituted "committee" for "department". Amendment effective March 20, 1989.

1987 Amendment: In middle of first sentence, after "providing", deleted "disease and parasite".

1985 Amendment: In first sentence after "maintain a laboratory", deleted "at Montana state university".

80-6-1107. Restrictions on importing bees.

Compiler's Comments

1995 Amendment: Chapter 57 deleted (1) that read: "(1) All bees to be imported shall meet importation, quarantine, and certification requirements established under 80-6-1103 and must be registered in accordance with 80-6-1111"; deleted (2) that read: "(2) Prior to the importation of any bee, the importer shall file a completed application form as required in 80-6-1105(2) and arrange an approximate date and time for official sampling"; deleted (4) that read: "(4) A representative sample of the population of bees imported shall be the basis for certification"; and deleted (5) that read: "(5) A bee may not be certified unless all other requirements for certification provided in 80-6-1105 are met." Amendment effective February 10, 1995.

1989 Amendment: Deleted former (3) that read: "(3) Every imported bee must be shipped to a storage facility designated by the department for sampling purposes. Prior to certification, each bee, container, and piece of associated equipment must be quarantined at the designated storage facility"; deleted former (6) that read: "(6) No person may import used equipment or nesting materials"; and made minor changes in phraseology. Amendment effective March 20, 1989.

1987 Amendment: Substituted (1) (see 1987 Session Law for text) for former (1) that read: "No bee may be imported into the state of Montana except under the provisions of this section"; at end of (2) substituted "official sampling" for "inspection"; in (3), after "department", deleted "rule"; in (4), after "adequate", substituted "sampling" for "inspection"; in (5), after "shall be", deleted "inspected as"; and made minor changes in phraseology.

1983 Amendment: In first sentence of (3), substituted all language after "shipped" for "directly to the certification laboratory to be examined for infestation by parasites or pathogens"; in last sentence of (3), substituted all language after "each bee" for "and associated transport equipment shall be quarantined at the laboratory".

80-6-1108. Restrictions on rearing, moving, and trapping of bees and movement of equipment.

Compiler's Comments

1995 Amendment: Chapter 57 in (1), at end, substituted "wild trap within 1 mile of registered bees without the written permission of the registrant" for "rear any bee in a drilled board or a nesting material from which samples of loose larval cells cannot readily be obtained, except in an unrestricted area"; deleted (4) that read: "(4) A person may not sell bees for use in Montana unless the bees are officially certified in accordance with 80-6-1103 and 80-6-1105"; deleted (5) that read: "(5) Any purchase of used nesting material in the state must be reported to the committee"; and made minor changes in style. Amendment effective February 10, 1995.

1989 Amendment: At end of (1) inserted "except in an unrestricted area"; in (2) and (3), in two places, substituted "committee" for "department"; in (4), after "sell", deleted "or distribute" and before "in Montana" inserted "for use"; inserted (5) that read: "(5) Any purchase of used nesting material in the state must be reported to the committee"; and made minor changes in phraseology. Amendment effective March 20, 1989.

1987 Amendment: In (3) inserted second sentence requiring the Department to establish, by rule, a permit fee; and inserted (4) prohibiting sale or distribution of noncertified bees.

1983 Amendment: In (1), before "a nesting material" inserted "a drilled board or".

Administrative Rules
ARM 4.12.1230 Disease control — wild trapping permit — fee.

80-6-1109. Fees to be set by rule — self-supporting program — enterprise fund established.

Compiler's Comments
1989 Amendment: Throughout section changed "department" to "committee"; and made minor changes in phraseology. Amendment effective March 20, 1989.
1987 Amendment: Inserted (3) allowing investment of fund money pursuant to the unified investment program and providing for crediting of income to the fund.
1983 Amendment: In (2), changed "earmarked revenue account" to "enterprise fund" and changed "account" to "fund" in two places.

Administrative Rules
ARM 4.12.1221 Registration procedures and fees.
ARM 4.12.1224 Official certification procedures and fees.
ARM 4.12.1229 Fees established for service samples.

80-6-1110. Violation — penalty.

Compiler's Comments
1989 Amendment: Near middle substituted "committee" for "department". Amendment effective March 20, 1989.

80-6-1111. Alfalfa leaf-cutting bees — registration.

Compiler's Comments
1995 Amendment: Chapter 57 in (1), after "registered", deleted "annually"; substituted (3) regarding continuous registration for former language that read: "The committee shall by rule specify the date by which any applicant must apply for reregistration each year. Applications for reregistration received after the date specified must be assessed a penalty equal to 50% of the applicable registration fee"; and made minor changes in style. Amendment effective February 10, 1995.
1989 Amendment: In (2)(c) substituted "committee" for "department"; deleted former (3) that read: "(3) One sample of the bees to be registered must be sent to the department by the beekeeper or his agent. This sample must be analyzed for pathogens and parasites at no cost to the beekeeper. Additional samples may be sent to the department for analysis on a fee-for-service basis as established by rule"; at beginning of (3) substituted "committee" for "department" and after "shall" inserted "by rule"; and made minor changes in phraseology. Amendment effective March 20, 1989.

Administrative Rules
ARM 4.12.1221 Registration procedures and fees.

80-6-1112. Funding limitation.

Compiler's Comments
1989 Amendment: In (1), in two places, changed "department" to "committee"; inserted (2) regarding contracting of lab services; and inserted (3) through (6) relating to certification fees. Amendment effective March 20, 1989.

CHAPTER 7
DISEASE, PEST, AND WEED CONTROL

Chapter Administrative Rules
Title 4, chapter 12, subchapter 14, ARM Distribution and inspection of orchard and nursery stock.

Chapter Law Review Articles
Biological Control: A Little Knowledge Is a Dangerous Thing, Miller & Aplet, 45 Rutgers L. Rev. 285 (1993).
Developments in Agricultural Biotechnology, Parr, 19 Wm. Mitchell L. Rev. 457 (1993).

Environmental Law—The Federal Insecticide, Fungicide, and Rodenticide Act Does Not Preempt Local Governmental Regulation of Pesticide Use, Coverdell, 42 Drake L. Rev. 287 (1993).

Genetic Resources, Biodiversity and Environmental Protection: An Analysis, and Proposals Towards a Solution, Subramanian, 26 J. World Trade 105 (1992).

Bugged by a Precedent (precedent involving the Federal Insecticide, Fungicide, and Rodenticide Act), Rosenfeld, 206 N.Y.L.J. 2 (1991).

An Ounce of Prevention: The Need for Source Reduction in Agriculture, Bolin, 8 Pace Envtl. L. Rev. 63 (1990).

Biological Control Agents in Integrated Pest Management: Are They Regulated?, A Research Guide, Abrams, 8 Pace Envtl. L. Rev. 89 (1990).

Commentary: Using Special Water Districts to Control Nonpoint Sources of Water Pollution (Symposium on Prevention of Groundwater Contamination in the Great Lakes Region), Davidson, 65 Chi. Kent L. Rev. 503 (1989).

Plant Disease, Pest Control, and Pesticides: Limit Liability of Farmers, Teel, 5 Ga. St. U.L. Rev. 239 (1988).

Why Pesticides Received Extensive Use in America: A Political Economy of Agricultural Pest Management to 1970, MacIntyre, 27 Nat. Resources J. 533 (1987).

Measure of Actual Damages for Crop Failure in Action for Breach of Herbicide Warranty, Settle, 37 S.C.L. Rev. 57 (1985).

Chapter Collateral References

3 Am. Jur. 2d Agriculture §§42 through 51, 65 through 72.

Recovery of punitive damages for injuries resulting from transport, handling, and storage of toxic or hazardous substances. 39 ALR 5th 763.

Validity, construction, and application of state hazardous waste regulations. 86 ALR 4th 401.

Standing to sue for violation of state environmental regulatory statute. 66 ALR 4th 685.

Anticompetitive covenants: aerial spray dust business. 60 ALR 4th 965.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning paint, cleaners, or other chemicals. 58 ALR 4th 76.

Aviation insurance: causal link between breach of policy provisions and accident as requisite to avoid insurer's liability. 48 ALR 4th 778.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in farming, ranching, or agricultural labor. 46 ALR 4th 220.

Liability of termite or other pest control or inspection contractor for work or representations. 32 ALR 4th 682.

Exterminator's tort liability for personal injury or death directly resulting from operations. 29 ALR 4th 987.

Products liability for use of insecticides, pesticides, fungicides, and weed killers. 12 ALR 4th 462.

Products liability: farm machinery. 4 ALR 4th 13.

Liability for injury caused by spraying or dusting of crops. 37 ALR 3d 833.

Validity of statutes, ordinances, or regulations for protection of vegetation against disease or infection. 70 ALR 2d 852.

Necessity and sufficiency of environmental impact statements under §102(2)(C) of National Environmental Policy Act of 1969 (42 USCS §4332(2)(C)) in cases involving herbicide, pesticide, and related projects. 74 ALR Fed. 249.

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1987).

Wildlife Damage to Agriculture: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1986).

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Preservation of Agricultural Lands—Alternative Approaches: A Report to the 45th Legislature, Subcommittee on Agricultural Lands, Montana Legislative Council (1976).

Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 1
Control of Diseases and Insects in Nurseries

Part Administrative Rules

Title 4, chapter 12, subchapter 14, ARM Distribution and inspection of orchard and nursery stock.

Part Attorney General's Opinions

Availability of Viral Indexing Services: Nurserymen in Montana seeking to export nursery stock to Canada must have the stock virally indexed, i.e., certified by a state agency to be free of significant viral infection. Neither the Department of Agriculture nor Montana State University (now Montana State University-Bozeman) is required to conduct viral indexing of nursery stock. However, the Department of Agriculture is authorized to provide viral indexing services to nurserymen under 80-7-112 (now repealed) and 80-7-132. 39 A.G. Op. 26 (1981).

Part Collateral References

Validity of statutes, ordinances, or regulations for protection of vegetation against disease or infection. 70 ALR 2d 852.

Liability for injury to animals poisoned as result of spraying or dusting of crop. 12 ALR 2d 436, superseded by 37 ALR 3d 833.

Right to and measure of compensation for trees destroyed to prevent spread of disease or infection. 67 ALR 208.

80-7-105. Definitions.

Compiler's Comments

2001 Amendment: Chapter 407 in definition of plant pest in second sentence after "as defined in" substituted "7-22-2101(8)(a)(i)" for "7-22-2101(7)(a)(i)"; and made minor changes in style. Amendment effective July 1, 2001.

Effective Date: Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

80-7-106. License required — application and payment of license fee.

Compiler's Comments

1999 Amendment: Chapter 54 in (3)(a) and (3)(b) substituted "an affidavit" for "a notarized affidavit". Amendment effective March 15, 1999.

1997 Amendment: Chapter 366 in (2), at end of first sentence, substituted "the anniversary date established by the board of review established in 30-16-302" for "December 31 following the date of issue" and at end of second sentence inserted "and in the form determined by rule by the board of review established in 30-16-302"; in (4), after "license", substituted "on or before the annual anniversary date provided for in subsection (2)" for "by January 1 of each year"; inserted (7) regarding payment of fees by credit card and discounting of fees; and made minor changes in style.

1997 Statement of Intent: The statement of intent attached to Ch. 366, L. 1997, provided:"A statement of intent is required for this bill because [section 1] [30-16-104] grants rulemaking authority to the board of review established in 30-16-302 for the purpose of implementing a one-stop business licensing pilot project required by the 54th Legislature."

1995 Amendment: Chapter 147 deleted former (3) that read: "(3) The license fee is $95 per nursery"; inserted (3)(b) setting license fee for nurseries earning $1,000 to $3,000; inserted (3)(c) setting license fee for nurseries earning $3,000 or more; and made minor changes in style. Amendment effective January 1, 1996.

Effective Date: Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

80-7-107. Grounds for refusal or revocation of license.

Compiler's Comments

1993 Amendment: Chapter 551 in introductory clause, after "department", inserted "in accordance with Title 2, chapter 4"; at beginning of (1) substituted "firm" for "person"; and at end of (2) deleted "or the horticulture laws". Amendment effective January 1, 1994.

80-7-108. Nursery stock inspection — fees.

Compiler's Comments

Effective Date: Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

Administrative Rules

ARM 4.12.1405 Plant inspection certificate/survey/treatment costs — fees.

80-7-109. Duty to notify department of infestation.

Compiler's Comments

Effective Date: Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

80-7-110. Removal of infected nursery stock — assessment of costs.

Compiler's Comments

1993 Amendment: Chapter 551 near beginning of (1) substituted "firm" for "person", after "owning" deleted "any orchard or", after "stock" inserted "or other materials", after "injurious" substituted "plant pest" for "insect pest or disease and which becomes a menace to the agricultural or fruit industry or a menace to ornamental trees, shrubs, plants, or vines", near middle, after "injurious", substituted "plant pest" for "insect pest or disease", after "infected" deleted "orchard or", after "stock" inserted "or other material", near end, after "destroy the", deleted "orchard or", and after "stock or" inserted "other material or"; and made minor changes in style. Amendment effective January 1, 1994.

1983 Amendment: In (2), after "address" inserted "and to any purchaser of the property under contract for deed at his last-known post-office address".

Administrative Rules

ARM 4.12.1405 Plant inspection certificate/survey/treatment costs — fees.

ARM 4.12.1407 Right to hold nursery stock for inspection — condemnation of products.

80-7-122. Nursery stock certification.

Compiler's Comments

Effective Date: Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

Administrative Rules

ARM 4.12.1419 Certification of growing sites.

80-7-123. Nursery account — investment of funds.

Compiler's Comments

1997 Amendments: Chapter 7 in (1) and in (2), in two places, deleted reference to 80-7-121.

Chapter 42 in (1) and (2) deleted references to 80-7-105, 80-7-109, and 80-7-121. Amendment effective March 12, 1997.

1997 Statement of Intent: The statement of intent attached to Ch. 7, L. 1997, provided: "A statement of intent is required for this bill because [section 2] [80-7-402] allows the department of agriculture to adopt all rules necessary to impose and administer quarantines. It is intended that the rules address:

(1) quarantines applicable to both intrastate and interstate plant and plant pest movement;

(2) procedures necessary to prevent the introduction and spread of pests that are considered plant pests and of plants capable of spreading plant pests, noxious weeds, and certain exotic plants that are considered pests;

(3) establishment of plant pest standards and procedures for surveying and controlling plant pests in this state;

(4) procedures that will allow the introduction of certain plant pests and biological control agents into Montana when necessary to control plant diseases or other plant pests; and

(5) procedures that will allow the department to recover costs incurred in implementing quarantines and plant pest management standards and to impose civil fines for violations of these rules, which may include a penalty schedule for initial and subsequent violations."

Effective Date: Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

80-7-132. Cooperation — agreements with other governmental agencies.

Administrative Rules

ARM 4.12.1418 Testing procedures.

Attorney General's Opinions

Availability of Viral Indexing Services: Nurserymen in Montana seeking to export nursery stock to Canada must have the stock virally indexed, i.e., certified by a state agency to be free of significant viral infection. Neither the Department of Agriculture nor Montana State University (now Montana State University-Bozeman) is required to conduct viral indexing of nursery stock. However, the Department of Agriculture is authorized to provide viral indexing services to nurserymen under 80-7-112 (now repealed) and 80-7-132. 39 A.G. Op. 26 (1981).

80-7-133. Acts made unlawful — penalty.

Compiler's Comments

2001 Amendment: Chapter 407 in (1)(f) at end substituted "as defined in 7-22-2101(8)(a)(i)" for "under 7-22-2101(7)(a)(i)"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 551 throughout section substituted reference to firm for reference to person; inserted (1)(a) regarding penalty for failure to properly identify nursery stock; in (1)(e), before "dangerous", substituted "a plant pest" for "any disease or insect"; inserted (1)(f) regarding penalty for selling certain noxious weeds; in (2), after "substitution", inserted "or sale and distribution of noxious weeds", after "provided" substituted "in 80-7-135" for "by 80-7-134", and after "liable to" substituted "a party" for "the person, firm, or corporation"; and made minor changes in style. Amendment effective January 1, 1994.

80-7-135. Penalty for violation.

Compiler's Comments

1997 Amendment: Chapter 7 in (4) deleted reference to 80-7-121.

1997 Statement of Intent: The statement of intent attached to Ch. 7, L. 1997, provided: "A statement of intent is required for this bill because [section 2] [80-7-402] allows the department of agriculture to adopt all rules necessary to impose and administer quarantines. It is intended that the rules address:

(1) quarantines applicable to both intrastate and interstate plant and plant pest movement;

(2) procedures necessary to prevent the introduction and spread of pests that are considered plant pests and of plants capable of spreading plant pests, noxious weeds, and certain exotic plants that are considered pests;

(3) establishment of plant pest standards and procedures for surveying and controlling plant pests in this state;

(4) procedures that will allow the introduction of certain plant pests and biological control agents into Montana when necessary to control plant diseases or other plant pests; and

(5) procedures that will allow the department to recover costs incurred in implementing quarantines and plant pest management standards and to impose civil fines for violations of these rules, which may include a penalty schedule for initial and subsequent violations."

Effective Date: Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

Administrative Rules

ARM 4.12.1430 Civil penalties — enforcement for nursery.

ARM 4.12.1431 Civil penalties — matrix for nursery.

Part 4
Quarantine and Pest Management

Part Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 7, L. 1997, provided: "A statement of intent is required for this bill because [section 2] [80-7-402] allows the department of agriculture to adopt all rules necessary to impose and administer quarantines. It is intended that the rules address:

(1) quarantines applicable to both intrastate and interstate plant and plant pest movement;

(2) procedures necessary to prevent the introduction and spread of pests that are considered plant pests and of plants capable of spreading plant pests, noxious weeds, and certain exotic plants that are considered pests;

(3) establishment of plant pest standards and procedures for surveying and controlling plant pests in this state;

(4) procedures that will allow the introduction of certain plant pests and biological control agents into Montana when necessary to control plant diseases or other plant pests; and

(5) procedures that will allow the department to recover costs incurred in implementing quarantines and plant pest management standards and to impose civil fines for violations of these rules, which may include a penalty schedule for initial and subsequent violations."

Part 5
Crop Insect Detection and Management

Part Attorney General's Opinions

Emergency Exception Inapplicable to Foreseeable Situations — Environmental Policy Act Applicable: The Department of Agriculture did not follow the directive of ARM 4.2.308 in dealing with an emergency infestation of grasshoppers when it failed to file a report with the Governor and the Environmental Quality Council. While an emergency situation is a legitimate exception to the requirements of the Montana Environmental Policy Act (MEPA), the Department should comply with MEPA before participating in a grasshopper spraying program if the need for such a program is reasonably foreseeable. 42 A.G. Op. 62 (1988).

State Participation in Spraying Program — Environmental Policy Act Triggered: State participation in a grasshopper spraying program in which the state paid up to one-third of the costs and provided financial management and technical expertise was a major state action in which compliance with the Montana Environmental Policy Act was required. 42 A.G. Op. 62 (1988).

80-7-503. Duties of department.

Compiler's Comments

1989 Amendment: In introductory clause substituted "may" for "shall". Amendment effective March 7, 1989.

80-7-508. Duties of the cooperative extension service.

Compiler's Comments

1991 Amendment: Inserted (2) concerning cooperation between cooperative extension service and agricultural experiment station in providing annual reports. Amendment effective July 1, 1991.

Part 7
Weed Control

80-7-701. Regulation of importation or sale of noxious weeds.

Compiler's Comments

1991 Amendment: Inserted (1) defining native plant and native plant community; and at beginning of (2) substituted "The department may regulate or prohibit the importation or sale" for "If the department believes that movements", near beginning, after "nursery stock", deleted "hay, straw", and at end substituted "harmful to Montana's horticultural, agricultural, forestry, livestock, wildlife, or native plant communities" for "dangerous or inimical to the horticultural or agricultural industries are about to be introduced into the state, it may advise the governor. The governor shall, by proclamation, declare an embargo against the importation or shipment of the grain, plants, tubers, nursery stock, seed, hay, straw, fruit, or other materials into the state, except under restrictions established in this part and provided in the rules adopted by the department".

Administrative Rules

ARM 4.12.1422 Regulated Loosestrife articles.
ARM 4.12.1423 Conditions governing importation of Loosestrife articles — permit.
ARM 4.12.1424 Failure to obtain permit or violation of terms of permit.

80-7-702. Rulemaking authority.

Compiler's Comments

1991 Amendment: In first sentence, after "rules", substituted "for the regulation of the importation or sale of materials" for "in the enforcement of an embargo proclaimed" and in second sentence, after "packaging", inserted "the regulation of nursery stock commerce".

Administrative Rules

ARM 4.12.1422 through 4.12.1424 Rules regarding Loosestrife.

80-7-704. Disposition of fines and inspection fees.

Compiler's Comments

2001 Amendment: Chapter 257 substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1987 Amendment: Near beginning, after "80-7-703", inserted "except fines paid to a justice's court".

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

80-7-705. Weed management district program enhancement.

Compiler's Comments

Effective Date: Section 28, Ch. 407, L. 2001, provided that this section is effective July 1, 2001.

80-7-711. Technical assistance.

Compiler's Comments

Severability Clause: Section 5, Ch. 466, L. 1977, was a severability clause.

80-7-712. Funding of noxious plant management programs.

Compiler's Comments

Severability Clause: Section 5, Ch. 466, L. 1977, was a severability clause.

80-7-713. Reports.

Compiler's Comments

1991 Amendment: In second sentence inserted reference to 5-11-210; and made minor changes in style. Amendment effective March 20, 1991.

Severability Clause: Section 5, Ch. 466, L. 1977, was a severability clause.

80-7-714. Rules.

Compiler's Comments

Severability Clause: Section 5, Ch. 466, L. 1977, was a severability clause.

80-7-720. Biological agents for weed control.

Compiler's Comments

Appropriation for Biological Agents: Section 7, Ch. 597, L. 1989, provided an appropriation of $150,000 to continue the biological control of weeds under authority of this section. See 1989 Session Law for text of the appropriation.

Part 8
Noxious Weed Management Funding

Part Compiler's Comments

Preamble: The preamble to Ch. 639, L. 1987, provided: "WHEREAS, noxious weeds infest 6.5 million acres of rangeland and are costing the State of Montana an estimated $47 million annually; and

WHEREAS, vehicles have been shown to be one of the major contributors to the spread of noxious weeds in Montana, and county and state funds are inadequate for stopping the spread of these weeds from roadsides and trails into adjacent rangeland; and

WHEREAS, the amount of $125,000 in annual revenue generated by the herbicide surcharge to fund weed control projects through the noxious weed management trust fund is inadequate to address the current weed problem; and interest income from the permanent account of the noxious weed management trust fund cannot be used to fund weed management projects in Montana until the fund reaches $2.5 million; and

WHEREAS, during this period, the spread of noxious weeds will continue at the rate of about 27% annually; and

WHEREAS, current weed management projects prove the success of well-planned, organized, and cooperative programs."

Statement of Intent: The statement of intent attached to Ch. 577, L. 1985, provided: "A statement of intent is required by this bill because rulemaking authority is granted to the Montana department of agriculture in section 8 [80-7-802].

It is the intent of the legislature that the department of agriculture adopt rules for the orderly administration of the noxious weed management trust fund and collection and administration of revenue as provided in the bill. The department, through reports required of herbicide registrants,

shall establish a collection system for the surcharge imposed in section 3 [80-7-812, now repealed], giving notice to the registrant and providing a procedure for the payment of the surcharge.

It is the intent of the legislature that the department adopt rules relating to the disbursement of funds generated by this act. Specifically, the department shall use the criteria stated in sections 5 and 6 [80-7-814 and 80-7-815] as the basis for the distribution of the funds. The legislature intends that the money given in the form of grants and contracts be primarily on a cost-share basis. The department shall determine the ratio of cost sharing by considering the entity being given the money, its ability to find other sources of funding, the need for the project for which it receives the money, and the amount of benefit it bestows on the area involved. The legislature intends that projects involving greater community action and benefit receive increased priority.

It is the intent of the legislature that if the trust fund should be terminated by the legislature, the funds to be distributed to the counties must be distributed in an equitable manner, taking into consideration the population of the counties, the participation in the program, and the needs of the counties with respect to noxious weed management.

The legislature intends that the department adopt rules identifying any weed which constitutes a new and potentially harmful noxious weed. The department shall take into consideration the possible harm the newly introduced weed will have on the Montana economy, the damage the weed will cause to the existing foliage and environment, and the likelihood that the noxious weed will spread throughout the state. The department shall also establish rules for verifying the existence of the weed. These rules shall take into consideration the scientific methods for verification and proper sampling techniques for determining the extent of the weed outbreak.

It is the intent of the legislature that the decision for the disbursement of the funds for the projects be made by the director of the department of agriculture upon the advice of the noxious weed management advisory council. The directives of the director must be implemented by a noxious weed management coordinator, who shall serve the director. The noxious weed management coordinator shall maintain records on the disbursement of the funds and the progress of the funded projects. He shall make determinations as to the effectiveness of the previously funded projects and provide the director and the advisory council all relevant information necessary to make decisions for future disbursements of funds. He shall also work with and assist county weed districts."

Severability Clause: Section 10, Ch. 577, L. 1985, was a severability clause.

Part Administrative Rules

Title 4, chapter 5, subchapter 1, ARM Noxious weed trust fund.

80-7-801. Definitions.

Compiler's Comments

2001 Amendment: Chapter 407 in definition of noxious weed at end substituted "7-22-2101(8)(a)" for "7-22-2101(7)(a)". Amendment effective July 1, 2001.

1995 Amendment: Chapter 220 inserted definition of crop weed; deleted definition of herbicide that read: ""Herbicide" means a substance or mixture of substances for preventing, destroying, repelling, or mitigating any weed, as defined in 80-8-102. The term does not include herbicides labeled only for home, yard, or garden use and sold in containers of less than 10 pounds or 1 gallon"; in definition of noxious weed substituted "defined in 7-22-2101(7)(a)" for "defined and designated as a noxious weed by rule of the department"; deleted definition of retail value that read: ""Retail value" means the suggested or retail price to the consumer of a given herbicide as established by the registrant, or as determined by a survey of dealers conducted by the department"; and deleted definition of sale that read: ""Sale" includes only the sale of a herbicide to an applicator or consumer. Sales between or to distributors, dealers, or retailers are not included." Amendment effective March 24, 1995.

1987 Amendment: In (2), at end of first sentence, substituted "weed, as defined in 80-8-102" for "noxious weed".

Administrative Rules

ARM 4.5.101 Definitions.

80-7-802. Rules.

Administrative Rules

Title 4, chapter 5, subchapter 1, ARM Noxious weed trust fund.

Title 4, chapter 5, subchapter 2, ARM Designation of noxious weeds.

80-7-805. Noxious weed management advisory council.

Compiler's Comments

1999 Amendment: Chapter 493 in (2) increased council membership from 9 to 11; inserted (2)(i) including county representatives on council; and made minor changes in style. Amendment effective July 1, 1999.

Administrative Rules

ARM 4.5.112 Noxious Weed Management Council.

80-7-811. Noxious weed management trust fund.

Compiler's Comments

1999 Amendment: Chapter 493 increased fund from $2.5 million to $10 million. Amendment effective July 1, 1999.

1995 Amendment: Chapter 220 at end of first sentence substituted "trust fund of $2.5 million" for "trust fund, which must be funded from revenue collected under 80-7-812 and 80-7-813". Amendment effective March 24, 1995.

Administrative Rules

ARM 4.5.101 Definitions.

80-7-813. Acceptance and expenditure of gifts and other funds.

Compiler's Comments

1995 Amendment: Chapter 220 substituted second sentence concerning deposit of fund in trust fund or account for expenditure to support a project for former sentence that read: "Such funds may be expended to support any weed management project or may be deposited in the noxious weed management trust fund." Amendment effective March 24, 1995.

80-7-814. Administration and expenditure of funds.

Compiler's Comments

2001 Amendment: Chapter 574 in (1)(b) near middle of first sentence after "80-7-822" deleted "pursuant to 80-7-810(2)"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 493 at beginning of (1)(a) inserted exception clause; inserted (1)(b) restricting use of principal in trust fund until fund reaches $10 million and allowing use of interest or revenue generated by fund; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment: Chapter 220 substituted (3)(d) concerning administrative expenses for former (3)(d) that read: "(d) costs of collecting the surcharge imposed by 80-7-812, not to exceed 3% of the total surcharge proceeds"; and made minor changes in style. Amendment effective March 24, 1995.

1991 Amendment: Inserted (3)(g) concerning grants for crop weed management research, evaluation, and education; inserted (4) requiring agricultural experiment station and cooperative extension service to submit annual reports; in (5), after "expenditures", inserted reference to subsections (2) and (3); and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: In (3)(f) substituted "advisory council" for "advisory committee".

1987 Amendment: At end of (2) inserted "or by an amount of not less than $100,000 for first class counties, as defined in 7-1-2111"; and inserted (3)(f) allowing the Department to conditionally expend funds for any recommended project.

Administrative Rules

ARM 4.5.102 through 4.5.109 Weed control projects — application — feasibility — ranking — legal requirements — monitoring.

80-7-815. Noxious weed emergency — expenditure authorized.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 407 inserted (1)(b) regarding potential influx of noxious weeds; in (2) at end inserted "or to protect the state from an influx of noxious weeds due to a natural disaster"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 near end of (3) after "part" deleted "or by revenue obtained from the fee imposed by 61-3-510"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 220 near middle of (2), after "replenished", deleted "by proceeds of the surcharge imposed in 80-7-812 or, if the surcharge has been terminated as provided in 80-7-812(5)"; and made minor changes in style. Amendment effective March 24, 1995.

1991 Amendment: In (1), near middle of second sentence before "trust", inserted "management"; and in (2), after "80-7-812", inserted language concerning replenishing the trust upon termination of surcharge fund by interest or revenue generated by trust fund or from other revenue as determined by Department. Amendment effective July 1, 1991.

Severability: Section 9, Ch. 588, L. 1991, was a severability clause.

Administrative Rules

ARM 4.5.111 Noxious weed identification and verification.

80-7-816. Account — deposit — investment.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 7 in (1) in second sentence substituted "noxious weed management trust fund" for "noxious weed trust fund". Amendment effective October 1, 2001.

Chapter 407 in (1) in first sentence near beginning substituted "a noxious weed account" for "an account" and in second sentence near middle inserted "and the funds directed to be deposited as provided in 80-7-823" and at end inserted reference to 80-7-705; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (1) in second sentence after "fund" deleted "and the fee imposed in 61-3-510". Amendment effective July 1, 2001.

Effective Date: Section 11, Ch. 220, L. 1995, provided that this section is effective on passage and approval. Approved March 24, 1995.

80-7-823. Transfer of funds.

Compiler's Comments

Effective Date: Section 28, Ch. 407, L. 2001, provided that this section is effective July 1, 2001.

Part 9
Noxious Weed Seed Free Forage Act

Part Compiler's Comments

Severability: Section 19, Ch. 521, L. 1995, was a severability clause.

80-7-901. Short title.

Compiler's Comments

Effective Date: Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

80-7-902. Findings — purpose.

Compiler's Comments

Effective Date: Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

Administrative Rules

ARM 4.5.301 Purpose and scope.

80-7-903. Definitions.

Compiler's Comments

2001 Amendment: Chapter 407 in definition of certification substituted "7-22-2101(8)(a)(i)" for "7-22-2101(7)(a)(i)". Amendment effective July 1, 2001.

Effective Date: Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

Administrative Rules

ARM 4.5.302 Definition of terms.

ARM 4.5.303 Noxious weeds.

80-7-904. Composition of advisory council.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

Effective Date: Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

80-7-905. Powers and duties of department.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 521, L. 1995, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the department of agriculture [in 80-7-905 and 80-7-909] to develop rules regarding implementation of the noxious weed seed free forage program. It is intended that the department, when adopting rules for the program and certification standards, processes, operations, agreements, and contracts; fees and the collection of fees; and inspections and investigation standards, ensure that the program and rules will be effective in preventing new introductions of noxious weed seed from forage in the state. The department shall base any related fees on the cost of managing and conducting the program. It is further intended that the program be conducted in a cooperative manner with federal, state, and local agencies, the regulated industry, and the public and that the department be allowed to enter into reciprocal agreements with other states or Canadian provinces as necessary for the proper administration of the program."

Effective Date: Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

Administrative Rules

Title 4, chapter 5, subchapter 3, ARM Noxious weed seed free forage.

80-7-906. Certification.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

Administrative Rules

ARM 4.5.306 Procedures for Montana certification of forage products.
ARM 4.5.307 Forage inspection procedures.
ARM 4.5.308 Forage identification and transportation.

80-7-907. Fees.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

80-7-908. Deposit and disbursement of funds — records — investment.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

Administrative Rules

ARM 4.5.312 Collection of fees.
ARM 4.5.313 Fees.

80-7-909. Rules.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 521, L. 1995, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the department of agriculture [in 80-7-905 and 80-7-909] to develop rules regarding implementation of the noxious weed seed free forage program. It is intended that the department, when adopting rules for the program and certification standards, processes, operations, agreements, and contracts; fees and the collection of fees; and inspections and investigation standards, ensure that the program and rules will be effective in preventing new introductions of noxious weed seed from

forage in the state. The department shall base any related fees on the cost of managing and conducting the program. It is further intended that the program be conducted in a cooperative manner with federal, state, and local agencies, the regulated industry, and the public and that the department be allowed to enter into reciprocal agreements with other states or Canadian provinces as necessary for the proper administration of the program."

Effective Date: Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

Administrative Rules

Title 4, chapter 5, subchapter 3, ARM Noxious weed seed free forage.

80-7-910. Investigation and enforcement authority.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

80-7-911. Stop sale, use, or removal order.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

Administrative Rules

ARM 4.5.310 Stop sale, use, or removal order.

80-7-912. Prohibited acts.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

80-7-921. Penalty for nonpayment of fees.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

80-7-922. Penalties.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

Administrative Rules

ARM 4.5.316 Civil penalties.

80-7-923. Injunction authorized.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

80-7-924. Embargo.

Compiler's Comments

Effective Date: Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

Part 11
Vertebrate Pest Management

Part Compiler's Comments

1987 Statement of Intent: The statement of intent attached to Ch. 144, L. 1987, provided: "This bill requires a statement of intent because section 6 [80-7-1108] authorizes the department of agriculture to adopt rules implementing the vertebrate pest management law. The department may operate management programs and may cooperate with other governmental and private entities for vertebrate pest management purposes.

It is the intent of the legislature that the department adopt rules for the orderly administration of the rodenticide fund and the collection of revenue as provided in the bill. The department shall provide a method of giving notice to the rodenticide registrant and a procedure for payment of the surcharge.

It is the intent of the legislature that the department adopt rules relating to the expenditure of funds generated by this bill. Specifically, the department shall use the criteria stated in 80-7-1102 and 80-7-1103 as the basis for the expenditure of the funds. The legislature intends that the money given in the form of grants and contracts be primarily on a cost-share basis. The department shall determine the ratio of cost sharing by considering the entity being given the money, its ability to find other sources of funding, the need for the project for which it receives the money, and the amount of benefit it bestows on the area involved. The legislature intends that projects involving greater community action and benefit receive increased priority."

Transfer of Functions — Terminology Change. Section 1, Ch. 65, L. 1983, provided: "(1) The functions of the department of livestock relating to rodent control as provided in Title 81, chapter 1, part 4, are transferred to the department of agriculture under Title 80, chapter 7.

(2) All references in Title 81, chapter 1, part 4, to the "department", meaning "department of livestock", are changed to mean "department of agriculture"."

80-7-1101. Department to operate vertebrate pest management program.

Compiler's Comments

1983 Amendment: Throughout section, substituted "management" for "control"; at end of first sentence, inserted "vertebrate pests."; at beginning of second sentence, inserted "Vertebrate pests are defined as"; in middle of second sentence, substituted "skunks, raccoons, bats, and the following depredatory and nuisance birds: blackbirds, cowbirds, starlings, house sparrows, and feral pigeons" for "and other rodents and related animals in this state"; at end of second sentence, after "public" deleted "health"; in middle and at end of third sentence, substituted "vertebrate pests" for "noxious rodents and related animals"; and inserted last sentence explaining what is encompassed by vertebrate pest management.

Administrative Rules

ARM 4.10.1704 through 4.10.1707 Grant application content and feasibility — legal requirements — project evaluation — monitoring procedures.

Collateral References

Agriculture *key* 9.

3 C.J.S. Agriculture §§83, 84.

3 Am. Jur. 2d Agriculture §§42, 43.

80-7-1102. Expenditures authorized.

Compiler's Comments

1987 Amendment: In introductory clause, after "expenditures", substituted "to:" for "for"; at beginning of (1) inserted "purchase" and after "supplies" deleted "other expenses, including expenditures for"; inserted (2) allowing expenditures for obtaining data and research information; inserted (3) allowing expenditures to conduct research or evaluation studies; inserted (4) allowing expenditures to make certain grants or enter certain contracts; inserted (5) allowing expenditures for maintenance and support of current rodenticide registration; inserted (6) allowing funding for seeking alternative rodenticide registration; inserted (7) allowing expenditures to develop new pest management methods and crop damage assessment techniques; inserted (8) allowing funding of research and evaluation projects; inserted (9) allowing funds to educate the agricultural community; inserted (10) allowing funds to educate the general public; and inserted (11) allowing expenditures for related activities.

Collateral References

Agriculture *key* 2.

3 C.J.S. Agriculture §§15 through 19.

80-7-1103. Purchase and sale of vertebrate pest management supplies.

Compiler's Comments

1983 Amendment: Throughout section, substituted "vertebrate pest management" for "rodent control"; before "baits" deleted "rodent"; and substituted "vertebrate pests" for "noxious rodents and related animals".

Collateral References

Agriculture *key* 2.

3 C.J.S. Agriculture §§15 through 19.

80-7-1105. Rodenticide fund.

Compiler's Comments

1993 Amendment: Chapter 280 after "money collected under" deleted "80-7-1106 and". Amendment effective April 7, 1993.

Preamble: The preamble attached to Ch. 280, L. 1993, provided: "WHEREAS, the volume of retail sales of field rodenticides has decreased to the extent that the administrative expenses for collecting the surcharge on those sales exceed the revenue raised."

80-7-1108. Rules.

Compiler's Comments

1987 Statement of Intent: The statement of intent attached to Ch. 144, L. 1987, provided: "This bill requires a statement of intent because section 6 [80-7-1108] authorizes the department of agriculture to adopt rules implementing the vertebrate pest management law. The department may operate management programs and may cooperate with other governmental and private entities for vertebrate pest management purposes.

It is the intent of the legislature that the department adopt rules for the orderly administration of the rodenticide fund and the collection of revenue as provided in the bill. The department shall provide a method of giving notice to the rodenticide registrant and a procedure for payment of the surcharge.

It is the intent of the legislature that the department adopt rules relating to the expenditure of funds generated by this bill. Specifically, the department shall use the criteria stated in 80-7-1102 and 80-7-1103 as the basis for the expenditure of the funds. The legislature intends that the money given in the form of grants and contracts be primarily on a cost-share basis. The department shall determine the ratio of cost sharing by considering the entity being given the money, its ability to find other sources of funding, the need for the project for which it receives the money, and the amount of benefit it bestows on the area involved. The legislature intends that projects involving greater community action and benefit receive increased priority."

Administrative Rules

ARM 4.10.1701 through 4.10.1703 Rodenticide surcharge and grants — dealer records — surcharge — application procedure.

ARM 4.10.1708 Applicability date.

CHAPTER 8
PESTICIDES

Chapter Law Review Articles

EPA Restricts Use of Some Pesticides, Pfaff, 112 L.A. Daily J. 3 (1999).

Pushing Science to Protect Food Supplies, Locke, 15 Envtl. F. 10 (1998).

The Food Quality Protection Act of 1996: Replacing Old Impracticalities With New Uncertainties in Pesticide Regulation, Bauer, 75 N.C.L. Rev. 1369 (1997).

FIFRA's Preemption of Common Law Tort Actions Involving Genetically Engineered Pesticides, Steen, 38 Ariz. L. Rev. 763 (1996).

Genetically Engineered Plant Pesticides: Recent Developments in the EPA's Regulation of Biotechnology, Angelo, 7 U. Fla. J.L. & Pub. Pol'y 257 (1996).

Pesticide Regulations Changed, but for Better or Worse?, Brienza, 32 Trial 86 (1996).

Farmworkers and Pesticides: The Struggle for Protections, Bobotek, 29 Clearinghouse Rev. 397 (1995).

Federal Preemption of Pesticide Labeling Claims, Curry, Antonucci, & Portuguese, 10 St. John's J. Legal Commentary 325 (1995).

Get Off Farmer Brown's Back: A Common Sense Approach to Farmer Liability for Groundwater Contamination Caused by the Normal Application of Pesticides, Munson, 18 Hamline L. Rev. 521 (1995).

The Legal Response to the Wide-Spread Poisoning of Farmworkers From Pesticide Exposure, Hauserman, 17 J. Products & Toxics Liability 47 (1995).

New Developments in Pesticide Regulation, Kahn, 13 Temp. Envtl. L. & Tech. J. 309 (1994).

Reforming the Law on Pesticides, Carlucci, 14 Va. Envtl. L.J. 189 (1994).

Public Participation in International Pesticide Regulation: When the Codex Commission Decides, Who Will Listen?, Rosman, 12 Va. Envtl. L.J. 329 (1993).

Agricultural Pesticide Contamination of Groundwater: Developing a 'Right-to-Spray Law' for Blameless Contamination, Centner & Wetzstein, 14 J. Agric. Tax'n & L. 38 (1992).

Pesticide Use and Impact: FIFRA and Related Regulatory Issues, Olexa, 68 N.D.L. Rev. 445 (1992).

The Flight of Toxic Tort—Aerial Application of Insecticides and Herbicides: From Drift Liability to Toxic Tort, Chappuis, 58 J. Air L. & Com. 411 (1992).

An Ounce of Prevention: The Need for Source Reduction in Agriculture, Bolin, 8 Pace Envtl. L. Rev. 63 (1990).

Agriculture: Licensing of Agents of Pesticide Dealers, Hoffman, 19 Pac. L.J. 468 (1988).

Cursed Is the Ground: Pesticide Regulation and Farmworkers, Dullinger, 5 L. & Inequality: J. Theory & Prac. 453 (1988).

The Constitutional Implications of Government Pesticide Spraying: The Case for Limited Judicial Intervention and an Intermediate Standard of Review, Landy, 76 Calif. L. Rev. 221 (1988).

Why Pesticides Received Extensive Use in America: A Political Economy of Agricultural Pest Management to 1970, MacIntyre, 27 Nat. Resources J. 533 (1987).

Chemical Trespass?—An Overview of Statutory and Regulatory Efforts to Control Pesticide Drift, Redfield, 73 Ky. L.J. 855 (1985).

Chapter Collateral References

3 Am. Jur. 2d Agriculture §§46 through 51.

9 Am. Jur. POF2d Crop Duster's Failure to Exercise Care in Spraying Crops, pp. 623 through 657.

Recovery of punitive damages for injuries resulting from transport, handling, and storage of toxic or hazardous substances. 39 ALR 5th 763.

Infliction of emotional distress: toxic exposure. 6 ALR 5th 162.

Liability insurance coverage for violations of antipollution laws. 87 ALR 4th 444.

Validity, construction, and application of state hazardous waste regulations. 86 ALR 4th 401.

Measure and elements of damages for pollution of well or spring. 76 ALR 4th 629.

Products liability: tractors. 75 ALR 4th 312.

Standing to sue for violation of state environmental regulatory statute. 66 ALR 4th 685.

Anticompetitive covenants: aerial spray dust business. 60 ALR 4th 965.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning paint, cleaners, or other chemicals. 58 ALR 4th 76.

Aviation insurance: causal link between breach of policy provisions and accident as requisite to avoid insurer's liability. 48 ALR 4th 778.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in farming, ranching, or agricultural labor. 46 ALR 4th 220.

Liability of termite or other pest control or inspection contractor for work or representations. 32 ALR 4th 682.

Exterminator's tort liability for personal injury or death directly resulting from operations. 29 ALR 4th 987.

Products liability for use of pesticides. 12 ALR 4th 462.

Products liability: farm machinery. 4 ALR 4th 13.

Liability for injury caused by spraying or dusting of crops. 37 ALR 3d 833.

Federal pre-emption of state common-law products liability claims pertaining to pesticides. 101 ALR Fed. 887.

Necessity and sufficiency of environmental impact statements under §102(2)(C) of National Environmental Policy Act of 1969 (42 USCS §4332(2)(C)) in cases involving herbicide, pesticide, and related projects. 74 ALR Fed. 249.

What constitutes use of pesticide in manner inconsistent with its labeling, so as to violate §12(a)(2)(G) of Federal Insecticide, Fungicide, and Rodenticide Act (7 USCS §136j(a)(2)(G)). 69 ALR Fed. 835.

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1987).

Wildlife Damage to Agriculture: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1986).

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Regulation of the Sale and Use of Pesticides—Pesticide Statewide Laboratory System: A Report to the 42nd Legislature, Montana Legislative Council (1970).

Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 1
General Administration

80-8-102. Definitions.

Compiler's Comments

1993 Amendment: Chapter 10 in definition of labeling substituted reference to Department of Health and Human Services for reference to Department of Health, Education, and Welfare; and made minor changes in style.

1991 Amendment: Inserted definition of waste pesticide. Amendment effective July 1, 1991.

Preamble: The preamble attached to Ch. 51, L. 1991, provided: "WHEREAS, Montana agricultural producers, government agencies, and citizens possess a substantial volume of waste pesticides that they cannot use in compliance with current regulatory requirements or are unable to beneficially use for a variety of other reasons; and

WHEREAS, all Montanans have an interest in providing for the proper disposal of waste pesticides for purposes of protecting public health and safety, ground water quality, and other resources."

80-8-105. Rules.

Compiler's Comments

Extension of Termination Date: Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsections (2)(r) and (2)(s) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

1993 Amendment: Chapter 465 inserted (2)(r) and (2)(s) regarding standards and fees applicable to a waste pesticide and pesticide container recycling program; inserted (2)(t) regarding standards for pesticide storage, sites, and facilities; in first sentence of (5), after "writing", substituted "and must be available at the department for public inspection" for "shall be entered in full in books to be kept by the department for that purpose, shall be indexed, and shall be public records open for inspection at all times during reasonable office hours"; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

Termination: Section 14, Ch 465, L. 1993, provided that subsections (2)(r) and (2)(s) of this section terminate June 30, 1999.

1989 Amendment: At beginning of (3)(a) inserted "Consistent with the provisions of Title 80, chapter 15". Amendment effective January 1, 1990.

1983 Amendment: In (2)(a), after "registration" inserted "suspension or cancellation of registration"; inserted (2)(o) allowing imposition of conditions for dealer, applicator, and operator

license and permit renewal by Department rule; inserted (2)(p) establishing procedures for implementing civil penalties by Department rule; inserted (2)(q) establishing fees for training courses and materials by Department rule; in (3)(a) after "registration" inserted "suspension or cancellation of registration"; in (3)(a)(i) after "animals" inserted "crops"; and made minor changes in phraseology.

Administrative Rules

Title 4, chapter 10, subchapter 1, ARM Liability rules for pesticide applicators.
Title 4, chapter 10, subchapter 2, ARM Pesticide applicator and operator rules.
Title 4, chapter 10, subchapter 3, ARM Aquatic herbicide rules.
Title 4, chapter 10, subchapter 4, ARM Certification of farm applicator rules.
Title 4, chapter 10, subchapter 5, ARM Pesticide dealer and retailer rules.
Title 4, chapter 10, subchapter 7, ARM Restriction of pesticide rules.
Title 4, chapter 10, subchapter 8, ARM Rinsing and disposing of pesticide containers.
Title 4, chapter 10, subchapter 11, ARM Pesticide reporting, cleanup, and containment.
Title 4, chapter 10, subchapter 12, ARM 1080 Livestock protection collars.
Title 4, chapter 10, subchapter 14, ARM Registration and use of M-44 sodium cyanide capsules and devices.
ARM 4.10.1501 Pesticide terminology.
Title 4, chapter 10, subchapter 18, ARM Pesticide disposal program.

Attorney General's Opinions

Public Disclosure: Pesticide applicator and dealer records held by the Department of Agriculture are subject to the public disclosure requirements of the Montana Constitution. 38 A.G. Op. 1 (1979).

80-8-107. Notice — public information.

Compiler's Comments

1997 Amendment: Chapter 454 inserted (1) defining building operator and public building; inserted (2) concerning posting of pesticide application notice; inserted (3) concerning duration of posted notice; inserted (4) concerning record retention; inserted (5) concerning local government standards; and made minor changes in style.

Local Implementation: Section 2, Ch. 454, L. 1997, provided: "An ordinance adopted by a local government pursuant to 80-8-120 before October 1, 1997, must comply with [this act] by January 1, 1998."

1989 Amendment: At beginning inserted exception clause. Amendment effective January 1, 1990.

80-8-109. Educational programs.

Compiler's Comments

1989 Amendment: In (2), in last sentence, substituted "employee of a state agency or of the Montana cooperative extension service" for "employee of the state or a unit of the Montana university system". Amendment effective July 1, 1989.

Severability: Section 7, Ch. 181, L. 1989, was a severability clause.

1985 Amendment: In (3) after "All fees collected", substituted present language for "in any fiscal year and not expended within that fiscal year must be placed in an educational and manuals account of the state special revenue fund for future use for that purpose".

1983 Amendments: Chapter 633, near beginning of (1), after "department" deleted "in cooperation with other state and federal agencies"; inserted (2) allowing departmental consultation with other entities in developing educational programs and providing for an administrative fee; and inserted (3) providing for deposit and allocation of fees.

Chapter 281, in (3), substituted "state special revenue fund" for "earmarked revenue fund".

80-8-110. Cooperation with other agencies.

Compiler's Comments

1995 Amendment: Chapter 418 in (2), at beginning, substituted "department and the department of environmental quality" for "department of agriculture and the department of health and environmental sciences"; in (3), in second sentence after "wastewater", substituted "effluents" for "affluents", substituted "department of environmental quality" for "department of state lands", with regard to reclamation, and substituted "department of natural resources and

conservation" for "department of state lands", with regard to slash and forest debris; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1981 Amendment: Changed "the department of natural resources and conservation" to "the department of state lands" near the end of (3). Chapter 529, L. 1981, transferred the duty of administering the regulation of slash and forest debris from the department of natural resources and conservation to the department of state lands necessitating this amendment.

80-8-111. Waste pesticide and pesticide container collection, disposal, and recycling program.

Compiler's Comments

1997 Amendment: Chapter 42 in version effective July 1, 1999, in (2) and in (3), in third sentence after "by the legislature", deleted "in 1993". Amendment effective March 12, 1997.

1993 Amendment: Chapter 465 substituted present section regarding waste pesticide and pesticide container collection, disposal, and recycling program for former section that read: "(1) The department shall establish a voluntary reporting system to encourage pesticide applicators and other persons to report:

(a) the types and volume of waste pesticides in their possession; and

(b) the county where the waste pesticides are stored.

(2) The department shall inventory the waste pesticide information reported under subsection (1) and develop a proposed waste pesticide disposal program for consideration by the legislature in 1993.

(3) All waste pesticide information reported to the department under subsection (1) is confidential. The department may summarize the information for purposes of preparing a waste pesticide inventory report that is public information. If a waste pesticide disposal program is not approved by the legislature in 1993, the department shall destroy the waste pesticide information received under subsection (1)."

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

Termination: Section 14, Ch 465, L. 1993, provided that this section terminates June 30, 1999.

Preamble: The preamble attached to Ch. 51, L. 1991, provided: "WHEREAS, Montana agricultural producers, government agencies, and citizens possess a substantial volume of waste pesticides that they cannot use in compliance with current regulatory requirements or are unable to beneficially use for a variety of other reasons; and

WHEREAS, all Montanans have an interest in providing for the proper disposal of waste pesticides for purposes of protecting public health and safety, ground water quality, and other resources."

Effective Date: Section 4, Ch. 51, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules

Title 4, chapter 10, subchapter 18, ARM Pesticide disposal program.

80-8-112. Deposit of waste pesticide and pesticide container collection, disposal, and recycling fees.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

Termination: Section 14, Ch. 465, L. 1993, provided that this section terminates June 30, 1999.

Administrative Rules

Title 4, chapter 10, subchapter 18, ARM Pesticide disposal program.

80-8-116. Pesticide management account — deposit of fees and penalties — investment.

Compiler's Comments

1999 Amendment: Chapter 65 deleted former (2)(b) that read: "(b) Any civil penalties collected under 80-8-306 must be deposited in the general fund"; and made minor changes in style. Amendment effective July 1, 1999.

1991 Amendment: Inserted (1) concerning existence of pesticide management account within state special revenue fund; in (2)(a), near beginning before "fees", substituted "devices and blending plant" for "equipment inspection", after "under" inserted reference to part 1, and after "chapter" inserted language concerning depositing fees into pesticide management account to be used to pay cost of equipment and facilities and of inspection, investigation, analyzation, and examination of pesticide products, users, sellers, equipment, facilities, and related pest and pesticide activities; inserted (3) concerning investment by Board of Investments of funds collected under section and crediting income from investments to pesticide management account; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 9, Ch. 588, L. 1991, was a severability clause.

80-8-117. Pesticide cleanup special revenue account.

Compiler's Comments

Effective Date: Section 5, Ch. 65, L. 1999, provided that this section is effective July 1, 1999.

80-8-120. Local pesticide regulation.

Compiler's Comments

1997 Amendment: Chapter 180 substituted (1) specifying provisions for a local government to regulate the notification of pesticide application for former (1) through (4) that read: "(1) A unit of local government may adopt an ordinance to regulate pesticide application that may include notification, provided that the ordinance is fully consistent with the authorities provided for in Title 80, chapter 8, and rules adopted under Title 80, chapter 8. The department shall develop a policy for the review and approval of local pesticide ordinances. A unit of local government shall submit a proposed ordinance to the department for verification that the proposed ordinance is consistent with the authorities provided for in Title 80, chapter 8. The ordinance may not be adopted until it has been approved by the department.

(2) A unit of local government may petition the department in writing to adopt rules to address specific local conditions, as provided in 80-8-105(3)(a). The petition must document:

(a) the need for a rule, including the reason that existing rules do not address the particular pesticide application;

(b) the need for specific local rules; and

(c) that a situation exists that threatens or is likely to threaten public health or environmental quality in the jurisdiction of the unit of local government.

(3) Local rules may be administered, enforced, and financed by a unit of local government:

(a) through a cooperative agreement with the department as provided under this section; or

(b) after the department adopts rules authorizing a unit of local government to administer, enforce, and finance an ordinance.

(4) Within 30 days of receiving the petition, the department shall respond to the unit of local government, stating:

(a) whether the petition conforms to the purpose of Title 80, chapter 15, and to the provisions of this section; and

(b) the procedures and time period for the promulgation of rules by the department, provided that the petition conforms to the purpose of Title 80, chapter 15, and to the provisions of this section"; in (3), at beginning of first sentence, substituted "subsections (1) and (2), a unit of local government" for "subsection (1), a local government ordinance" and after "pesticides" inserted "or enact notification provisions more stringent than those provided for in subsections (1) and (2)"; and made minor changes in style. Amendment effective April 1, 1997.

Preamble: The preamble attached to Ch. 180, L. 1997, provided: "WHEREAS, statewide uniformity in regulations, specifically pesticide notification posting and notification regulations a unit of local government may choose to enact, is in the best interest of Montana citizens; and

WHEREAS, excessive regulation inhibits Montana's economic health and the freedom of its citizens; and

WHEREAS, a local government is entitled to local control and may wish to enact an ordinance or resolution on pesticide application notification; and

WHEREAS, pesticides are a vital and necessary tool to protect Montanans from the threat of disease and economic harm caused by mosquitoes, weeds, and other pests; and

WHEREAS, this bill is in the best interest of the citizens of Montana."

Severability: Section 3, Ch. 180, L. 1997, was a severability clause.

Applicability: Section 4, Ch. 180, L. 1997, provided: "An ordinance adopted by a local government under 80-8-120 before [the effective date of this act] [effective April 1, 1997] must comply with [this act] by January 1, 1998."

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

Effective Date: Section 13, Ch. 465, L. 1993, provided that this section was effective on passage and approval. Approved April 21, 1993.

80-8-121. Penalty.

Compiler's Comments

Preamble: The preamble attached to Ch. 180, L. 1997, provided: "WHEREAS, statewide uniformity in regulations, specifically pesticide notification posting and notification regulations a unit of local government may choose to enact, is in the best interest of Montana citizens; and

WHEREAS, excessive regulation inhibits Montana's economic health and the freedom of its citizens; and

WHEREAS, a local government is entitled to local control and may wish to enact an ordinance or resolution on pesticide application notification; and

WHEREAS, pesticides are a vital and necessary tool to protect Montanans from the threat of disease and economic harm caused by mosquitoes, weeds, and other pests; and

WHEREAS, this bill is in the best interest of the citizens of Montana."

Severability: Section 3, Ch. 180, L. 1997, was a severability clause.

Applicability: Section 4, Ch. 180, L. 1997, provided: "An ordinance adopted by a local government under 80-8-120 before [the effective date of this act] [effective April 1, 1997] must comply with [this act] by January 1, 1998."

Effective Date: Section 5, Ch. 180, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 1, 1997.

Part 2
Registration and Licensing

Part Administrative Rules

Title 4, chapter 10, subchapter 7, ARM Restriction of pesticide rules.

Part Attorney General's Opinions

Licensing of Private Canal and Ditch Company: A private canal and ditch company that applies pesticides to its own property and to property of adjoining landowners is not classified as a commercial applicator under the provisions of the Montana Pesticides Act as long as the company does not receive any compensation or consideration for the application of pesticide to property not its own. It is classified as a farm applicator and is consequently not required to license one of its employees as a commercial applicator. 36 A.G. Op. 3 (1975).

80-8-201. Registration.

Compiler's Comments

2001 Amendment: Chapter 141 in (4) in first sentence increased annual fee from $70 to $90 and substituted introductory clause and (4)(a) through (4)(c) regarding purposes for which annual fee is paid for former second sentence that read: "A registration fee is not required to register a federally approved experimental use permit"; and in (8)(a) deleted former second sentence that read: "The applicant shall pay a one-time fee of $70 for a special local need or experimental-use permit registration." Amendment effective October 1, 2001.

Saving Clause: Section 3, Ch. 141, L. 2001, was a saving clause.

1997 Amendment: Chapter 73 in (8)(a), in four places, and in (8)(c) substituted "department of public health and human services" for "department of environmental quality"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 418 throughout section, after "department", deleted "of agriculture"; in (8)(a), in three places, substituted "department, the department of environmental quality, and the department of fish, wildlife, and parks" for "departments of health and environmental sciences, agriculture, and fish, wildlife, and parks"; in fourth sentence of (8)(a) and in (8)(c) substituted "environmental quality" for "health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendments: Chapters 139 and 465 throughout (5) and (6) substituted "pesticide" for "article"; in (9)(a), at beginning of third sentence, inserted exception clause; inserted (9)(b) allowing sale and use of certain pesticides up to 6 years from date distribution is terminated; and made minor changes in style. Amendment effective March 22, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension

service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

1991 Amendment: In (4) decreased annual fee from $75 to $70 and deleted last sentence concerning depositing collected fees into general fund; and in second sentence of (8)(a) decreased one-time fee from $75 to $70. Amendment effective January 1, 1992.

Severability: Section 9, Ch. 588, L. 1991, was a severability clause.

1989 Amendment: In (4) and (8)(a) increased fee to $75 from $50. Amendment effective July 1, 1989.

Severability: Section 7, Ch. 181, L. 1989, was a severability clause.

1983 Amendment: In (1), after "register all" inserted "federally"; in (3) after "restrict the" inserted "sale or", after "type of" inserted "dealer"; in (4) increased annual fee from $15 to $50, after "register" deleted "an" and inserted "a federally approved"; in third sentence of (6) after "this chapter", inserted "or wherever scientific evidence proves that the article endangers man or the general environment afforded protection under 80-8-105(3)(a)"; at end of (6) after "the registrant may" substituted "pursue administrative remedies under the Montana Administrative Procedure Act and rules of the department" for "appeal the department's decision"; in (8)(a) inserted second sentence imposing $50 fee; and inserted (9) explaining procedures necessitated by federal cancellation.

80-8-203. Commercial applicator.

Compiler's Comments

Extension of Termination Date: Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsection (5) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

1993 Amendment: Chapter 465 in second sentence of (1), after "application", substituted "for a pesticide applicator's license must" for "shall" and deleted former third sentence that read: "Applicators applying for a dealer's license under this chapter shall be required to pay only a $20 licensing fee for the dealer's license"; inserted (5) allowing assessment of an additional fee to fund the recycling program; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

Termination: Section 14, Ch. 465, L. 1993, provided that subsection (5) of this section terminates June 30, 1999.

1989 Amendment: In (1) increased fee for applicator's license to $45 from $35; and inserted (4) relating to an applicator's responsibility for an operator or employee. Amendment effective July 1, 1989.

Severability: Section 7, Ch. 181, L. 1989, was a severability clause.

1983 Amendment: In (1), increased applicator's license fee from $15 to $35, increased dealer's license fee from $10 to $20, and after "provisions of this" substituted "subsection" for "section".

80-8-204. Application for applicator's license.

Compiler's Comments

2001 Amendment: Chapter 483 in (2) near end after "department of" substituted "transportation" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: In (1), changed renewal date in two places from May 1 to March 1, and increased late renewal fee from $15 to $25.

1981 Amendments: Chapter 184 substituted language requiring the applicant to certify that he has met all federal aviation administration and department of community affairs requirements for language requiring the applicant to first meet the requirements to operate the equipment described in the application in (2).

Chapter 274 substituted "department of commerce" for "department of community affairs" in (2).

80-8-205. Commercial operator.

Compiler's Comments

Extension of Termination Date: Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsection (2) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

1993 Amendment: Chapter 465 inserted (2) establishing a fee to fund the recycling program and providing for deposit of the fee.

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

Termination: Section 14, Ch. 465, L. 1993, provided that subsection (2) of this section terminates June 30, 1999.

Administrative Rules

Title 4, chapter 10, subchapter 2, ARM Pesticide applicator and operator rules.

80-8-206. Applicator's and operator's examination.

Administrative Rules

ARM 4.10.203 through 4.10.205 Applicator competency standards.

80-8-207. Dealers.

Compiler's Comments

1999 Amendment: Chapter 65 in (3) in first sentence inserted option allowing for electronic verification of restricted pesticide purchaser's license or permit and inserted second sentence allowing adoption of rules concerning dealer verification of restricted pesticide purchaser's license or permit; and made minor changes in style. Amendment effective July 1, 1999.

Extension of Termination Date: Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsection (4) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

1993 Amendment: Chapter 465 substituted present (4) allowing assessment of an additional fee to fund the recycling program for former language that read: "Dealers may make one application for two annual licenses if the application is accompanied by a $45 licensing fee for each year of the state biennium"; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for

persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

Termination: Section 14, Ch. 465, L. 1993, provided that subsection (4) of this section terminates June 30, 1999.

1989 Amendment: In (2) and (4) increased fee to $45 from $35. Amendment effective July 1, 1989.

Severability: Section 7, Ch. 181, L. 1989, was a severability clause.

1983 Amendment: In (2), increased license fee from $15 to $35, changed renewal date in two places from May 1 to March 1, and increased late renewal fee from $15 to $25; and in (4) increased fee from $15 to $35.

1981 Amendment: Substituted "any person" for "a dealer" and inserted "offer for sale" near the beginning of (1).

Administrative Rules

Title 4, chapter 10, subchapter 5, ARM Pesticide dealer and retailer rules.

80-8-208. Dealer's examination.

Administrative Rules

ARM 4.10.503 Pesticide dealer requirements and standards.

80-8-209. Farm applicators.

Compiler's Comments

Extension of Termination Date: Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsection (7) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

1993 Amendment: Chapter 465 in second sentence of (1) increased fee from $15 to $35 and after fourth sentence inserted remainder of (1) providing for expenditure of the permit fee; in second sentence of (3), after "course", substituted "must meet the minimum certification standards and procedures established by the environmental protection agency except as otherwise provided by this chapter" for former language that read: "shall require and demonstrate practical knowledge of the applicator's ability to:

(a) recognize common pests to be controlled and damage caused by them;

(b) read and understand the label and labeling information, including the common name of the pesticide(s) applied, pest(s) to be controlled, timing and methods of application, safety precautions, any preharvest or reentry restrictions, and any specific disposal procedures;

(c) apply pesticides in accordance with label instructions and warnings, including the ability to prepare the proper concentration of pesticides to be used under particular circumstances, taking into account such factors as area to be covered, speed at which application equipment will be driven, and the quantity dispersed in a given period of operation;

(d) recognize local environmental situations that must be considered during application to avoid contamination; and

(e) recognize poisoning symptoms and procedures to follow in case of a pesticide accident"; in first sentence of (5), after "attending", substituted "an approved training program" for "a program consisting of 6 hours of training"; inserted (7) allowing assessment of an additional fee to fund the recycling program; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset

the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

Termination: Section 14, Ch. 465, L. 1993, provided that subsection (7) of this section terminates June 30, 1999.

1985 Amendment: In (5) in first sentence substituted "by attending a program consisting of 6 hours of training" for "by obtaining 100 training credits" and in second sentence substituted "program" for "credits".

1983 Amendment: In (1), inserted second sentence relating to permit fee; at end of (2) after "applicator" deleted "or as provided in (6) of this section"; in (3) after "qualify for" substituted "their first" for "the"; in (5) substituted existing text requiring farm applicators to requalify by attending a training program administered by the Department for former language, which read: "Farm applicators manifesting reading disabilities may become certified to use as many as two restricted-use pesticides by passing a specific oral examination on the particular pesticide(s) if the applicator documents that a certified applicator in the immediate vicinity can advise him."

1981 Amendment: In (1), changed to a special use permit, effective for 5 years, and a staggered system of issuing permits established by the department from a certificate issued for 5 years, but renewed annually; inserted "by such applicator" after "rented" in (2); changed to a graded written examination or a course with an ungraded written examination from a written examination or course with or without an examination in the first sentence in (3); substituted "The examinations and course shall require and demonstrate practical knowledge of the applicator's ability" for "The examination or course shall include practical knowledge as to the ability" in the second sentence of (3); substituted "manifesting" for "having verified" near the beginning of (5).

Administrative Rules

Title 4, chapter 10, subchapter 4, ARM Certification of farm applicator rules.

80-8-211. Revocation of licenses and permits.

Compiler's Comments

1995 Amendment: Chapter 189 inserted (1)(l) authorizing the Department to refuse to grant or renew or authorizing revocation or modification of a license or permit if a licensee or permittee fails to satisfy judgment entered as a result of a complaint on use of pesticide; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 8, Ch. 189, L. 1995, was a severability clause.

1981 Amendment: Inserted "or modify" after "revoke" near the beginning of the second sentence in (1); inserted "or sold" after "applied" and the clause after "materials" in (1)(b); inserted (1)(k) providing that false statements made to induce engagement of services or misleading statements concerning pesticide effectiveness are grounds for Department refusal of licenses or permits.

Administrative Rules

ARM 4.10.106 Revocation of license.
ARM 4.10.208 Inconsistent use.
ARM 4.10.404 Improper purchase or use.
ARM 4.10.504 Records.

80-8-212. Retail sale of pesticides — education program.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

1991 Amendment: Inserted (2) concerning cooperative agreement by Department and Montana State University Extension Service establishing education program on pests, pesticides, and alternative control methods. Amendment effective January 1, 1992.

Severability: Section 9, Ch. 588, L. 1991, was a severability clause.

Administrative Rules

ARM 4.10.502 Retail sale of pesticides.

80-8-213. Government agencies.

Compiler's Comments

Extension of Termination Date: Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsections (3)(a)(ii), (3)(b)(ii), and (3)(d) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

1993 Amendment: Chapter 465 in (2), near middle after "pesticides for", substituted "a state agency, municipal corporation, or any other governmental agency" for "such agencies"; inserted (3)(a)(i) and (3)(a)(ii) establishing the annual fee and an additional fee to fund the recycling program that are payable by a government agency for each of its first four employee applicators; inserted (3)(b)(i) and (3)(b)(ii) establishing the annual fee and an additional fee to fund the recycling program that are payable by a government agency for each additional employee applicator; inserted (3)(c) capping annual fee amounts payable by a government agency; inserted (3)(d) providing for deposit of recycling program fees; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

Severability: Section 11, Ch. 465, L. 1993, was a severability clause.

Termination: Section 14, Ch. 465, L. 1993, provided that subsections (3)(a)(ii), (3)(b)(ii), and (3)(d) of this section terminate June 30, 1999.

1983 Amendment: In (2), after "applicator's" deleted "operator's"; after "license" substituted "for an annual fee of $50" for "without a fee"; after "such" substituted "applicator or dealer is" for "applicators, operators, and dealers are"; inserted (3) providing fees for government employee applicators; inserted (4) relating to government employees qualifying for conducting pesticide education courses; and made a minor change in phraseology.

80-8-214. Liability.

Administrative Rules

Title 4, chapter 10, subchapter 1, ARM Pesticide applicator liability rules.

ARM 4.10.317 Personal liability for damages by aquatic herbicides.

Attorney General's Opinions

State Agencies Exempt: State agencies who apply pesticides in the same manner as commercial applicators need not comply with the financial responsibility requirements of this section. 35 A.G. Op. 49 (1973).

Collateral References

3 Am. Jur. 2d Agriculture §§47, 48.

9 Am. Jur. POF2d Crop Duster's Failure to Exercise Care in Spraying Crops, pp. 623 through 657.

Products liability for use of pesticides. 12 ALR 4th 462.

Liability for injury caused by spraying or dusting of crops. 37 ALR 3d 833.

Part 3
Enforcement and Penalties

Part Compiler's Comments

Severability Clause: Section 18, Ch. 462, L. 1977, was a severability clause. Section 33, Ch. 403, L. 1971, was a severability clause.

Part Administrative Rules

ARM 4.10.208 and 4.10.404 Violations and penalties for violations of pesticide rules.

80-8-301. Report of loss or damage — effect of failure to report.

Compiler's Comments

1981 Amendment: Inserted "of itself" before "be considered" in (2).

80-8-302. Sampling and analysis.

Compiler's Comments

1981 Amendment: Inserted subsection (3) relating to official analysis.

80-8-303. Embargo.

Compiler's Comments

1981 Amendment: Substituted "Any person who" for "It is unlawful for any person" and added clauses relating to criminal and administrative penalties in the last sentence of (1).

80-8-304. Investigation and enforcement authority.

Compiler's Comments

1995 Amendment: Chapter 189 at beginning of (1)(d) inserted "handling, use, application"; in (1)(e), at end, inserted "or agricultural commodities"; inserted (1)(h) authorizing Department to enter private or public property with warrant or consent to inspect or investigate person's compliance with pesticide worker protection standards and labeling; inserted (1)(i) concerning compliance with pesticide ground water and endangered species standards; inserted (1)(j) concerning compliance with licensing, labeling, permitting, and certification requirements; in (2), after "application", inserted "sale" and at end, after "persons", deleted "other than the applicator"; in (3), after "investigation", inserted "or inspection" and after "permit" deleted "only upon receipt of a complaint or report of an incident"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 8, Ch. 189, L. 1995, was a severability clause.

1981 Amendment: Substituted "used for applying pesticides" for "subject to this chapter" in (1)(a); substituted "any person" for "persons licensed or regulated under this chapter" in (1)(d); deleted "sample" at the beginning and added "and to sample the pesticides" at the end of (1)(e); inserted (1)(g) allowing Department investigation and collection of samples from affected environments; inserted (2) authorizing Department investigation of potentially adverse pesticide incidents; and inserted (3) allowing investigation authority over nonlicensed persons only upon receipt of complaints or incident reports.

80-8-305. General violations — compliance orders.

Compiler's Comments

1995 Amendments: Chapter 189 inserted (3)(b) providing that subsection (3) does not affect liability or indemnity agreements between owner, lessee, or possessor and seller, lessor, or person relinquishing possession of site; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (4), in three places, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 8, Ch. 189, L. 1995, was a severability clause.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: Inserted (3) concerning Department issuing compliance order to any person, employee, agent, or subcontractor violating requirements of chapter; inserted (4) concerning compliance order requiring violator to clean up and dispose of contaminated soil, requiring Department of Health and Environmental Sciences to regulate cleanup and disposal,

and requiring on a case-by-case basis approval by Department of Health and Environmental Sciences or U.S. Environmental Protection Agency, or both, of disposal of soils contaminated by a canceled or suspended pesticide; inserted (5) concerning Department requiring violator to conduct monitoring of presence or level of concentration of pesticides; and inserted (6) concerning compliance order specifying violation and setting time schedule for compliance and concerning service of compliance order. Amendment effective July 1, 1991.

Severability: Section 9, Ch. 588, L. 1991, was a severability clause.

1989 Amendments: Chapter 181 inserted (1)(e) relating to use of certain unregistered agents. Amendment effective July 1, 1989.

Chapter 668 at beginning of (1) inserted "Consistent with the provisions of Title 80, chapter 15". Amendment effective January 1, 1990.

Severability: Section 7, Ch. 181, L. 1989, was a severability clause.

1981 Amendment: Inserted (1)(b) prohibiting dangerous pesticide handling; inserted (1)(c) prohibiting use of pesticides not properly labeled; inserted (1)(d) prohibiting application inconsistent with label instructions; and inserted (2) prohibiting manufacture, formulation, or storage of pesticides or byproducts in a manner precluding containment, except odor, within land of person involved.

80-8-306. Penalties.

Compiler's Comments

1995 Amendment: Chapter 189 in (1) deleted "impede, obstruct, hinder"; in (2), in first sentence after "court of the", deleted "county or any"; in (5)(a) inserted "in addition to other penalties provided in this chapter", increased civil penalty on registrant, applicator, dealer, retailer, or other violator from $1,000 to $2,500, and increased first offense penalty on farm applicator from $200 to $500; in (5)(b), after "hearing", inserted "and an appeal"; inserted (5)(c)(i) authorizing up to $25,000 civil penalty for each major offense; inserted (5)(c)(ii) requiring up to $50,000 civil penalty, 10-year prison term, or both, for conviction of felony violation; in (5)(d), before "health", inserted "human" and after "agricultural" substituted "commodities" for "crops"; in (5)(e)(i), after "results in", inserted "proven exposure of humans, agricultural commodities, or livestock or results in" and inserted second sentence defining misuse; inserted (5)(e)(vi) concerning noncompliance with pesticide worker protection standards and labeling; inserted (5)(e)(vii) concerning noncompliance with pesticide ground water and endangered species standards and labeling; inserted (5)(e)(viii) concerning noncompliance with pesticide or container disposal, labeling, or handling requirements or standards; in (5)(e)(ix) substituted "2 years of the first violation" for "the same calendar year"; deleted (6) that provided de novo appeal within 30 days of final agency action and jury trial upon request; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 8, Ch. 189, L. 1995, was a severability clause.

1983 Amendment: At end of (1), increased maximum fine from $500 to $1,500 and deleted "or imprisoned in the county jail for a term not to exceed 6 months, or both"; inserted (5) defining major violation and providing penalties therefor; and inserted (6) providing for appeal of assessment of penalties for major violations.

1981 Amendment: Added the last clause in (1) to provide penalties for chapter violations; added next to last sentence in (2) providing for jurisdiction in cases where pesticide applications are made in more than one county; inserted "or by a lawful written order" after "in writing" near the middle of (3); deleted "Notwithstanding any other provisions of this section, if" at the beginning of (4); deleted former subsection (5) relating to the use of a copy of the report of the official analysis in legal proceedings which was added to 80-8-302.

Administrative Rules

ARM 4.10.208 and 4.10.404 Violations and penalties for violations of pesticide rules.

Title 4, chapter 10, subchapter 10, ARM Civil penalties.

ARM 4.10.1009 Noncompliance with pesticide worker protection standards and labeling.

CHAPTER 9
COMMERCIAL FEEDS

Chapter Compiler's Comments

Severability Clause: Section 16, Ch. 356, L. 1973, was a severability clause.

Chapter Administrative Rules

Title 4, chapter 12, subchapter 2, ARM Feed and pet food regulations.

Title 4, chapter 12, subchapter 4, ARM Commercial feed enforcement and penalties.

Chapter Law Review Articles

Environmental Law: The Clean Water Act - Understanding When a Concentrated Animal Feeding Operation Should Obtain an NPDES Permit, Todd, 49 Okla. L. Rev. 481 (1996).

Animal Drug Control: The Challenge of Coordination—The Federal-State Perspective, Van Stavern, 38 Food Drug Cosm. L.J. 106 (1983).

Chapter Collateral References

Products liability: animal feed or medicines. 29 ALR 4th 1045.

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 1
General Provisions

80-9-101. Definitions.

Compiler's Comments

1999 Amendment: Chapter 396 inserted definition of AOAC international; in definition of commercial feed in first sentence near beginning substituted "or combinations of materials that" for "except the mixed or unmixed whole seeds or physically altered mixed or unmixed entire seeds of cereal grains with or without molasses added, when not adulterated within the meaning of subsections (1) through (5) of 80-9-204, which", inserted "or intended for distribution", and inserted "unless the materials are specifically exempted by law", inserted second sentence concerning exemption for certain seeds, and in third sentence after "not intermixed" deleted "or mixed" and deleted reference to subsections (1) through (5) of 80-9-204; inserted definition of contract feeder; in definition of customer formula feed at beginning substituted "customer formula" for "custom mixed" and substituted "specific instructions of the final purchaser" for "specifications mutually agreed to by the purchaser and the manufacturer" and deleted former second sentence that read: "A copy of the specifications or a list of the ingredients, but not necessarily the percentage of each ingredient, shall be on file at the manufacturing facility"; in definition of distribute inserted "or to supply, furnish, or otherwise provide commercial feed to a contract feeder"; in definition of official sample deleted reference to subsections (3), (5), or (6) of 80-9-301; inserted definition of quantity statement; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

ARM 4.12.201 Definitions and terms.

ARM 4.12.219 Adoption of model feed and pet food regulations.

80-9-103. Rules — adoption by department.

Compiler's Comments

1999 Amendment: Chapter 396 in (1) at end inserted "including rules related to"; inserted (1)(a) through (1)(i) listing subject matter of authorized rules; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

Title 4, chapter 12, subchapter 2, ARM Feed and pet food regulations.

80-9-105. Publications.

Compiler's Comments

1999 Amendment: Chapter 396 in first sentence near beginning substituted "may publish" for "shall publish at least annually"; and made minor changes in style. Amendment effective October 1, 1999.

Part 2
Production and Distribution

80-9-201. Licenses and registration.

Compiler's Comments

1999 Amendment: Chapter 396 inserted (1) concerning requirement for license and exception; substituted (1)(a) concerning manufacturer of commercial feed for former text that read: "(a) No person may manufacture for distribution or distribute a commercial feed in this state unless he has obtained a permit by filing with the department, on forms provided by the department, his name, place of business, and location of manufacturing facility, distribution point, or point of invoicing. All new applicants or those failing to renew a permit by January 1 of each year shall pay a nonrefundable fee of $25 per calendar year for each facility, distribution point, or point of invoicing. A permit will remain in force until the end of the calendar year for which it is issued or until canceled by the permit holder or canceled for cause by the department. No refund may be made at the time of cancellation. No transfer of permits will be made. A distributor who distributes only pet foods or specialty pet foods is exempt from this provision"; substituted (1)(b) regarding person who distributes commercial feed for former text that read: "(b) Feed permit renewals received by the department prior to January 1 of each year must be accompanied by a nonrefundable renewal fee of $25 for each permit"; inserted (1)(c) regarding person whose name appears on label; inserted (2) through (5) regarding licensing; in (6)(a) in first sentence inserted "not manufacture for distribution or" and substituted "pet food or specialty pet food" for "commercial feed, except a custom-mixed feed, which" and in second sentence after "nonrefundable fee" deleted "of $6.50 for each product other than a pet food or specialty pet food and a nonrefundable fee"; in (6)(b) substituted "pet food" for "commercial feeds" and substituted "January 1" for "October 1" and "December 31" for "September 30"; in (7) inserted "of a pet food or specialty pet food"; in (7)(b) substituted "standard list of all products being registered" for "copy of the label or label facsimile that will appear on the product"; deleted former (7)(c) and (7)(d) that read: "(c) when requested by the department, promotional material and claims made about the product; and

(d) any other necessary information requested by the department"; in (8) in first sentence near beginning substituted "a pet food or specialty pet food" for "any commercial feed"; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 14, Ch. 396, L. 1999, provided: "Because 80-9-201(6)(b) changes the period of registration of a pet food or specialty pet food from October 1 through September 30 to January 1 through December 31 of each year, it is intended that registrations issued after October 1, 1998, be valid through December 31, 1999, in order to coordinate registration issuance with the new period of registration."

1989 Amendment: In (1)(a), at beginning of second sentence, inserted "All new applicants or those failing to renew a permit by January 1 of each year"; inserted (1)(b) requiring a renewal fee of $25; in (2)(a) changed fee for registering commercial feed, other than pet food, from $5 to $6.50; inserted (1)(b) providing registration period; deleted former (4) that provided for a continuous certificate of registration; and made minor changes in style.

Severability: Section 4, Ch. 38, L. 1989, was a severability clause.

Transition: Section 5, Ch. 38, L. 1989, provided: "All commercial feeds registered on or before [the effective date of this act] must be registered for the upcoming year by October 1, 1989." Effective October 1, 1989.

1985 Amendment: In (1) and (2) inserted "nonrefundable" before the three fees set with dollar amounts; inserted (3) delineating required registration information.

80-9-202. Labeling.

Compiler's Comments

1999 Amendment: Chapter 396 throughout section substituted "customer formula" for "custom mixed"; in (1)(a) substituted "quantity statement" for "net weight"; inserted (2)(g)

regarding drug-containing product in customer formula feed; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

Title 4, chapter 12, subchapter 2, ARM Feed and pet food regulations.
ARM 4.12.202 Label format.
ARM 4.12.204 Expressions of guarantee.
ARM 4.12.219 Adoption of model feed and pet food regulations.

80-9-203. Misbranded feed.

Administrative Rules

ARM 4.12.203 Brand and product names.
ARM 4.12.219 Adoption of model feed and pet food regulations.

80-9-204. Adulterated feed.

Compiler's Comments

1999 Amendment: Chapter 396 in (5) substituted "section 721" for "section 706"; "inserted (6) through (11) specifying instances in which commercial feed is considered adulterated; in (13) substituted "the composition or quality that is purported or represented to possess by its labeling" for "that stated on its label"; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

ARM 4.12.209 Adulterants.
ARM 4.12.210 Good manufacturing practices.
ARM 4.12.219 Adoption of model feed and pet food regulations.

80-9-205. Prohibitions.

Compiler's Comments

1999 Amendment: Chapter 396 at beginning inserted proviso regarding 80-9-303; in (3) extended reference to subsections (6) through (11) of 80-9-204; in (5) substituted "license" for "permit"; inserted (8) through (11) regarding prohibited acts; and made minor changes in style. Amendment effective October 1, 1999.

80-9-206. Inspection fees — filing of annual statement.

Compiler's Comments

1999 Amendment: Chapter 396 in (1) substituted "customer formula" for "custom mix"; deleted former (1)(a) that read: "(a) The inspection fee must be set by rule on a cents-per-ton basis, except that the first 10 tons are exempt. The department may adjust the fee by rule to adequately fund the administration of this chapter. Adjustments may be made only after holding a public hearing on the proposed changes as required in 80-9-103 and must remain within the limits of 5 cents to 25 cents per ton. The effective date of any rule adjusting fees is January 1 of the calendar year following the issuance of the rule. All permit holders are to be notified immediately of any changes in fees"; in (1)(b) inserted first sentence regarding inspection fee, in second sentence substituted "customer formula" for "custom mix", and in third sentence after "feed plant" deleted "are exempt but not premixes", after "or" deleted "ingredients", and at end inserted "are exempt"; in (2) substituted "license" for "permit"; in (2)(a) after "pay the inspection fee" deleted "at the rate stated in subsection (1)"; in (2)(c) substituted "license" for "permit"; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: In (2)(a), before "before January 31", inserted "on or"; and made minor changes in style.

1989 Amendment: In middle of (1) inserted "including custom-mix feeds"; at end of first sentence in (1)(a) changed fee of 10 cents per ton to a fee to be established by rule and exempted first 10 tons from the fee; at beginning of second sentence of (1)(a) deleted "However, after May, 1975"; in (1)(c), in middle of first sentence, inserted "custom-mix feeds and"; in (2)(a) changed filing date from February 28 to January 31 and in middle of second sentence substituted "before January 31" for "within 15 days following the due date"; and made minor changes in phraseology.

Severability: Section 4, Ch. 38, L. 1989, was a severability clause.

Administrative Rules

ARM 4.12.218 Inspection fee.

80-9-207. Deposit of fees.

Compiler's Comments

1999 Amendment: Chapter 396 in (1) near beginning substituted "licenses" for "permits"; inserted (3) regarding account in subsection (1); inserted (4) regarding administrative civil penalties; and made minor changes in style. Amendment effective October 1, 1999.

1983 Amendment: Substituted references to state special revenue fund for references to earmarked revenue fund.

Part 3
Enforcement and Penalties

Part Administrative Rules

Title 4, chapter 12, subchapter 4, ARM Commercial feed enforcement and penalties.

80-9-301. Enforcement — inspection — notice — sampling and analysis.

Compiler's Comments

1999 Amendment: Chapter 396 in (1) after "appropriate credentials" deleted "and a written notice to the owner, operator, or agent in charge", substituted "at reasonable times or under emergency conditions" for "during normal business hours", after "processed, packed" inserted "distributed", and at end substituted reference to subsection (14) for reference to subsection (8) of 80-9-204; in (2) deleted former first sentence that read: "A separate notice shall be given for each inspection, but a notice is not required for each entry made during the period covered by the inspection"; deleted former (4) that provided: "(4) If the owner of a factory, warehouse, or establishment described in subsection (1) or his agent refuses to allow an inspection, the department may obtain from the district court a warrant directing the owner or his agent to allow inspection of the premises described in the warrant"; in (7) substituted reference to subsection (14) of 80-9-101 for reference to subsection (12) of that section; in (8) in first sentence substituted "official analyses" for "chemical analyses" and inserted second sentence regarding arrangements for specific analyses; and made minor changes in style. Amendment effective October 1, 1999.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

80-9-302. Enforcement — embargo order — condemnation.

Compiler's Comments

1999 Amendment: Chapter 396 in first sentence after "commercial feed" inserted "or other feed" and in third sentence in middle inserted "manufacturer, distributor"; and made minor changes in style. Amendment effective October 1, 1999.

80-9-303. Violation — penalty — injunction — appeal.

Compiler's Comments

1999 Amendment: Chapter 396 in (1) substituted "is convicted of violating" for "violates", inserted "or rules adopted under this chapter", and substituted "is subject to one or both of the following penalties" for "is guilty of"; inserted (1)(b) concerning assessment of administrative civil penalty; inserted (2) regarding penalty matrix and assessment of civil penalties; in (3) inserted "issue civil penalties"; in (4) substituted "person" for "distributor"; in (5) inserted "in the district court of the first judicial district"; in (6) substituted "of the first judicial district" for "where the person resides or has his place of business"; and made minor changes in style. Amendment effective October 1, 1999.

80-9-304. Disclosure of information prohibited.

Compiler's Comments

1999 Amendment: Chapter 396 in (2) inserted second sentence regarding nonrelease of information; and made minor changes in style. Amendment effective October 1, 1999.

CHAPTER 10
COMMERCIAL FERTILIZERS

Chapter Administrative Rules
Title 4, chapter 12, subchapter 6, ARM Fertilizer regulations.
Title 4, chapter 12, subchapter 7, ARM Anhydrous ammonia rules.

Chapter Collateral References
3 Am. Jur. 2d Agriculture §57.
Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).
Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 1
General Provisions

80-10-101. Definitions.

Compiler's Comments
1985 Amendment: Inserted (8) defining manufacture; and inserted (9) defining manufacturer.
Severability Clause: Section 16, Ch. 279, L. 1975, was a severability clause.

80-10-102. Guaranteed analysis.

Administrative Rules
ARM 4.12.601 Guaranteed analysis.

80-10-103. Assessment to fund educational and experimental programs — collection.

Compiler's Comments
1985 Amendment: At beginning changed "will" to "must"; and at end substituted "manufacturer" for "licensee or registrant of fertilizer".

Administrative Rules
ARM 4.12.608 Reporting of fertilizer and fee schedules.

80-10-104. Allocation of assessment.

Compiler's Comments
1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Part 2
Licensing and Registration

Part Compiler's Comments
Severability Clause: Section 16, Ch. 279, L. 1975, was a severability clause.

80-10-201. Registration.

Compiler's Comments
1989 Amendment: In second sentence of (1) inserted "nonrefundable" before "fee of $10", after "specialty fertilizers" deleted "in packages of 10 pounds or less", and inserted "nonrefundable" before "fee of $25 each".
Severability: Section 5, Ch. 27, L. 1989, was a severability clause.
1985 Amendment: In first sentence of (1) inserted "or on behalf of"; and inserted (4) precluding manufacturer reregistration without full payment of assessment fees.

80-10-202. License required.

Compiler's Comments
1989 Amendment: At end of first sentence, after "this state", deleted "upon payment of"; inserted second sentence relating to failure to renew licenses by January 1 and increasing the fee from $50 to a nonrefundable $75 fee; deleted former (2) that read: "(2) The applicant shall

provide a sample copy of labeling to be used. The form of labeling shall meet department standards, established by rule, and all labeling shall be in proper form"; inserted (3) establishing a $50 fee for renewals received prior to January 1; and made minor changes in form.

Severability: Section 5, Ch. 27, L. 1989, was a severability clause.

80-10-204. Labeling.

Compiler's Comments

1985 Amendment: Inserted (2) requiring labeling of bins in which commercial fertilizer is stored for distribution.

Administrative Rules

ARM 4.12.602 Guarantees for soil amendments.

ARM 4.12.604 Labeling of slowly available nutrients.

80-10-205. Misbranding and adulteration prohibited.

Administrative Rules

ARM 4.12.606 Definitions for commercial fertilizers.

80-10-206. Inspection, sampling, and analysis.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

Administrative Rules

ARM 4.12.605 Inspection, sampling, and analysis.

ARM 4.12.607 Investigational allowances and overall index value.

Collateral References

3 Am. Jur. 2d Agriculture §57.

Constitutionality, construction, and application of statutes relating to testing or sampling of agricultural fertilizers. 105 ALR 348, supplemented by 147 ALR 765.

80-10-207. Fees.

Compiler's Comments

1995 Amendment: Chapter 220 in (5) inserted second and third sentences concerning investment of funds and deposit of income; and made minor changes in style. Amendment effective March 24, 1995.

1989 Amendment: In middle of (1)(a), after "specialty fertilizers", deleted "sold in packages of 10 pounds or less"; near beginning of first sentence of (3)(a)(i), after "specialty fertilizer", deleted "in packages of 10 pounds or less"; and near beginning of first sentence of (3)(a)(ii), after "specialty fertilizer", deleted "in packages of 10 pounds or less".

Severability: Section 5, Ch. 27, L. 1989, was a severability clause.

1985 Amendments: Chapter 197 at beginning of (1)(a) substituted "A manufacturer registering under 80-10-201(1) shall pay" for "There shall be paid"; near end of (1)(a)(i) changed "registrants" to "manufacturers"; inserted (1)(b) requiring a fee on added fertilizer or soil amendment; in (3)(a)(i) at beginning after "Every", deleted "registrant and" and at end deleted "The registrant or licensee shall pay the proper fees, as set forth in subsection (1) of this section, at that time"; inserted (3)(a)(ii) requiring manufacturer's monthly statements of net tons of commercial fertilizer and soil amendment distributed and to whom distributed and providing exceptions; and in (3)(b) near beginning, inserted "required by subsection (3)(a)(ii)" and near middle and end, substituted "manufacturer" for "registrant or licensee".

Chapter 310 near beginning of (1)(a)(i) after "inspection", inserted "of fertilizers other than anhydrous ammonia"; inserted (1)(a)(ii) providing fees for inspection of anhydrous ammonia; at beginning of (4) inserted exception clause; and inserted (5) providing for deposit and expenditure of anhydrous ammonia inspection fees.

1983 Amendment: Substituted references to state special revenue fund for references to earmarked revenue fund.

Administrative Rules

ARM 4.12.608 Reporting of fertilizer and fee schedules.

ARM 4.12.609 Reports of nonfeepaying fertilizer dealers.

80-10-208. Penalties.

Compiler's Comments
1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

80-10-211. Cancellation or refusal of registration or licenses.

Administrative Rules
ARM 4.12.608 Reporting of fertilizer and fee schedules.
ARM 4.12.609 Reports of nonfeepaying fertilizer dealers.

80-10-212. Exchanges between manufacturers.

Administrative Rules
ARM 4.12.603 Licensing exemption.

Part 3
Enforcement

Part Compiler's Comments
Severability Clause: Section 16, Ch. 279, L. 1975, was a severability clause.

80-10-301. Rules — adoption by department.

Administrative Rules
Title 4, chapter 12, subchapter 6, ARM Fertilizer regulations.

80-10-303. Violations — enforcement proceedings — judicial review.

Compiler's Comments
1985 Amendment: Near beginning of (1) after "fertilizer", inserted "or from the inspection of any anhydrous ammonia facility".

Collateral References
Agriculture *key* 7.
3 C.J.S. Agriculture §23.

Part 5
Anhydrous Ammonia Facilities

Part Compiler's Comments
Statement of Intent: The statement of intent attached to Ch. 310, L. 1985, provided: "It is the intent of the legislature that the department of agriculture adopt rules to establish enforceable standards for the safe storage and handling of anhydrous ammonia. In adopting these rules, the department shall demonstrate strong consideration of the safety standards for the storage and handling of anhydrous ammonia published by the American national standards institute, a private, nationally recognized institute with expertise in matters pertaining to industrial safety and design standards. It is the intent of the legislature that the department of agriculture adopt other rules necessary to administer the provisions of this act."

Part Administrative Rules
Title 4, chapter 12, subchapter 7, ARM Anhydrous ammonia rules.

Part Law Review Articles
Products Liability on the Farm: Anhydrous Ammonia Equipment, Greig & Althoff, 5 J. Products Liability 411 (1982).

80-10-501. Short title.

Compiler's Comments
Preamble: The preamble to Ch. 310, L. 1985, provided: "WHEREAS, commercial fertilizer, primarily anhydrous ammonia, is a necessary enhancement to agricultural production in Montana; and

WHEREAS, there is continuing and growing demand for anhydrous ammonia in Montana and new anhydrous ammonia facilities will be constructed and operated in this state; and

WHEREAS, there is no central, statewide coordination of a safety program and location standards for commercial anhydrous ammonia facilities; and

WHEREAS, the State of Montana does not have an existing safety code for anhydrous ammonia storage, manufacturing, and distribution facilities; and

WHEREAS, the public interest in health and safety requires that such facilities be properly located and operated, according to acceptable and defined industry standards.

THEREFORE, the Legislature finds it necessary and appropriate to enact legislation providing that the Montana Department of Agriculture act as the coordinator of a comprehensive safety program for commercial anhydrous ammonia facilities."

CHAPTER 11
MARKETING

Chapter Law Review Articles

Export Grain Rates—Now and Then, Rehner, 66 J. Transp. L., Logistics & Pol'y 350 (1999).

Human, Animal, and Plant Life and Health Regulations as Nontariff Barriers to Trade, Gunderson-Schipper, 2 Transnat'l L. & Contemp. Probs. 651 (1992).

Marketing Orders, Garoyan, 23 U.C. Davis L. Rev. 697 (1990).

Chapter Collateral References

Propriety of Federal District Court's enforcement, or injunction against violation, of agriculture order, regulation, or agreement under 7 USCS §608(a)(6). 74 ALR Fed. 276.

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1987).

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Certification of Agricultural Seeds in Montana: A Report to the 47th Legislature, Study Committee on Seed Certification, Montana Legislative Council (1980).

Interim Report on Property Taxation and the Montana Property Classification Law, Montana Legislative Council (1963).

Part 2
Wheat and Barley Research and Marketing

Part Administrative Rules

Title 4, chapter 9, ARM Montana Wheat and Barley Committee rules.

Part Attorney General's Opinions

Appropriations — Legislative Control Over Marketing Assessment Funds: Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the Wheat Marketing and Research Account (now Wheat and Barley Account), but those appropriations are subject to the statutorily stated purposes of the Account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the Account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

80-11-201. Definitions.

Compiler's Comments

1987 Amendment: Changed definition of "committee" to Wheat and Barley Committee from Wheat Research and Marketing Committee.

1983 Amendment: Amendment terminated July 1, 1985, pursuant to sec. 6, Ch. 630, L. 1983. The amendment inserted former (4), (5), (7), and (9) that read: "(4) "Grain" means wheat or barley.

(5) "Grain dealer" means any person, association, dealer, partnership, or corporation or its agent or representative who is licensed by the state or federal government and engaged in the business of buying, receiving, selling, exchanging, warehousing, or negotiating for the sale of grain. The term also includes anyone who solicits the sale, resale, exchange, or transfer of any

grain purchased from a grower; receives grain on consignment from a grower; or receives grain to be handled on a net return basis from the grower.

(7) "Loss" means any monetary loss to a grower resulting from the delivery of grain to a grain dealer due to an extraordinary cause, including but not limited to bankruptcy, embezzlement, theft, or fraudulent disposition by the grain dealer.

(9) "Warehousing" means any method by which grain owned by another is held for him by one who is not the direct owner of the grain. The term does not include transportation of grain for another."

Administrative Rules

ARM 4.9.101 Organizational rules.

80-11-202. Declaration of policy.

Compiler's Comments

1991 Amendment: In two places, after "wheat", inserted "and barley" and near middle, after "competitive in character", deleted "and that barley is also an important crop"; and made minor changes in style. Amendment effective July 1, 1991.

Administrative Rules

Title 4, chapter 9, subchapter 3, ARM Grants.

Attorney General's Opinions

Role of Montana Wheat Research and Marketing Committee (now Montana Wheat and Barley Committee) in Political Action and Legal Action: "Marketing" is to be interpreted in its broadest sense to include the transportation of goods, including transportation rates. The committee may take action to assure reasonable transportation rates if it is in the best interest of the wheat and barley growers of Montana as a whole. Political action, not legal action, is prohibited. Although in some situations lawsuits against purchasers or growers of wheat or barley for violation of the wheat research and marketing statutes must be brought by the Department of Agriculture, that requirement did not govern a situation when the litigation in question was brought not merely to enforce the procedural requirements of the wheat research and marketing statutes but also to assure reasonable transportation rates. Actual use of committee funds for permissible legal action is impermissible if the use of the funds is not under state control. The committee also is prohibited from contributing to a legal fund over which it has no control; however, the committee is not prohibited from engaging indirectly in litigation by funding research if it controls the expenditure of the funds for the studies by way of contract or agreement. 39 A.G. Op. 8 (1981).

80-11-203. Compensation — per diem.

Compiler's Comments

1989 Amendment: Before "special" substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

1987 Amendment: Changed name of account to wheat and barley account from wheat research and marketing account.

1983 Amendment: Substituted "other special revenue funds" for "federal and private revenue fund".

80-11-205. Powers of the committee.

Compiler's Comments

1991 Amendment: In (1)(d) substituted "with units of the Montana university system" for "with Montana state university"; and made minor changes in style. Amendment effective July 1, 1991.

1983 Amendment: Amendment terminated July 1, 1985, pursuant to sec. 6, Ch. 630, L. 1983. The amendment inserted former (1)(e) that read: "authorize the department to enter into insurance contracts and pay premiums therefor from the wheat research and marketing account for the purpose of providing insurance coverage to growers who, after the contract has been entered into, suffer a loss as defined in 80-11-201".

Administrative Rules

Title 4, chapter 9, ARM Montana Wheat and Barley Committee rules.

Attorney General's Opinions

Role of Montana Wheat Research and Marketing Committee (now Montana Wheat and Barley Committee) in Political Action and Legal Action: "Marketing" is to be interpreted in its broadest

sense to include the transportation of goods, including transportation rates. The committee may take action to assure reasonable transportation rates if it is in the best interest of the wheat and barley growers of Montana as a whole. Political action, not legal action, is prohibited. Although in some situations lawsuits against purchasers or growers of wheat or barley for violation of the wheat research and marketing statutes must be brought by the Department of Agriculture, that requirement did not govern a situation when the litigation in question was brought not merely to enforce the procedural requirements of the wheat research and marketing statutes but also to assure reasonable transportation rates. Actual use of committee funds for permissible legal action is impermissible if the use of the funds is not under state control. The committee also is prohibited from contributing to a legal fund over which it has no control; however, the committee is not prohibited from engaging indirectly in litigation by funding research if it controls the expenditure of the funds for the studies by way of contract or agreement. 39 A.G. Op. 8 (1981).

80-11-206. Maximum annual assessment on wheat and barley grown, delivered, or stored.

Compiler's Comments

1993 Amendments — Composite Section: Chapter 51 near beginning of (2)(b), after "program", inserted "other than the commodity credit corporation"; inserted (2)(c) regarding collection of the assessment on wheat or barley pledged under the federal commodity credit corporation; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 576 in (1), after "wheat", deleted "grown" and after "barley grown" inserted "delivered, or stored"; in (2), after "imposed", deleted "on each grower of wheat or barley in the state of Montana"; in (2) and (3) substituted "seller" for "grower"; in (2)(a), before "sale", substituted "first" for "any"; and made minor changes in style. Amendment effective April 28, 1993.

Style changes in (2)(b) and (3) were slightly different in the two chapters. The codifier chose the more appropriate of the two.

Applicability: Section 3, Ch. 576, L. 1993, provided that the chapter is not intended to affect or impair an agreement for collection of the assessment entered into on or before April 28, 1993, the chapter's effective date, or to preclude entry into an agreement for collection of the assessment after the effective date.

Severability: Section 4, Ch. 576, L. 1993, was a severability clause.

1983 Amendment: Increased the maximum annual assessment on wheat from 5 to 10 mills and on barley from 10 to 15 mills.

Administrative Rules

ARM 4.9.401 Wheat and barley assessment and refunds.

Attorney General's Opinions

Appropriations — Legislative Control Over Marketing Assessment Funds: Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the Wheat Marketing and Research Account (now Wheat and Barley Account), but those appropriations are subject to the statutorily stated purposes of the Account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the Account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

Appropriation of Specially Assessed Funds — Due Process of Law: The Legislature may appropriate wheat research and marketing funds, which are funds derived from a special tax on the growers of wheat and barley, to the Centralized Services Division of the Department of Agriculture in order to pay for administrative services used by the Wheat Research and Marketing Committee (now Montana Wheat and Barley Committee) because the Committee is required by law to use the services of the Division and that requirement implies a duty to pay for the services. Because the money appropriated is taxed to the grower for a specific purpose, the amount appropriated to the Centralized Services Division must be for a purpose substantially related to the purposes of the tax. 39 A.G. Op. 3 (1981).

80-11-207. Delivery of invoice — form — filing of sworn statement — payment of assessment — refund.

Compiler's Comments

1993 Amendment: Chapter 576 in (1), after "purchase", inserted "delivery, or storage charge" and substituted "seller or person delivering the wheat or barley or entering it into storage" for "grower"; in (1)(a) substituted "seller or of the person delivering the wheat or barley or entering it into storage" for "grower and seller"; in (1)(c), at end, inserted "delivered, or stored"; in (1)(d), after "pledge", inserted "delivery, or storage"; in (2), near middle of first sentence in two places before "wheat or barley", deleted "a grower's" and at end inserted "or the number of bushels of wheat or hundredweights of barley delivered or stored"; in (4), in first sentence, inserted "under 80-11-206(2)" and throughout subsection substituted "seller" for "grower"; and made minor changes in style. Amendment effective April 28, 1993.

Applicability: Section 3, Ch. 576, L. 1993, provided that the chapter is not intended to affect or impair an agreement for collection of the assessment entered into on or before April 28, 1993, the chapter's effective date, or to preclude entry into an agreement for collection of the assessment after the effective date.

Severability: Section 4, Ch. 576, L. 1993, was a severability clause.

1989 Amendment: Near end of (2) substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

1987 Amendment: At end of (2) changed name of account to wheat and barley account from wheat research and marketing account.

1983 Amendment: At end of (2), substituted "the other special revenue funds" for "the revolving fund".

Administrative Rules

ARM 4.9.402 Requirements for reports.

80-11-210. Wheat and barley account — sources — use — expenditures.

Compiler's Comments

1989 Amendment: In (1) substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

1987 Amendment: In (1) and (3) changed name of account to wheat and barley account from wheat research and marketing account.

1983 Amendment: Substituted "other special revenue funds" for "federal and private revenue fund".

Attorney General's Opinions

Appropriations — Legislative Control Over Marketing Assessment Funds: Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the Wheat Marketing and Research Account (now Wheat and Barley Account), but those appropriations are subject to the statutorily stated purposes of the Account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the Account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

80-11-224. Determination of amount and allocation of assessment.

Compiler's Comments

1987 Amendment: In (2) changed name of account to wheat and barley account from wheat research and marketing account and substituted "carrying out research" for "wheat research".

Part 3
Alfalfa Seed Industry

Part Administrative Rules

Title 4, chapter 8, ARM Montana Alfalfa Seed Committee rules.

80-11-304. Powers of the committee.

Administrative Rules

Title 4, chapter 8, subchapter 2, ARM Alfalfa seed grants.

80-11-308. Payment of assessment.

Administrative Rules

Title 4, chapter 8, subchapter 4, ARM Alfalfa seed reports.

80-11-309. Refund of assessment.

Administrative Rules

ARM 4.8.301 Alfalfa seed assessment and refunds.

80-11-310. Deposit and disbursement of funds — investment.

Compiler's Comments

1995 Amendments: Chapter 220 in (3) inserted second sentence concerning deposit of income; and made minor changes in style. Amendment effective March 24, 1995.

Chapter 509 in (2), after "(1)", substituted "may be appropriated" for "is statutorily appropriated, as provided in 17-7-502"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: In (2), near beginning of first sentence after "subsection (1)", deleted "of this section" and inserted language making a statutory appropriation to Committee. Amendment effective July 1, 1991.

1989 Amendment: Near end of (1) substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

1983 Amendment: Substituted "other special revenue funds" for "federal and private revenue fund".

80-11-311. Records required.

Administrative Rules

ARM 4.12.1019 Reports to Department.

80-11-313. Penalty.

Compiler's Comments

1987 Amendment: In last sentence, after "collected", inserted "except fines collected by a justice's court".

Part 4
Mint and Mint Oil Production

Part Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 182, L. 1989, provided: "A statement of intent is required because this bill grants to the Montana mint committee the authority to adopt rules to implement the provisions of the bill. At a minimum, it is intended that the rules address:

(1) general rules and orders for the exercise of power and performance of duties of the mint committee in accordance with the Montana Administrative Procedure Act;

(2) implementation of the integrated pest management program established in [section 7] [80-11-411, now repealed];

(3) the form of sworn statements and invoices required of purchasers of mint oil;

(4) the manner of collection of assessments on mint oil produced in Montana;

(5) recordkeeping and licensure required of mint oil purchasers; and

(6) any other topics necessary for the proper implementation of this bill."

Sunrise Exemption: Section 16, Ch. 182, L. 1989, provided: "The provisions of Title 2, chapter 8, part 2 [now repealed], do not apply to [this act]."

Severability: Section 19, Ch. 182, L. 1989, was a severability clause.

Effective Date: Section 20, Ch. 182, L. 1989, provided that this part is effective July 1, 1989.

Part Administrative Rules

Title 4, chapter 12, subchapter 15, ARM Montana Mint Committee rules.

80-11-401. Findings — purpose.

Administrative Rules

ARM 4.12.1507 Definitions.

ARM 4.12.1508 Conditions governing importation of mint and mint rootstock.

ARM 4.12.1509 Conditions governing importation of mint equipment.
ARM 4.12.1510 Right to contest Committee action.

80-11-402. Definitions.

Compiler's Comments

2001 Amendment: Chapter 46 in definition of first purchaser at end substituted "from a grower" for "for subsequent sale or that acts as a sales or purchasing agent, broker, or factor of mint. The term includes a mortgagee, pledgee, lienor, or other person, public or private, having a claim against a grower, where the actual or constructive possession of mint oil is taken as partial payment or in satisfaction of a mortgage, pledge, lien, or claim"; and in definition of sale substituted reference to passing of title to mint oil for a price for "any pledge or mortgage of mint oil to any person, public or private". Amendment effective March 16, 2001.

Severability: Section 6, Ch. 46, L. 2001, was a severability clause.

Saving Clause: Section 7, Ch. 46, L. 2001, was a saving clause.

80-11-403. Powers of the committee.

Compiler's Comments

1999 Amendment: Chapter 22 in (2) substituted current language concerning agreements with university system for language authorizing contracts "in the name of the committee, to:

(a) improve the quality of mint;

(b) develop and improve control measures for diseases and pests that attack mint;

(c) improve mint growing culture;

(d) disseminate appropriate information among mint growers and dealers of the state"; and made minor changes in style. Amendment effective July 1, 1999.

1993 Amendment: Chapter 62 in (8), near beginning of first sentence, inserted "by rule", at end of first sentence deleted reference to 80-11-411, and inserted second sentence describing the purpose of the integrated pest management program. Amendment effective July 1, 1993.

80-11-412. Assessment on mint oil — exception.

Compiler's Comments

2001 Amendment: Chapter 46 in (1) at beginning of first sentence inserted exception clause, in second sentence after "The assessment" deleted "is levied on each grower in the following manner", deleted beginning of former (a) that read: "(a) in the case of the sale of mint oil, the assessment", and deleted former (b) that read: "(b) in the case of a pledge or mortgage of mint oil as security for a loan, the assessment must be collected by deducting the amount of the assessment from the proceeds of the loan at the time the loan is made by the agency or person making the loan"; in (2) near beginning of first sentence after "assessment must be" deleted "deducted and" and in second sentence near beginning after "assessment is imposed" inserted "only", after "initial sale" deleted "pledge, mortgage, or other transaction", and after "title to the mint oil" deleted remainder of sentence that read: "or creates an interest in the mint oil in a pledgee, mortgagee, or other person, but a grower is not subject to assessment more than once regardless of the number of times the oil is subject to a sale, pledge, mortgage, or other transaction"; in (3) after "the amount of the assessment" deleted "annually"; inserted (4) concerning first purchaser's liability for assessment; and made minor changes in style. Amendment effective March 16, 2001.

Severability: Section 6, Ch. 46, L. 2001, was a severability clause.

Saving Clause: Section 7, Ch. 46, L. 2001, was a saving clause.

1993 Amendment: Chapter 62 in (1), in first sentence, reduced minimum assessment from 10 cents to 5 cents. Amendment effective July 1, 1993.

Administrative Rules

ARM 4.12.1504 Fee on all mint oil produced.

80-11-413. Buyer's delivery of invoice to grower — form.

Compiler's Comments

2001 Amendment: Chapter 46 in first sentence after "time of sale" deleted "or the pledgee, mortgagee, or other lender at the time of the loan or advance"; in (2) at end after "purchaser" deleted "or the lender"; in (3) at end after "mint oil sold" deleted "mortgaged, or pledged"; in (4) at end after "purchase" deleted "mortgage, or pledge"; and made minor changes in style. Amendment effective March 16, 2001.

Severability: Section 6, Ch. 46, L. 2001, was a severability clause.

Saving Clause: Section 7, Ch. 46, L. 2001, was a saving clause.

80-11-414. Payment of assessment — sworn statement.

Compiler's Comments

2001 Amendment: Chapter 46 in (1) near beginning of first sentence after "The purchaser" deleted "mortgagor, or pledgee", at end of first sentence after "purchased in Montana" deleted remainder of sentence that read: "or the number of pounds of mint oil mortgaged, transferred, or otherwise subject to a lien as security for a loan during the preceding calendar month", in second sentence near beginning after "the purchaser" deleted "or lender", and at end of second sentence inserted exception clause; and made minor changes in style. Amendment effective March 16, 2001.

Severability: Section 6, Ch. 46, L. 2001, was a severability clause.

Saving Clause: Section 7, Ch. 46, L. 2001, was a saving clause.

Administrative Rules

ARM 4.12.1506 Mint oil purchaser license required.

80-11-416. Records required.

Administrative Rules

ARM 4.12.1505 Records required.

80-11-417. Mint oil purchaser license — application — fee — exception.

Compiler's Comments

2001 Amendment: Chapter 46 in (1) at beginning inserted exception clause and after "first purchaser shall" deleted "annually"; in (2) in first sentence decreased license fee from $50 to $20 and in second sentence substituted "is valid for 10 years" for "is valid for the calendar year in which it is issued"; inserted (4) exempting certain purchasers from license requirement; and made minor changes in style. Amendment effective March 16, 2001.

Severability: Section 6, Ch. 46, L. 2001, was a severability clause.

Saving Clause: Section 7, Ch. 46, L. 2001, was a saving clause.

Administrative Rules

ARM 4.12.1506 Mint oil purchaser license required.

Part 5
Agricultural Commodity Research and Market Development

Part Compiler's Comments

Effective Date: Section 16, Ch. 83, L. 1999, provided: "[This act] is effective on passage and approval." Approved March 16, 1999.

Part 6
Organic Certification

80-11-601. Plan for establishment of state organic certification program — submission by governor to U.S. secretary of agriculture — administration by department.

Compiler's Comments

Effective Date: Section 7(1), Ch. 172, L. 1999, provided: "Except as provided in subsection (2), [this act] [enacting 80-11-601] is effective on passage and approval." Approved March 24, 1999.

80-11-602. Account established — sources — use — expenditures.

Compiler's Comments

Effective Date: Section 7(1), Ch. 172, L. 1999, provided: "Except as provided in subsection (2), [this act] [enacting 80-11-602] is effective on passage and approval." Approved March 24, 1999.

CHAPTER 12
MONTANA AGRICULTURAL LOAN AUTHORITY ACT

Chapter Compiler's Comments

Preamble: The preamble to SB 316 (Ch. 580, L. 1983) provided:

"WHEREAS, obtaining sufficient financing to begin a farm or ranch operation in Montana is increasingly difficult; and

WHEREAS, beginning farmers experience great difficulty in repaying loans under high interest rates and with low market prices for agricultural products; and

WHEREAS, the agricultural loan programs administered by the Montana Department of Agriculture are inadequate to meet the real needs of the state; and

WHEREAS, the federal Farmers Home Administration's farm ownership loan program is also inadequate to the real needs of the state; and

WHEREAS, low interest rate financing for beginning farmers is not available in the private sector; and

WHEREAS, the value of family farms to the economic, social, and political well-being of the state is worthy of legislative action and support.

THEREFORE, it is the purpose of this act to assist beginning farmers with financial support and encouragement by making low interest rate loans available to eligible farmers and by providing incentives to retiring farmers who sell their land to eligible beginning farmers."

Chapter Administrative Rules

Title 4, chapter 14, ARM Agricultural loan authority rules.

Chapter Law Review Articles

The Qualified Farm Indebtedness Exception to Taxation of Discharged Debt: Making Hay Under TRA, Williams, 50 Mont. L. Rev. 279 (1989).

The Montana Family Farmer Under Chapter 12 Bankruptcy, Tremper, 49 Mont. L. Rev. 40 (1988).

The Montana Judicial and Non-Judicial Foreclosure Sale: Analysis and Suggestions for Reform, Dietrich, 49 Mont. L. Rev. 285 (1988).

Termination of Credit for the Farm or Ranch: Theories of Lender Liability, Bahls, 48 Mont. L. Rev. 213 (1987).

Internal Revenue Code Section 351: Principles, Application, and Strategies for Incorporating Family Farms, Fanning, 47 Mont. L. Rev. 421 (1986).

Financing the Agricultural Operation: Recent Developments and Current Trends, Schneider, 4 Drake J. Agric. L. 215 (1999).

The Availability of Small Business Loans for Agricultural and Related Businesses, Pringle, 13 J. Agric. Tax'n & L. 134 (1991).

Government Response to Financial Stress: The Farm Experience, Saxowsky, 3 Nat. Resources Env't 28(8) (1989).

Agricultural Lending in the 1980's: An Insurance Company's Perspective, Jensen, 18 Mem. St. U.L. Rev. 353 (1988).

Agricultural Lending in a Troubled Economy, Guyerson & Block, 16 Colo. Law. 1773 (1987).

Chapter 11: The Creditor's View of Farm Bankruptcy, Dixon & Wegner, 38 Ala. L. Rev. 509 (1987).

The Effect of Federal Policy on Farm Size, Kennedy, 5 L. & Inequality: J. Theory & Prac. 391 (1987).

Agricultural Credit and the Uniform Commercial Code: A Need for Change?, Meyer, 34 U. Kan. L. Rev. 469 (1986).

Cooperation in a Time of Farm Credit Crises, Woodworth, 65 Mich. B.J. 405 (1986).

Protecting Farmers Through Lender Liability Suits, Cappello, 2 Prac. Real Est. Law. 69 (1986).

Chapter Collateral References

Liability for breach of farming lease or contract. 35 ALR 5th 285.

Promissory estoppel of lending institution based on promise to lend money. 18 ALR 5th 307.

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Montana Legislative Council (1987).

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Montana's Greenbelt Law: A Report to the 47th Legislature, Revenue Oversight Committee, Montana Legislative Council (1980).

Preservation of Agricultural Lands—Alternative Approaches: A Report to the 45th Legislature, Subcommittee on Agricultural Lands, Montana Legislative Council (1976).

Part 1
General

80-12-102. Definitions.

Compiler's Comments

1991 Amendment: In definition of authority substituted "department of agriculture provided for in 2-15-3001" for "agricultural loan authority provided for in 2-15-3011". Amendment effective March 26, 1991.

Preamble: The preamble attached to Ch. 168, L. 1991, provided: "WHEREAS, the Montana Agricultural Loan Authority Act and beginning farm loan program have been inactive since adoption of the federal Tax Reform Act of 1986 because of the loss of an effective funding source."

Administrative Rules

ARM 4.14.301 Definitions.

80-12-103. Agricultural loan authority — general powers.

Compiler's Comments

1985 Amendment: Inserted (6) allowing the loan authority to procure insurance or guaranties from any party against any loss in connection with its loan agreements.

Statement of Intent: The statement of intent attached to SB 316 (Ch. 580, L. 1983) provided: "Section 1. It is the specific intent of the Legislature that the Montana Agricultural Loan Authority should operate in the same manner that the Iowa Loan Authority has operated for the last 13 months in the state of Iowa. Each loan is processed individually by a bank or other financial institution. The loans can be for farmland acquisition or for purchase or construction of depreciable property (farm equipment or farm buildings). The bank or other financial institution initially approves the loan and agrees to accept the credit risk. It then sends an application to the Montana Agricultural Loan Authority in the exact amount and the money is made available to fund the loan.

Thus, the entire transaction is treated identically with any other bank loan to a farmer except that the bank or other financial institution is able to obtain municipal bond tax exemption for the interest income. The bank or other financial institution loan is, in effect, converted to a municipal bond and held in the bank's municipal bond tax-exempt portfolio.

Section 2. It is the intent of the Legislature that the Montana Agricultural Loan Authority created by this bill will not make direct loans. It will acquire existing loans already made and approved by a local financial institution only. It is also the specific intent of the Legislature that the state of Montana would have no financial risk on any of these loans. Whoever purchases the bonds will take the full risk that the loan that secures payment of each bond will be repaid.

Section 3. It is the specific intent of the Legislature that the Montana Agricultural Loan Authority would charge a one-time fee for issuing the bonds which fee shall not exceed the maximum amount authorized by the federal internal revenue code with regard to tax-exempt bond issues. It is the intent of the Legislature that the fee would be sufficient to pay the cost of bond counsel to review and approve each bond issue and all other administrative costs of the Montana Agricultural Loan Authority.

Section 4. This Statement of Intent is required by the rulemaking authority granted to the Montana Agricultural Loan Authority in section 4 [80-12-103] and section 8 [80-12-204]. Further, rules are contemplated for determining the procedure for granting approval by the Montana Agricultural Loan Authority and the procedure for verification by the Department of Revenue under section 23 [80-12-211].

Section 5. It is the intent of the Legislature that the Montana Agricultural Loan Authority adopt rules for the orderly handling and processing of applications under the authority granted in this Act to issue bonds secured by farm loans. The rules under section 8 [80-12-204] are intended to be sufficiently specific to allow for an objective determination by the Montana Agricultural Loan Authority of which applicants should receive approval of farm acquisition bonds from the authority. The same criteria should be established by rule for depreciable property loans with special emphasis on the need of the applicant and the applicant's possible prospects for success.

Section 6. The criteria for determining a bona fide beginning farmer in connection with the approval of the tax credit application by retiring farmers as provided in section 23 [80-12-211] shall be established by rule. The same requirements for establishing eligibility under section 8 [80-12-204] should be used under section 23 [80-12-211]."

Administrative Rules

Title 4, chapter 14, ARM Agricultural loan authority rules.

Part 2
Loans

80-12-201. Loan agreements — general provisions.

Compiler's Comments

2001 Amendment: Chapter 591 inserted (4)(d) concerning alternative renewable energy source production; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 28, Ch. 591, L. 2001, was a severability clause.

Administrative Rules

ARM 4.14.302 Loan powers and eligible loan activities.
ARM 4.14.307 Loans to beginning farmers and security arrangements.
ARM 4.14.308 Use of financial and security documents.
ARM 4.14.311 Fees and terms of loan.
ARM 4.14.314 Assumption of loans, substitution of collateral, and transfer of property.

80-12-203. Qualifications of applicants.

Compiler's Comments

1991 Amendment: Near end of (2) substituted "35-1-113" for "35-1-102". Amendment effective January 1, 1992.

1985 Amendment: Inserted (1)(c) limiting an applicant's net worth for loan eligibility purposes.

Administrative Rules

ARM 4.14.305 Applicant eligibility.

80-12-204. Evaluation of applicants.

Compiler's Comments

1985 Amendment: In (1)(b)(i) after "net worth", deleted "which may not exceed $250,000"; and deleted former (1)(b)(iii) that read: "the applicant's inability to secure adequate financing for purchase of agricultural land from other sources at an interest rate that will allow a reasonable prospect for repayment".

Statement of Intent: The statement of intent attached to SB 316 (Ch. 580, L. 1983) provided: "Section 1. It is the specific intent of the Legislature that the Montana Agricultural Loan Authority should operate in the same manner that the Iowa Loan Authority has operated for the last 13 months in the state of Iowa. Each loan is processed individually by a bank or other financial institution. The loans can be for farmland acquisition or for purchase or construction of depreciable property (farm equipment or farm buildings). The bank or other financial institution initially approves the loan and agrees to accept the credit risk. It then sends an application to the Montana Agricultural Loan Authority in the exact amount and the money is made available to fund the loan.

Thus, the entire transaction is treated identically with any other bank loan to a farmer except that the bank or other financial institution is able to obtain municipal bond tax exemption for the interest income. The bank or other financial institution loan is, in effect, converted to a municipal bond and held in the bank's municipal bond tax-exempt portfolio.

Section 2. It is the intent of the Legislature that the Montana Agricultural Loan Authority created by this bill will not make direct loans. It will acquire existing loans already made and approved by a local financial institution only. It is also the specific intent of the Legislature that the state of Montana would have no financial risk on any of these loans. Whoever purchases the bonds will take the full risk that the loan that secures payment of each bond will be repaid.

Section 3. It is the specific intent of the Legislature that the Montana Agricultural Loan Authority would charge a one-time fee for issuing the bonds which fee shall not exceed the maximum amount authorized by the federal internal revenue code with regard to tax-exempt bond issues. It is the intent of the Legislature that the fee would be sufficient to pay the cost of bond counsel to review and approve each bond issue and all other administrative costs of the Montana Agricultural Loan Authority.

Section 4. This Statement of Intent is required by the rulemaking authority granted to the Montana Agricultural Loan Authority in section 4 [80-12-103] and section 8 [80-12-204]. Further, rules are contemplated for determining the procedure for granting approval by the Montana Agricultural Loan Authority and the procedure for verification by the Department of Revenue under section 23 [80-12-211].

Section 5. It is the intent of the Legislature that the Montana Agricultural Loan Authority adopt rules for the orderly handling and processing of applications under the authority granted in this Act to issue bonds secured by farm loans. The rules under section 8 [80-12-204] are intended to be sufficiently specific to allow for an objective determination by the Montana Agricultural Loan Authority of which applicants should receive approval of farm acquisition bonds from the authority. The same criteria should be established by rule for depreciable property loans with special emphasis on the need of the applicant and the applicant's possible prospects for success.

Section 6. The criteria for determining a bona fide beginning farmer in connection with the approval of the tax credit application by retiring farmers as provided in section 23 [80-12-211] shall be established by rule. The same requirements for establishing eligibility under section 8 [80-12-204] should be used under section 23 [80-12-211]."

Administrative Rules

ARM 4.14.305 Applicant eligibility.

80-12-211. Income tax deduction for land sale to beginning farmers.

Compiler's Comments

1985 Amendment: Near end of section, before "approved", deleted "first".

Administrative Rules

ARM 4.14.601 Tax deduction.

ARM 42.15.415 Deductions for sale of land to a beginning farmer.

ARM 42.23.424 Sale of land to a beginning farmer—corporation license tax deduction.

80-12-215. Loan guaranty program.

Compiler's Comments

Statement of Intent: The statement of intent attached to Ch. 448, L. 1985, provided:

"Section 1. A statement of intent is required for this bill because it delegates authority to the agricultural loan authority to adopt rules concerning loan guaranties. The legislature intends that in adopting rules the authority look to existing rules established by the Montana economic development board [abolished and functions transferred to the Board of Investments by Ch. 581, L. 1987], on which the authority contained in this bill is patterned.

Section 2. It is the intent of the legislature that the agricultural loan authority prepare rules to establish the loan guaranty program authorized in Senate Bill 208 by addressing and providing for the following terms and conditions:

(1) Banks and other financial institutions should be required to participate in any guaranty program. It is suggested that the normal participation would be a minimum of 20% by the bank or other financial institution and 80% affected by the state guaranty authorized under Senate Bill 208.

(2) A program for guaranteeing existing operating loans made by existing banks and other financial institutions should be considered, provided all other conditions are met, including: (a) an equity in real estate or other comparable property is obtained; (b) the guaranty does not extend beyond 10 years; and (c) the bank or other financial institution agrees to reduce the interest rate to at least no higher than the rate on federal obligations for comparable maturities.

(3) Any loan guaranteed under the provisions of Senate Bill 208 should be supported by a mortgage on real estate or a lien on other comparable property.

(4) An appraisal by a qualified appraiser should be required. The loan or guaranty secured by mortgage on real estate or other comparable property should not exceed, when taken in conjunction with any prior mortgages or obligations on the real estate, 65% of the appraised value of the property pledged as security.

(5) Before any loan can be guaranteed pursuant to Senate Bill 208, the applicant should provide the agricultural loan authority with sufficient information to show that he can reasonably expect a positive cash flow from the normal operation of the agriculture enterprise. The agricultural loan authority may require a surplus cash flow by rules properly adopted.

(6) The agricultural loan authority should not guarantee loans that exist for more than 10 years.

(7) The guaranties provided in Senate Bill 208 should be targeted primarily for existing farmers and ranchers who own agricultural land on which their farming and ranching is located and whose total debt from that agricultural operation equals between 40% and 60% of their total farm and ranch assets.

(8) The department of agriculture and the agricultural loan authority should retain persons with sufficient experience in agricultural credit to adequately review all applications made for guaranty under Senate Bill 208. They shall take such time in implementing this program as may be necessary to guarantee that it will operate smoothly and properly without undue exposure or risk of loss. Experienced lenders who know and understand the Montana agricultural situation are absolutely critical to the success of this program.

(9) The bank or financial institution that originated the guaranteed loan must initiate the appropriate action to liquidate the property pledged as security. The costs of liquidation should be shared pro rata at the same rate as participation in the guaranty program."

Part 3
Bonds

80-12-301. Issuance of bonds — credit of the state not pledged.

Compiler's Comments

1985 Amendment: In (5) reduced amount of bonds which may be outstanding from $200 million to $40 million.

80-12-302. Provisions of bond resolutions or trust indentures.

Administrative Rules

ARM 4.14.313 Procedures following bond issuance.

80-12-305. Tax exemption of bonds.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 at end of first sentence deleted references to inheritance taxes and gift taxes; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

80-12-311. Accounts of the authority.

Compiler's Comments

1983 Amendment: Substituted three references to the agricultural loan authority enterprise fund in the enterprise fund type for three references to the agricultural loan authority account in the bond proceeds and insurance clearance fund.

CHAPTER 15
MONTANA AGRICULTURAL CHEMICAL GROUND WATER PROTECTION ACT

Chapter Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 668, L. 1989, provided: "A statement of intent is required for this bill in order to provide guidance to the department of agriculture and the department of health and environmental sciences [now department of environmental quality] concerning the administration of the provisions of the bill and the adoption of rules.

Because the departments share responsibility for certain duties established by the bill, the departments shall coordinate their rulemaking efforts and whenever possible adopt identical rules for the areas of shared responsibility, including:

(1) ground water monitoring as authorized by [sections 10 and 11] [80-15-202 and 80-15-203];

(2) field and laboratory operational quality assurance, quality control, and confirmatory procedures as authorized by [sections 7, 10, and 11] [80-15-107, 80-15-202, and 80-15-203];

(3) maintenance of confidentiality of certain data as required by [section 8] [80-15-108]; and

(4) administrative civil penalties as authorized by [section 22] [80-15-412].

The board of health and environmental sciences [now board of environmental review] is responsible for adoption of certain ground water quality standards for agricultural chemicals as required by [section 9] [80-15-201]. The board shall adopt appropriate rules as necessary to comply

with the special requirements and considerations that apply to the adoption of these standards as specified in [section 9] [80-15-201], including acquisition of current and scientifically valid data from the United States environmental protection agency (EPA) and other sources and communications with EPA concerning the content and status of promulgated federal standards, nonpromulgated federal standards, and other relevant EPA regulations and materials.

The department of agriculture is responsible for the development of agricultural chemical ground water management plans. The department shall adopt appropriate rules to ensure compliance with the requirements of [section 12] [80-15-211 through 80-15-218], including procedures for the development of the plans, communication with sources of information needed for the plans, communication with citizens who may be affected by the plans, and criteria for ensuring that the content of the plans meets the objectives of preventing ground water impairment, minimizing the presence of agricultural chemicals in ground water, and protecting present and future beneficial uses of ground water as specified in [section 12] [80-15-211 through 80-15-218]. The department of agriculture shall also adopt rules specifying procedures for obtaining comments on agricultural chemical ground water management plans from the department of health and environmental sciences [now department of environmental quality], for adoption of completed plans, and for making modifications to adopted plans."

Severability: Section 30, Ch. 688, L. 1989, was a severability clause.

Chapter Law Review Articles

Get off Farmer Brown's Back: A Common Sense Approach to Farmer Liability for Groundwater Contamination Caused by the Normal Application of Pesticides, Munson, 18 Hamline L. Rev. 521 (1995).

A Comparison of State Groundwater Laws, Patrick & Archer, 30 Tulsa L.J. 123 (1994).

Pollution Coverage: Who Owns the Groundwater?, Cash, 134 N.J. L.J. 10 (1993).

Agricultural Pesticide Contamination of Groundwater: Developing a 'Right-to-Spray Law' for Blameless Contamination, Centner & Wetzstein, 14 J. Agric. Tax'n & L. 38 (1992).

Agricultural Chemical Contamination of Groundwater: An Economic Analysis of Alternative Liability Rules, Mill, 1991 U. Ill. L. Rev. 1135 (1991).

Murky Standards for Groundwater (NEPA to CERCLA: 20 Years of Environmental Legislation), Brown, Envtl. F. 16(6) (1990).

EPA's Pesticides in Groundwater Strategy: Will It Work?, Lewis & Berry, 4 Nat. Resources & Env't 16(6) (1989).

Pesticides: The Feds Step In, But Toxins Don't Come Out, Feldman, Bus. & Soc'y Rev. 49 (1989).

Grappling With Groundwater, Cunningham, 5 Envtl. F. 18(2) (1988).

Groundwater Pollution From Agricultural Activities: Policies for Protection, Sivas, 7 Stan. Envtl. L.J. 117 (1988).

Plant Disease, Pest Control, and Pesticides: Limit Liability of Farmers, Teel, 5 Ga. St. U.L. Rev. 239 (1988).

Some Legal Solutions for Contemporary Problems Concerning Groundwater and Aquifers, Murphy, 4 J. Min. L. & Pol'y 49 (1988).

State Regulation of Groundwater Pollution Caused by Changes in Groundwater Quantity or Flow (Symposium: Revisiting California Water Law), Sawyer, 19 Pac. L.J. 1267 (1988).

Why Pesticides Received Extensive Use in America: A Political Economy of Agricultural Pest Management to 1970, MacIntyre, 27 Nat. Resources J. 533 (1987).

Part 1
General Provisions

80-15-102. Definitions.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 418 in definition of best management plans, after "department", deleted "of agriculture"; in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; in definition of point of standards application, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a

coordination section, in definition of point of standards application, the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted the Board of Health and Environmental Sciences. Chapter 418 replaced that Board with the Board of Environmental Review. Pursuant to sec. 569, Ch. 546, the Code Commissioner has codified the definition of the Board of Environmental Review.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Administrative Rules

ARM 4.11.101 Definitions.

80-15-104. Administration.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) and (2) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

80-15-105. Rulemaking.

Compiler's Comments

1995 Amendments: Chapter 418 in (1) and (2)(b) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 471 in (1), near beginning, inserted "subject to the provisions of 80-15-110". Amendment effective April 14, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

Administrative Rules

Title 4, chapter 11, ARM Environmental management — Chemical Ground Water Protection Act.

ARM 4.11.101 Environmental management — definitions.

ARM 4.11.205 General management plan evaluations.

ARM 4.11.901 Ensure compliance.

80-15-106. Educational programs.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

Administrative Rules

ARM 4.11.204 General management plan education.

ARM 4.11.305 Specific management plan education.

80-15-107. Research.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

80-15-108. Confidentiality.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) and (2) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 4, chapter 11, subchapter 11, ARM Confidentiality of business information.

80-15-110. State regulations no more stringent than federal regulations or guidelines.

Compiler's Comments

Preamble: The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

1995 Statement of Intent: The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

Effective Date: Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

Applicability: Section 22(1) and (3), Ch. 471, L. 1995, provided: "(1) [Sections 1 through 3] are intended to apply to any rule that is in effect, adopted, or amended, and that regulates those resources or activities for which the state has been given primary authority to regulate by federal authority pursuant to Title 75, chapter 2; Title 75, chapter 3 [except for part 6, renumbered Title 50, chapter 79]; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10, as of [the effective date of this act] [April 14, 1995].

(3) [This act] does not apply to the establishment of fees or public participation requirements."

Part 2
Control

80-15-201. Ground water standards.

Compiler's Comments

1995 Amendment: Chapter 418 in (2)(c) and in two places in (3) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

80-15-202. Monitoring programs.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 189 deleted former (2) requiring person receiving analysis indicating presence of agricultural chemical in ground water to notify the Department; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), (2), and (3) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995. The amendment in (2) was rendered void by Ch. 189.

Severability: Section 8, Ch. 189, L. 1995, was a severability clause.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 4, chapter 11, subchapter 6, ARM Monitoring procedures.

80-15-203. Evaluation and use of monitoring results.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) substituted "department and the department of environmental quality" for "departments"; and in (2)(a), (3), (4), and (5) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 4, chapter 11, subchapter 6, ARM Monitoring procedures.

Collateral References

93 C.J.S. Waters §§97, 102.

61A Am. Jur. 2d Pollution Control §§134, 478, 482.

80-15-211. General agricultural chemical ground water management plan.

Compiler's Comments

1995 Amendment: Chapter 418 near end substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 4, chapter 11, subchapter 2, ARM General management plan.

ARM 4.11.403 Sources of information.

80-15-212. Specific agricultural chemical ground water management plans.

Administrative Rules

ARM 4.11.301 Specific management plan.

ARM 4.11.307 Prioritizing preparation of specific management plans.

ARM 4.11.401 General or specific management plan advisory committees.

ARM 4.11.403 Sources of information.

80-15-213. Beneficial use to be considered in developing management plans — water classification.

Compiler's Comments

1995 Amendment: Chapter 418 in (1)(b)(i) and in four places in (2) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

80-15-214. Contents of specific agricultural chemical ground water management plan.

Administrative Rules

ARM 4.11.302 Specific management plan content.
ARM 4.11.303 Best management plan or practices for specific management plan.
ARM 4.11.403 Sources of information.

80-15-215. Benefits of appropriate agricultural chemical use to be considered.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

Administrative Rules

ARM 4.11.304 Specific management plan — public participation.
ARM 4.11.305 Specific management plan education.
ARM 4.11.401 General or specific management plan advisory committees.
ARM 4.11.403 Sources of information.

80-15-216. Commercial fertilizer ground water management plan.

Compiler's Comments

1995 Amendment: Chapter 418 substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

80-15-217. Management plans — rulemaking — review.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), in two places, substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 4, chapter 11, subchapter 3, ARM Specific management plan.
ARM 4.11.402 Department of Health and Environmental Sciences review and comment.
ARM 4.11.403 Sources of information.
ARM 4.11.904 General and specific management plan evaluations.

Part 3
Funding

80-15-301. Agricultural chemical ground water protection accounts — acceptance and expenditure of gifts, grants, and funds.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) and (3) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

80-15-302. Special funding.

Compiler's Comments

2001 Amendment: Chapter 141 in (1) increased pesticide registration fee from $80 to $95. Amendment effective October 1, 2001.

Saving Clause: Section 3, Ch. 141, L. 2001, was a saving clause.

1995 Amendment: Chapter 418 in (2)(a)(i) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: At beginning of (1) increased pesticide registration fee from $15 to $80; inserted (2) concerning deposit of fees into state special revenue account, with $15,000 credited to Department of Health and Environmental Sciences, $15,000 to Montana State University Extension Service, and remainder to Department; in (3), near middle of third sentence after "fertilizer", inserted "agricultural chemical ground water"; and inserted (4) concerning investment by Board of Investments of fees collected and crediting investment income to Department. Amendment effective January 1, 1992.

Severability: Section 9, Ch. 588, L. 1991, was a severability clause.

Part 4
Enforcement

Part Collateral References

93 C.J.S. Waters §§97, 102.

61A Am. Jur. 2d Pollution Control §§478, 482.

80-15-401. Authority to investigate and inspect.

Administrative Rules

ARM 4.11.902 Compliance inspections.

ARM 4.11.903 Compliance evaluations.

80-15-403. Compliance orders.

Compiler's Comments

1995 Amendments: Chapter 189 at end of (2)(a) substituted "who violates any requirement established pursuant to this chapter" for former language authorizing Department to issue cleanup orders to person's employees, agents, and subcontractors; inserted (2)(b) providing that subsection does not affect indemnity or liability agreements between owner, lessee, possessor, or person controlling the site and seller, lessor, or person relinquishing possession or control of the site; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 192 at end of (2)(a) inserted "This subsection does not apply"; inserted (2)(a)(i) exempting commercial wood treatment facilities; and inserted (2)(a)(ii) concerning agricultural chemical spills that threaten public water supply.

Chapter 418 in (1), in second sentence, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 8, Ch. 189, L. 1995, was a severability clause.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 4.11.903 Compliance evaluations.

ARM 4.11.905 Coordinating proposed orders.

ARM 4.11.906 Determining significant probability.

ARM 4.11.907 Contents of orders.

ARM 4.11.908 Corrective actions.
ARM 4.11.909 Duration of monitoring.

80-15-404. Injunctions authorized.

Administrative Rules
ARM 4.11.903 Compliance evaluations.
ARM 4.11.913 Other penalties.

80-15-405. Emergencies.

Administrative Rules
ARM 4.11.903 Compliance evaluations.
ARM 4.11.905 Coordinating proposed orders.
ARM 4.11.906 Determining significant probability.
ARM 4.11.907 Contents of orders.
ARM 4.11.908 Corrective actions.
ARM 4.11.909 Duration of monitoring.

80-15-411. Violators subject to penalties.

Compiler's Comments
1995 Amendment: Chapter 418 in (5) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules
ARM 4.11.903 Compliance evaluations.
ARM 4.11.913 Other penalties.

80-15-412. Administrative civil penalty.

Compiler's Comments
1995 Amendments — Composite Section: Chapter 189 in (1) and (5) deleted specific reference to Department of Health and Environmental Sciences; in (3) and in two places in (4), before "department", deleted "responsible"; and made minor changes in style. Amendment effective July 1, 1995.
Chapter 418 in (1), in two places, and in (5) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995. The amendment by Ch. 189 rendered the first amendment in (1) and the amendment in (5) void.
Severability: Section 8, Ch. 189, L. 1995, was a severability clause.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules
ARM 4.11.903 Compliance evaluations.
ARM 4.11.911 Enforcement.
ARM 4.11.912 Ability to stay in business.
ARM 4.11.913 Other penalties.
ARM 4.11.914 Penalty determination.
ARM 4.11.915 Gravity of violations.
ARM 4.11.916 Degree of care.
ARM 4.11.917 Significance of harm.

80-15-413. Judicial civil penalty.

Administrative Rules
ARM 4.11.903 Compliance evaluations.

80-15-414. Criminal penalties.

Administrative Rules
ARM 4.11.903 Compliance evaluations.

CHAPTER 18
ALTERNATIVE AGRICULTURAL CROPS

Part 1
Industrial Hemp

Part Compiler's Comments

Effective Date: This part is effective October 1, 2001.

Request for Federal Change or Waiver: Section 9, Ch. 360, L. 2001, provided: "The department shall send a copy of [this act], along with a request for a change in federal law or a waiver that will allow [this act] to be effective without federal preemption, to the Montana congressional delegation and the director of the drug enforcement administration."

CHAPTER 20
AGRICULTURAL RESEARCH

Part 1
Crop Research Facilities Protection Act

Part Compiler's Comments

Effective Date: Section 6, Ch. 441, L. 2001, provided: "[This act] is effective on passage and approval." Approved April 30, 2001.

TITLE 81
LIVESTOCK

Title Administrative Rules

Title 32, ARM Livestock.

Title Law Review Articles

Animal Behavior Evidence, Muckelston, 31 Mont. L. Rev. 257 (Spring 1970).

The Right to Kill Wild Animals in Defense of Person or Property, Bender, 31 Mont. L. Rev. 235 (Spring 1970).

The Range Cattle Industry: Its Effect on Western Land Law, Scott, 28 Mont. L. Rev. 155 (Spring 1967).

Animals at Large on the Highway, Murphy, 10 Mont. L. Rev. 109 (Spring 1949).

Recent Developments in Agribusiness Taxation, Maydew, 75 Taxes 155 (1997).

Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management, Pendery, 27 Envtl. L. 513 (1997).

Environmental Law: The Clean Water Act—Understanding When a Concentrated Animal Feeding Operation Should Obtain an NPDES Permit (National Pollutant Discharge Elimination System), Todd, 49 Okla. L. Rev. 481 (1996).

The Legal Prevention of Equine Insurance Fraud—How We Can Stop the Killing Game, Hunter, 22 Ohio N.U.L. Rev. 845 (1996).

Cows in Hot Water: Regulation of Livestock Grazing Through the Federal Clean Water Act, Frank, 35 Santa Clara L. Rev. 1269 (1995).

Environmental Regulation of Livestock Production Operations, Frarey & Pratt, 9 Nat. Resources & Env't 8 (1995).

Farm and Ranch Transactions: More Than Just Real Estate Sales Contracts, Krohn, 24 Colo. Law. 2497 (1995).

Liability for Damages Caused by Escaped Livestock, Turner, 24 Colo. Law. 1581 (1995).

The Effect of NAFTA (and GATT) on Animal Health Laws and Regulations (Sixteenth Annual American Agricultural Law Association Educational Conference Symposium), Looney, 48 Okla. L. Rev. 367 (1995).

'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy, Feller, 25 Envtl. L. 703 (1995).

The Development of Anti-Cruelty Laws During the 1800's, Favre & Tsang, 1993, Det. C.L. Rev. 1 (1993).

Animal Rights: A Socio-Legal Perspective, Pocar, 19 J.L. & Soc'y 214 (1992).

They Shoot Horses. (Animals Convicted of Crimes), McConnell, 142 New L.J. 806 (1992).

Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis, Hamilton & Bolte, 10 J. Agric. Tax'n & L. 99 (1988).

Cattle Breeding Syndications: Selected Securities and Tax Issues, Janvey & Bringardner, 8 J. Agric. Tax'n & L. 326 (1987).

Statutory Protection for Farm Animals, McCarthy & Bennett, 3 Pace Envtl. L. Rev. 229 (1986).

Of Farm Animals and Justice, Wise, 3 Pace Envtl. L. Rev. 191 (1986).

Liability for Damages Resulting From a Collision Between a Motor Vehicle and an Animal at Large on a Highway, Kennedy, 8 Willamette L. J. 183 (1972).

Commercial Law—Uniform Commercial Code—Security Interests in Livestock, Emmerson, 8 Nat. Resources J. 183 (1968).

Title Collateral References

Construction and application of terms "agricultural," "farm," "farming," or the like, in zoning regulations. 38 ALR 5th 357.

Contracts for breeding horses. 34 ALR 5th 651.

What constitutes offense of cruelty to animals—modern cases. 6 ALR 5th 733.

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Mont. Leg. Council (1987).

CHAPTER 1
DEPARTMENT OF LIVESTOCK

Part 1
General Provisions

Part Compiler's Comments

Preamble: The preamble attached to Ch. 153, L. 1999, provided: "WHEREAS, the pilot program to clarify and standardize regulations regarding the brucellosis vaccination of cattle imported into Montana has been successful; and

WHEREAS, requirements for the brucellosis vaccination of imported cattle may be more appropriately addressed through the rulemaking authority in 81-2-102 through 81-2-104, rather than by statute."

81-1-101. Definitions.

Compiler's Comments

Preamble: The preamble to Ch. 444, L. 1983, provided: "WHEREAS, the sunset law, sections 2-8-103 [now repealed] and 2-8-112, MCA, terminates the Board of Livestock and requires a performance evaluation of the Board by the Legislative Audit Committee; and

WHEREAS, as a result of the performance evaluation, the Legislative Audit Committee recommends that the Board of Livestock be reestablished under existing statutory authority."

Reestablishment: Section 1, Ch. 444, L. 1983, provided: "The Board of Livestock created pursuant to 2-15-3102 is reestablished with its existing statutory authority and rules." The audit report relating to the reestablishment of the Board of Livestock may be obtained from the Legislative Auditor. The report number is 81-554.

81-1-102. Duties and powers of department — fees based on costs.

Compiler's Comments

1999 Amendment: Chapter 574 in (3) at end substituted "alternative livestock ranches" for "game farms as described in Title 87, chapter 4, part 4"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 inserted (3) concerning the Department performing duties assigned to it relating to game farms. Amendment effective July 1, 1995.

1983 Amendment: Inserted (2) requiring establishment of fees based on costs.

Statement of Intent: The statement of intent attached to Ch. 444, L. 1983, provided: "A statement of intent is required for Senate Bill 259 because section 4 [amending this section] grants the Department of Livestock authority to charge fees commensurate with costs and section 12 [amending 81-4-605] grants authority to establish rules for handling estrays.

The Legislature intends that the fees be set in an amount sufficient to provide funds to administer the function for which the fee is charged. Fees shall not be set so high as to generate revenue in excess of expenses. The Legislature intends that a penalty be established by rule for failure to apply for renewal of a license required by 81-22-208. The penalty should be sufficient to encourage renewal of licenses.

The Department is required by law to process estrays at livestock markets. Section 12 [amending 81-4-605] specifically grants the Department authority to establish rules for the handling of estrays. It is the intent of the Legislature that the rules provide for collecting, holding, advertising, and selling of estrays in an expeditious manner while facilitating the movement of livestock and also protecting the property interests of the owner of the livestock."

Administrative Rules

Title 12, chapter 6, subchapter 15, ARM Game farms.

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Title 32, chapter 18, subchapter 1, ARM Branding.

Case Notes

Livestock Markets — Necessity and Convenience: In the regulation of livestock markets under section 46-907, R.C.M. 1947 (now repealed), the Livestock Commission (now Board of Livestock) had the power to determine whether or not a showing of convenience and necessity had been made. Baker Sales Barn, Inc. v. Mont. Livestock Comm'n, 140 M 1, 367 P2d 775 (1962).

Power of Representing Attorney: An attorney who represented the State Board of Stock Commissioners (now Board of Livestock) had the right to appear in aid of the prosecution of one accused of grand larceny in having stolen livestock. St. v. Biggs, 45 M 400, 123 P 410 (1912).

Attorney General's Opinions

Change of Policy: A gratuitous service by a state agency, not required by statute, provided for 40 years, did not create a legal duty to continue to provide the service, absent the applicability of estoppel principles to specific cases. There was no statutory or constitutional impediment to the adoption of a new policy, provided the policy adopted conformed to the statute to be implemented and was adopted in compliance with the Montana Administrative Procedure Act. 38 A.G. Op. 69 (1980).

Authority of Department Legal Counsel in Issuing Opinions: Although certain agencies such as the Department of Livestock have been given authority by the Legislature to employ legal counsel to assist in the accomplishment of the agency's statutory duties, only the Attorney General has the specific authority to issue legal opinions to County Attorneys or other agencies of state and county government, and conflicting opinions on the same subject issued by other state officers and agencies should be disregarded. 35 A.G. Op. 68 (1974).

Collateral References

Animals *key* 1.
4 Am. Jur. 2d Animals §§8, 9.

81-1-103. Audit of bills — payment of expenses.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

81-1-104. Investment of state special revenue account funds — crediting of investment income.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue account for earmarked revenue account in two places.

Attorney General's Opinions

Cost Deductions From Investment Earnings Allowed: Subsection (8) of 17-6-201 allows for deduction of allocated program costs from investment earnings of the state special revenue accounts referred to in this section. 42 A.G. Op. 108 (1988).

Part 2
Inspectors and Detectives

81-1-201. Appointment and powers.

Compiler's Comments

1983 Amendment: In second sentence, inserted provision allowing department to designate which inspectors and detectives are law enforcement officers; in fourth sentence, after "detectives" inserted "designated as law enforcement officers".

Collateral References

Animals *key* 6.
3A C.J.S. Animals §25.

Part 3
Administration of Animal Health Laws

81-1-302. Duties of administrator.

Administrative Rules

ARM 32.3.116 Regulations and orders for exotic and other extremely dangerous diseases.

CHAPTER 2
DISEASE CONTROL

Chapter Administrative Rules

Title 32, chapter 3, ARM Disease control.

Title 32, chapter 8, subchapter 2, ARM Milk freshness dating.

Chapter Law Review Articles

Liability for Damages Caused by Escaped Livestock, Turner, 24 Colo. Law. 1581 (1995).

Veterinarian Liability, Eglin & McGonagle, 35 For the Def. 2 (1993).

Animal Drug Control: The Challenge of Coordination—The International Perspective, Crawford, 38 Food Drug Cosm. L.J. 136 (1983).

Part 1
General Administration

81-2-102. Powers of department.

Compiler's Comments

1999 Amendment: Chapter 574 in (1)(d) in two places after "livestock" inserted "and alternative livestock"; in (1)(e) after "livestock" inserted "and alternative livestock"; and made minor changes in style. Amendment effective October 1, 1999.

1987 Amendment: In (1)(f), near end after "81-9-201", deleted "through 81-9-207"; in (1)(h) substituted "in accordance with 81-9-216 through 81-9-220 and 81-9-226 through 81-9-236" for "at any time and in such places as public welfare may demand, under the rules which may provide fees for the maintenance of such inspection and"; and near end of (1)(j) deleted "81-9-201 through 81-9-207".

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Administrative Rules

Title 12, chapter 6, subchapter 15, ARM Game farms.

Title 32, chapter 3, subchapter 1, ARM Disease control — general provisions.

ARM 32.3.125 Disposal of carcasses.

ARM 32.3.130 through 32.3.132 Vehicles used for transportation of livestock — cleaning and disinfection.

ARM 32.3.137 Authority to seize and destroy articles, products, and commodities.

Title 32, chapter 3, subchapter 2, ARM Importation of animals and semen into Montana.

Title 32, chapter 3, subchapter 3, ARM Pseudorabies.

Title 32, chapter 3, subchapter 4, ARM Brucellosis.

Title 32, chapter 3, subchapter 6, ARM Tuberculosis.

Title 32, chapter 3, subchapter 8, ARM Scabies.

Title 32, chapter 3, subchapter 10, ARM Anthrax.

Title 32, chapter 3, subchapter 12, ARM Rabies.

Title 32, chapter 3, subchapter 13, ARM Scrapie.

Title 32, chapter 3, subchapter 14, ARM Equine infectious anemia.

Title 32, chapter 3, subchapter 20, ARM Animal identifications.

Title 32, chapter 3, subchapter 23, ARM Control of biologics.

Title 32, chapter 5, ARM Laboratory activities.

Title 32, chapter 6, subchapter 1, ARM Animal foods.

Title 32, chapter 6, subchapter 7, ARM Slaughterhouses, meat packing houses, and meat depots.

Title 32, chapter 6, subchapter 8, ARM Sanitary requirements for poultry slaughterhouses, poultry meat packing houses, and poultry meat depots.

Title 32, chapter 6, subchapter 9, ARM Horse meat and horse meat food products.

Title 32, chapter 8, subchapter 1, ARM Fluid milk and grade A milk products.

Title 32, chapter 8, subchapter 2, ARM Milk freshness dating.

Title 32, chapter 9, subchapter 2 through 8, ARM Milk quality requirements — processing of dairy products.

Title 32, chapter 10, ARM Tester licensing.

Title 32, chapter 15, subchapter 2, ARM Animal health requirements for livestock markets.

Collateral References
Animals *key* 28 through 37.
4 Am. Jur. 2d Animals §§20, 41 through 47.

81-2-103. Adoption of rules.

Compiler's Comments
1981 Amendment: Changed "test" to "testing" throughout the section; added "or other animals" after "disposition of livestock" in the middle of the section.
Statement of Intent: The statement of intent attached to HB 107 (Ch. 110, L. 1981) provided: "A Statement of Intent is required for this bill because it grants rulemaking authority to the Department of Livestock.
Under the present law, the Department of Livestock may adopt rules for the inspection, testing, and treatment of certain diseases in livestock. The diseases in question can sometimes affect animals which are not normally categorized as livestock and can spread from those animals to livestock. The intent of this legislation is to allow the Department to adopt rules for the inspection, testing, and treatment of these other animals to prevent spreading of the disease."

Administrative Rules
Title 32, chapter 3, ARM Disease control.
ARM 32.3.214 Special requirements for goats.
ARM 32.3.218 Special requirements for sheep.
ARM 32.3.221 Tuberculosis and brucellosis test — importation of wild species of cloven-hoofed ungulates.
ARM 32.3.224 Bison.
ARM 32.3.224A Unlawfully estrayed and public-owned migratory bison from herds affected with a dangerous disease.
ARM 32.3.225 Llamas.
ARM 32.3.226 Ratites (flat-breasted) flightless birds.
Title 32, chapter 3, subchapter 3, ARM Pseudorabies.
Title 32, chapter 3, subchapter 4, ARM Brucellosis.
Title 32, chapter 3, subchapter 6, ARM Tuberculosis.
Title 32, chapter 3, subchapter 13, ARM Scrapie.

Collateral References
Animals *key* 29.
4 Am. Jur. 2d Animals §42.

81-2-104. Rules — agreement with federal government.

Collateral References
4 Am. Jur. 2d Animals §41.

81-2-105. Authority of municipal corporations.

Collateral References
4 Am. Jur. 2d Animals §42.

81-2-106. Cooperation by public officers.

Compiler's Comments
1995 Amendments: Chapter 418 at beginning substituted "department of public health" for "department of health and environmental sciences", substituted "board of public health" for "board of health and environmental sciences", and in two places, after "department", deleted "of livestock"; and made minor changes in style. Amendment effective July 1, 1995.
Chapter 546 at beginning substituted "department of public health and human services" for "department of health and environmental sciences, the board of health and environmental sciences". Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.
Section 571, Ch. 546, L. 1995, was a saving clause.

81-2-108. Diseased animals not to run at large — burial of carcasses.

Administrative Rules

ARM 32.3.125 Disposal of carcasses.
ARM 32.3.310 Disposal of dead animals.

Collateral References

Animals *key* 30, 32.
3A C.J.S. Animals §§73, 76.
4 Am. Jur. 2d Animals §§49 through 52.

81-2-109. Expenses, how paid — lien and foreclosure.

Compiler's Comments

1983 Amendment: In (1), at beginning inserted "If there is no violation of law or department rule", and near end inserted "designated" before "supervising officer" and "law or" before "rules"; inserted (2) delineating expenses for which an owner, agent, or person in charge is liable; inserted (3) requiring notice of expenses to be served on the violator and outlining the violator's liability for expenses absent response; and inserted (4) allowing absence of a response to constitute prima facie evidence of the reasonableness of expenses and of the violator's responsibility for those expenses.

Administrative Rules

Title 32, chapter 3, ARM Disease control.
Title 32, chapter 3, subchapter 4, ARM Brucellosis.

Case Notes

Only One Employee to Be Considered "Supervising Officer": The 1974 amendment to this section changed "supervising officer or officers" to "supervising officer", indicating a legislative intent to preclude only one employee of the Department from recovering his salary from the rule violator. St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

Penal Nature of Statute as Requiring Strict Construction: As this statute seeks to redress a wrong to the public, it is penal in nature and is to be construed strictly. The phrase "all expenses" in the second sentence of this section must (prior to the 1983 amendments) be limited to those expenses directly related to one or more of the activities listed in the first sentence of this section. St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

"All Expenses" Construed and Applied: The phrase "all expenses" in the second sentence of this section must (prior to the 1983 amendments) be limited to those expenses directly related to one or more of the activities listed in the first sentence of this section. The Department may not recover for expenses resulting from an investigation of a possible import violation. The Department may recover for travel and per diem expenses but must show that these expenses were reasonably related to the activities listed in the first sentence of this section. The Department may recover for the rental of a private airplane used to supervise a quarantine if it was the only effective method available. St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

Recovery of Expenses Denied: Although a portion of the salaries of two Department officers was properly recoverable from the rule violator, the carelessness and overreaching of the Department in computing the amounts made recovery impossible, resulting in the denial of all expenses. St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

81-2-110. Expense of cleaning and disinfecting carriers' facilities.

Collateral References

Animals *key* 31.
3A C.J.S. Animals §74.

81-2-112. Prohibition by governor on importation of animals from localities where disease exists — penalty.

Collateral References

Animals *key* 15, 28, 29, 31.
3A C.J.S. Animals §§67, 74.

81-2-114. Civil liability.

Collateral References

Animals *key* 35.

3A C.J.S. Animals §117.

Veterinarian's liability for malpractice. 71 ALR 4th 811.

Livestock or animal insurance: risks and losses. 47 ALR 4th 772.

Insured's duties respecting care of injured or ill animal covered by animal or livestock policy. 22 ALR 4th 1053.

Extent of liability of seller of livestock infected with communicable disease. 14 ALR 4th 1096.

81-2-120. Management of wild buffalo or bison for disease control.

Compiler's Comments

1997 Amendment: Chapter 523 in (1), near end of introductory clause after "compliance with", inserted "other state-administered or"; in (1)(a), after "transportation", inserted "quarantine"; inserted (1)(c) allowing the sale or transfer of brucellosis-free bison; inserted (1)(d) regarding disposition of sale proceeds; inserted (1)(e) providing for deposit of excess revenue in the state special revenue fund; and in (4), near end after "compliance with", inserted "other state-administered or".

1995 Statement of Intent: The statement of intent attached to Ch. 346, L. 1995, provided: "A statement of intent is required for this bill because the department of livestock is authorized in [section 1] [81-2-120] to adopt rules with regard to management of publicly owned wild buffalo or bison that enter Montana on private or public land and that are from a herd that is infected with a contagious disease that may spread to persons or livestock and may jeopardize compliance with federally administered livestock disease control programs. The department may determine that rulemaking is necessary with regard to feasible methods of taking wild buffalo or bison allowed within [section 1(1)] [81-2-120(1)] or with regard to disposal of the carcasses of wild buffalo or bison as provided for in [section 1(2) and (3)] [81-2-120(2) and (3)] .

A statement of intent is also required because [section 2] [87-1-216] authorizes the department of fish, wildlife, and parks to adopt rules with regard to wild buffalo or bison that have not been exposed to or infected with a contagious disease but are in need of management because of potential damage to person or property. The department may determine that rulemaking is necessary if management of wild buffalo or bison under the provisions of [section 2] [87-1-216] includes public hunting.

Effective Date: Section 5, Ch. 346, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 10, 1995.

Administrative Rules

ARM 32.3.224A Unlawfully estrayed and public-owned migratory bison from herds affected with a dangerous disease.

81-2-121. Taking of publicly owned wild buffalo or bison that are present on private property — notice — supplemental feeding — penalty.

Compiler's Comments

Effective Date: Section 4, Ch. 540, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 27, 1995.

Coordination Instruction: Section 3(2)(b), Ch. 540, L. 1995, provided: "If Senate Bill No. 312 is passed and approved and if it transfers to the department of livestock primary management of publicly owned wild buffalo or bison that enter Montana on private or public land, then . . . a new section is enacted to read" (see 1995 Session Law for text). Senate Bill No. 312 was approved April 10, 1995, as Ch. 346, L. 1995; therefore, the coordinated version of 81-2-121 in sec. 3(2)(b), Ch. 540, L. 1995, has been appropriately codified.

Part 2
Indemnity

Part Administrative Rules

ARM 32.3.418 Brucellosis — indemnity paid for reactors.

Part Collateral References

37 Am. Jur. POF2d Justifiable Destruction of Animal, pp. 711 through 737.

Construction of provisions of statute or ordinance governing occasion, time, or manner of summary destruction of domestic animals by public authorities. 42 ALR 4th 839.

Personal liability of public officer for killing or injuring animal while carrying out statutory duties with respect to it. 2 ALR 3d 822.

81-2-201. Classification of animals as to compensation for slaughter.

Collateral References

Animals *key* 32.
3A C.J.S. Animals §76.
4 Am. Jur. 2d Animals §44.

81-2-208. Sale of condemned carcasses — disposition of proceeds.

Collateral References

Animals *key* 32.
3A C.J.S. Animals §76.

Part 3
Disease Control Area

81-2-301. Establishment of livestock disease control area — entry into area — compulsory inspection.

Case Notes

Petition Required: Jurisdiction of the state Livestock Sanitary Board (now Board of Livestock) depended upon the receipt of a proper petition. State ex rel. Lee v. St. Livestock Sanitary Bd., 138 M 536, 357 P2d 685 (1960).

Prohibition Against Inspection Order:

Sufficiency of petition presented to the state Livestock Sanitary Board (now Board of Livestock) could be tested by Prohibition. State ex rel. Lee v. St. Livestock Sanitary Bd., 138 M 536, 357 P2d 685 (1960).

A Writ of Prohibition did not lie to arrest the ministerial action of the state Livestock Sanitary Board (now Board of Livestock) in ordering an inspection of cattle in a diseased area pursuant to the provisions of this section. State ex rel. Lee v. Mont. Livestock Sanitary Bd., 135 M 202, 339 P2d 487 (1959).

Writ of Review: A proceeding under 27-25-102 seeking a Writ of Review of the action of the state Livestock Sanitary Board (now Board of Livestock) was a proper remedy to review the action of the Board. State ex rel. Lee v. St. Livestock Sanitary Bd., 138 M 536, 357 P2d 685 (1960).

Law Review Articles

Agriculture: Animal Quarantine—Brucellosis, Bothwell, 19 Pac. L.J. 463 (1988).

81-2-302. Duty of department of revenue.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in first sentence substituted "property tax record" for "assessment roll"; and in second sentence substituted "department of revenue" for "county assessor". Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Part 4
Regulation of Semen Used for Artificial Insemination

Part Administrative Rules

ARM 32.3.220 Bovine semen shipped into Montana — permit required.

Part Law Review Articles

Emerging Legal Issues Associated With the Application of Embryo Transfer Technology in Livestock Agriculture, Looney, 34 Drake L. Rev. 321 (1985).

Taxation of Embryo Transplants: The Land of Milk and Money, Dostart, 36 Tax Law. 61 (1982).

Part Collateral References

Animals *key* 29.
4 Am. Jur. 2d Animals §86.
Contracts for artificial insemination of cattle. 61 ALR 3d 811.

Part 5
Treatment of Garbage Fed to Swine

Part Attorney General's Opinions

Prohibition of Feeding Uncooked Garbage to Apply to Chickens and Other Fowls: The prohibition of feeding uncooked garbage to swine and other animals, as contained in this part, applies to chickens and other fowls. 26 A.G. Op. 37 (1955).

81-2-502. Licenses.

Compiler's Comments

1983 Amendments: Chapter 444, at end of (1), substituted a fee to be established by department for a $5 fee; changed disposition of fee from general fund to earmarked fund for departmental use.

Chapter 281, near end of (1), substituted "state special revenue fund" for "earmarked revenue fund".

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.
ARM 32.6.201 Application for garbage feeder's license.

Collateral References

Licenses *key* 11(1).
53 C.J.S. Licenses §30.

81-2-504. Power to adopt rules.

Administrative Rules

Title 32, chapter 6, subchapter 2, ARM Garbage feeding.

81-2-505. Entry of premises for inspection — keeping of records.

Administrative Rules

ARM 32.6.203 Garbage feeding — cooking requirements.
ARM 32.6.204 Feeding areas separate.
ARM 32.6.205 Records kept — availability for inspection.
ARM 32.6.206 Disposal of garbage-fed animals — inspection before sale.

81-2-509. Cooking or other treatment of garbage.

Administrative Rules

ARM 32.6.203 Garbage feeding — cooking requirements.

Part 6
Tuberculin Regulation

Part Administrative Rules

Title 32, chapter 3, subchapter 6, ARM Tuberculosis.

81-2-601. Tuberculin — permission for sale or distribution of.

Collateral References

Animals *key* 29.
3A C.J.S. Animals §§66, 67, 70.

Part 7
Importation Permits and Health Certificates

Part Compiler's Comments

1981 Title: The title to Ch. 65, L. 1981 (SB 158), read: "An act to require the application for and the possession of a permit and a health certificate, unless the permit or certificate is waived, before certain animals, animal semen, or animal biologics may be imported into Montana; and providing for an immediate effective date."

Statement of Intent: The statement of intent attached to SB 158 (Ch. 65, L. 1981) provided: "A Statement of Intent is required for this bill because it delegates rulemaking authority to the Department of Livestock in Section 7 [81-2-707].

It is the intent of this bill that the Department maintain its present rules, and update them when necessary, regarding the importation of animals, animal semen, and animal biologics. However, these rules should be reviewed to ensure that they are in compliance with this bill and to eliminate any redundancy created by passage of this bill."

Part Collateral References
Animals *key* 28 through 37.
3A C.J.S. Animals §§66 through 98.
4 Am. Jur. 2d Animals §§41 through 47.

81-2-701. Short title.

Administrative Rules
ARM 32.3.214 Special requirements for goats.

81-2-702. Definitions.

Compiler's Comments
1999 Amendment: Chapter 574 in definition of animals after "game animals" deleted "game farm animals"; in definition of livestock after "goats" inserted "alternative livestock as defined in 87-4-406, and other animals for purposes of disease prevention, control, and eradication"; and made minor changes in style. Amendment effective October 1, 1999.
1995 Amendment: Chapter 206 in definition of livestock inserted "ostriches, rheas, emus"; and made minor changes in style.
Applicability: Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."
1993 Amendment: Chapter 417 in definition of livestock inserted "alpacas"; and made minor changes in style.
1991 Amendment: Included game farm animals in definition of animals.
1989 Amendment: Added llamas and bison to definition of livestock. Amendment effective March 20, 1989.

81-2-703. Documents required for importation — exemptions.

Compiler's Comments
1983 Amendment: Inserted second sentence of (2) permitting an exception for importation of cattle destined directly for slaughter.

Administrative Rules
ARM 32.3.223 Research facility exemption.

Collateral References
Animals *key* 31.
3A C.J.S. Animals §§67, 74, 82, 93.
4 Am. Jur. 2d Animals §43.

81-2-704. Quarantine for illegal entry — liability for expenses.

Collateral References
Animals *key* 34, 35.
3A C.J.S. Animals §§73, 77 through 90.
4 Am. Jur. 2d Animals §§43, 45.

81-2-705. Lien resulting from quarantine — foreclosure of lien.

Collateral References
Animals *key* 35.
3A C.J.S. Animals §§73, 92, 93, 97.
4 Am. Jur. 2d Animals §§45, 46.

81-2-707. Department rulemaking power.

Administrative Rules
Title 32, chapter 3, subchapter 2, ARM Importation of animals and semen into Montana.

Collateral References
Animals *key* 29.
3A C.J.S. Animals §67.
4 Am. Jur. 2d Animals §45.

81-2-708. Penalty.

Collateral References
Animals *key* 35.
3A C.J.S. Animals §97.
4 Am. Jur. 2d Animals §§45, 46.

CHAPTER 3
MARKS AND BRANDS

Chapter Administrative Rules
Title 32, chapter 18, ARM Branding and inspection.

Chapter Law Review Articles
Animal Branding, Meyer, 12 J. Agric. Tax'n & L. 179 (1990).
Electronic Monitoring Equipment, Russell, 4 Y.B. L. Computers & Tech. 139 (1990).
Freeze Marking and Other Techniques for Identifying Horses, Farrell, Johnson & Buckley 26 J. Forensic Sci. 82 (1981).

Part 1
Recording of Marks and Brands

81-3-101. Recorder of marks and brands.

Case Notes
Prior Legislation: For history of earlier recording acts, see Cuerth v. Arbogast, 48 M 209, 136 P 383 (1913).

Collateral References
Animals *key* 8.
3A C.J.S. Animals §§15, 16.
4 Am. Jur. 2d Animals §§8, 9.

81-3-102. Recording of brands required — alternative livestock to be marked — limit.

Compiler's Comments
1999 Amendment: Chapter 574 in (2) at beginning substituted "Alternative livestock" for "Game farm animals" and after "87-4-406" deleted "exclusive of carnivores and omnivores"; and made minor changes in style. Amendment effective October 1, 1999.
1993 Amendment: Chapter 30 inserted (2) requiring game farm animals to be identified by a recorded mark or brand.
1991 Amendment: Near beginning and near end of (1), after "person", deleted "firm, or corporation"; inserted (2) limiting number of brands to five; and made minor change in style. Amendment effective January 1, 1992.

Administrative Rules
ARM 32.18.105 Brand ownership and transfer.
ARM 32.18.106 Sale of branded livestock.
ARM 32.18.107 Change in brand recording.

Collateral References
Animals *key* 8.
3A C.J.S. Animals §16.
4 Am. Jur. 2d Animals §§8, 9.
Constitutionality of statute for prevention of larceny of livestock. 3 ALR 81.

81-3-103. Application for recording — record of brands.

Compiler's Comments
1991 Amendment: Near beginning of (1) and near middle of (2), after "person", deleted "firm, or corporation"; and made minor changes in style. Amendment effective January 1, 1992.
1989 Amendment: Inserted third sentence of (1) that read: "An applicant may apply for a seasonal mark or brand that is designated for use only for a specific period of time and that is subject to renewal upon termination of that period." Amendment effective March 20, 1989.

Administrative Rules

ARM 32.18.105 Brand ownership and transfer.

81-3-104. Designation of years for rerecording brands.

Compiler's Comments

1995 Amendment: Chapter 14 at beginning of (1) deleted reference to subsection (2); deleted (2) that read: "(2) The department shall develop a system for the staggered recording and rerecording of marks and brands"; and made minor changes in style.

1993 Amendment: Chapter 30 in (1), in second sentence, substituted "81-3-102(3)" for "81-3-102(2)"; and made minor changes in style.

1991 Amendment: In five places throughout section, after "person", deleted "firm, or corporation"; in (1) inserted introductory clause of first sentence and at beginning of second sentence inserted "Subject to the provisions of 81-3-102(2)"; inserted (2) requiring development of a system for staggered recording of marks and brands; and made minor changes in style. Amendment effective January 1, 1992.

81-3-105. Right of owner of recorded brand.

Compiler's Comments

1991 Amendment: Near beginning of first sentence and near middle of second sentence, after "person", deleted "firm, or corporation". Amendment effective January 1, 1992.

Current Practice: Currently, determination of the right of ownership is by means of brands and bills of sale. "Venting" of brands is no longer practiced.

Administrative Rules

ARM 32.18.106 Sale of branded livestock.

Case Notes

Placing Person's Name on Brand Certificate Not Evidence of Joint Tenancy: Ron Shaw claimed that cattle owned by his deceased parents were his property as a joint tenant because his name was on the brand certificate. The Supreme Court held that although a person's name on the certificate was prima facie evidence of ownership, it did not address the nature of that ownership and that a joint tenancy could only be created by an express declaration that the parties are creating a joint tenancy. In re Estate of Shaw, 259 M 117, 855 P2d 105, 50 St. Rep. 709 (1993) 259 M 117.

Death of Partner — Disposition of Property Held Jointly by Partners: Robert and William, brothers, opened a joint checking account in 1947, paid all ranch expenses through the account, put all ranch income in the account, and equally split net profits. All cattle were branded with either of two brands, each of which was registered in the name of "William Palmer or Robert Palmer". The brothers were also joint tenants in a commodity brokerage account. The Supreme Court held that the cattle and both accounts were partnership property not held in joint tenancy and remained so upon Robert's death. Thus, they did not pass to William as the surviving joint tenant; rather, they remained in the partnership for the purpose of winding up the partnership and paying its liabilities, after which William must account to Robert's survivor, his widow, for Robert's share of the partnership. By its very nature, partnership property must be treated differently than property of individuals, including property held by individuals as joint tenants but who are not in partnership. This rule applies regardless of the formal legal manner in which the property is held. This is a rule of equity developed over hundreds of years and codified in the Uniform Partnership Act. In re Estate of Palmer, 218 M 285, 708 P2d 242, 42 St. Rep. 1585 (1985), followed in Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994).

Improper to Include in Marital Estate Cattle Whose Brand Not Registered to Either Husband or Wife: In determining the size of the marital estate for the purpose of a division of property in a dissolution of marriage proceeding, the District Court included within the estate cattle whose brand was registered to the parties' adult children. The Supreme Court reversed because no evidence had been produced at trial to rebut the presumption that the person whose brand appeared on cattle was the owner of those cattle. Therefore, the court held that the cattle should not have been included in the marital estate since they were not owned by the husband or wife. In re Marriage of Schultz, 199 M 332, 649 P2d 1268, 39 St. Rep. 1435 (1982).

Ownership of Cattle:

Although under this section and 70-1-307, prima facie owners of the recorded brand have the same interest in the cattle bearing their brand as shown in brand record, joint ownership of the cattle may be contradicted and overcome by other evidence under 26-1-102. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

In action by administrator of estate of deceased partner against surviving partners to recover assets transferred by deceased during his last illness, evidence that deceased had a half interest in partnership cattle and failure of defendants to produce any of the partnership records at the trial in the lower court overcame the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

A transfer of a herd of cattle, at the time in the possession of a lessee, after they were segregated from other cattle, identified and counted out in the presence of seller and buyer, the lessee at the time agreeing to the substitution of owners, was sufficient to transfer possession, even though the brand of the transferor was not vented, there being uncontroverted evidence to overcome the prima facie presumption flowing from the fact that they still bore the brand of the seller. Costello v. Shields, 99 M 335, 43 P2d 879 (1935).

It was prima facie evidence that one was the owner of cattle bearing his recorded brand. Klind v. Valley County Bank of Hinsdale, 69 M 386, 222 P 439 (1924).

Vented Brand Prima Facie Evidence of Sale or Transfer: The recorded brand on livestock was prima facie proof of ownership of livestock bearing it. The presumption was rebuttable. One of the best methods of rebutting it was prescribed by section 3300, R.C.M. 1935 (since repealed), which provided that the venting of brands was prima facie evidence of sale or transfer of animals. Bohart v. Songer, 110 M 405, 101 P2d 64 (1940).

Evidence of Ownership of Brand: The best evidence of ownership of a livestock brand is the certificate of ownership executed by the recorder of marks and brands provided for by this section; therefore admission of the oral testimony of the secretary of the state Livestock Commission (now Board of Livestock) as to the owners of various brands found on horses shown by an inspector's reports with regard to shipments made by one charged with having received stolen animals was technical error. St. v. Keays, 97 M 404, 34 P2d 855 (1934).

81-3-106. Publication of notice of rerecording brands.

Compiler's Comments

1991 Amendment: In two places in second sentence, after "person", deleted "firm, or corporation"; and made minor changes in style. Amendment effective January 1, 1992.

81-3-107. Fees for department — deposit requirements.

Compiler's Comments

1995 Amendment: Chapter 14 at end of (1), after "governor", inserted "or the board"; inserted (2) exempting fees from deposit requirements of 17-6-105; and made minor changes in style.

1983 Amendments: Chapter 34 inserted the third sentence relating to research of mark or brand histories.

Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted fees established by department for $25 for recording a brand and $2.50 for copy of a record.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

ARM 32.18.107 Change in brand recording.

81-3-108. Penalty.

Compiler's Comments

1991 Amendment: Near beginning, after "person", deleted "firm, or corporation"; and made minor changes in style. Amendment effective January 1, 1992.

Collateral References

Animals *key* 13.

3A C.J.S. Animals §30.

Part 2
Inspection of Marks and Brands

81-3-201. Definitions.

Compiler's Comments

1997 Amendment: Chapter 376 in definition of livestock, at end, deleted "and includes bison, sheep, elk, and game farm animals, as defined in 87-4-406, exclusive of carnivores and omnivores";

inserted definition of specially qualified deputy stock inspector; and made minor changes in style. Amendment effective April 24, 1997.

1993 Amendments: Chapter 30 in definition of livestock, after "elk", inserted "and game farm animals, as defined in 87-4-406, exclusive of carnivores and omnivores"; and made minor changes in style.

Chapter 417 in definition of livestock, after "includes", deleted "llama".

1991 Amendment: In introductory clause substituted "chapter" for "part"; in definition of livestock, after "sex", inserted "and includes llama, bison, sheep, and elk"; in definition of person, after "association", inserted "firm"; and made minor changes in style. Amendment effective January 1, 1992.

81-3-202. Rules.

Administrative Rules

Title 32, chapter 4, ARM Game farm regulations.

Title 32, chapter 18, subchapter 2, ARM, Issuance of inspection certificates and transportation permits.

Title 32, chapter 18, subchapter 3, ARM Railroad shipments.

Collateral References

Animals *key* 6, 7; Inspection *key* 1, 5.

3A C.J.S. Animals §17.

81-3-203. Duties of state stock inspectors and deputy stock inspectors.

Compiler's Comments

1989 Amendment: Near beginning of (3), before "upon application", deleted "or any sheriff or deputy sheriff" and in three places in last sentence, after "the inspector", deleted "or sheriff's office"; near end of first sentence of (4), before "adjoining", deleted "immediately" and at end of third sentence substituted "as provided in 81-3-211(6)(d)" for "for 6 months"; and made minor change in phraseology. Amendment effective March 20, 1989.

Administrative Rules

ARM 32.18.201 Presentation of livestock for brand inspection — length of time inspection effective.

Case Notes

Ownership of Livestock — Inspection Certificate Controlling: The term "rightful owner" in 81-8-233 refers to the owner as determined by the Department of Livestock under this section. Any duty of a livestock market to go beyond the directions of the state inspector in ascertaining the name of the true owner of cattle would conflict with the statutory scheme. Eberl v. Scofield, 244 M 515, 798 P2d 536, 47 St. Rep. 1780 (1990).

Report — Admission in Evidence: One of the copies of the report of the inspector made under section 3324, Revised Codes of 1935 (now repealed), was admissible in an action for conversion, although the report was not made until the day after the sale. Smith v. Armstrong, 121 M 377, 198 P2d 795 (1948).

Collateral References

Animals *key* 6, 7; Inspection *key* 5.

3A C.J.S. Animals §11.

81-3-204. Seizure of livestock — retention of livestock — sale — disposal of proceeds.

Case Notes

Liability of Inspectors: Employees of the state Livestock Commission (now Board of Livestock) who, with probable cause, seized and killed animals to establish whether brand had been altered or defaced were simply following their duty under this section and could not be sued for wrongful conversion. Johnson v. Furgeson, 158 M 170, 489 P2d 1032 (1971).

81-3-205. Fees for inspection and livestock transportation permits.

Compiler's Comments

1989 Amendment: In (1), in second sentence and in two places in fourth sentence, deleted reference to Sheriff or Deputy Sheriff. Amendment effective March 20, 1989.

1983 Amendments: Chapter 277 substituted references to state special revenue fund for references to earmarked revenue fund.

Chapter 444, in (1), substituted fee established by department for schedule of 25 per head for 12 head or less, $3 for 12 to 20 head, and 20 per head for each head over 20 as inspection fees; substituted fee established by department for schedule of 25 for 12 head or less, 50 for 12 to 30 head, and $1 for over 30 head for movement permits; substituted fee established by the department for $5 permanent horse transportation permit; in (2) substituted "a fee established by department for each head inspected" for "20 cents per head for an animal originating within the county in the state in which the market or slaughterhouse is maintained or transported under a market consignment permit or transportation permit and 10 cents per head for an animal previously inspected before removal from a county as herein provided"; substituted a fee established by the department for 20 per head for release from a licensed livestock market; in (3)(a) substituted a fee established by the department for $1 a head for the first 10 head, and 50 for each additional head for inspecting horses, mules, or asses before removal from a county; in (3)(b) substituted a fee established by the department for $1 a head for inspecting horses, mules, or asses at a licensed livestock market.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Case Notes

Fees of Inspector: As formerly written this section did not permit the inspector to retain as additional compensation the fees received for inspections made at other than a public market occasioned by the removal of livestock from one county to another. State ex rel. Erwin v. Warren, 124 M 378, 224 P2d 142 (1950).

81-3-206. Commissioners to designate places for loading livestock for inspection.

Collateral References

Inspection *key* 5.

81-3-210. Bill of sale required to prove ownership.

Compiler's Comments

1983 Amendments: Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444, in (1), after "inspection for livestock" deleted "exempt from the change of ownership inspection when purchased in lots of 5 head or less"; after "department" deleted "of livestock"; in (2) substituted fee established by department for $2.50 for each copy of a bill of sale.

Incorporation Into Existing Law: This section was enacted without any codification instructions. The apparent intent of the Legislature was that it become part of Title 81, chapter 3, part 2, and the Code Commissioner has codified it accordingly. This arrangement may affect other sections in part 2, especially 81-3-231(5). See 1-11-103(4).

Collateral References

Animals *key* 10.

81-3-211. Inspection of livestock before change of ownership or removal from county — transportation permits.

Compiler's Comments

1997 Amendment: Chapter 376 in (6)(a), near beginning of first sentence after "business or", substituted "if cattle are" for "where a purebred cow is"; in (6)(b), near end of second sentence and near middle of third sentence, after "state", inserted "stock inspector or a specially qualified deputy"; and made minor changes in style. Amendment effective April 24, 1997.

1995 Amendment: Chapter 380 in (6)(d), in first sentence after "permit", inserted "in a 12-month period" and in second sentence substituted "period of 8 months from the date of issuance" for "period from March 31 through November 30 of the calendar year in which it is issued"; and made minor changes in style. Amendment effective April 12, 1995.

1989 Amendments: Chapter 166 in (1) inserted definition of rodeo producer; and in first sentence of (6)(d), before "adjoining", deleted "immediately", in second sentence, after "valid for", substituted "the period from March 31 through November 30 of the calendar year in which it is issued" for "6 months", and inserted third sentence that read: "The permit may be issued only if the livestock is branded with the permittee's brand, which must be registered in Montana." Amendment effective March 20, 1989.

Chapter 217 in (5) changed "patrolman" to "patrol officer".

1983 Amendments: Chapter 17, in second to last sentence of (6)(c) before "year", substituted "for the calendar" for "only between April 1 and October 31 of the".

Chapter 277, in (6)(d), substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 deleted former (2)(a), which read: "such sale or change of ownership transaction involves five or fewer animals"; in (6)(b) substituted a fee established by the department for a $5 permit fee; in (6)(d) substituted a fee established by the department for a $5 permit fee for moving for grazing.

1981 Amendments: Chapter 10 inserted (7) requiring the livestock seller to request required inspections and pay required fees prior to removal or change of ownership.

Chapter 364 amended this section by moving the exempt transaction language formerly in (2)(b)(i), (ii), and (iii) to (2)(a), (b), and (c) for clarity.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

ARM 32.18.201 Presentation of livestock for brand inspection — length of time inspection effective.

ARM 32.18.202 Requirements for obtaining county line grazing permits.

ARM 32.18.204 Livestock market releases — duration and circumstances under which diversion allowed.

Attorney General's Opinions

Removal of Cattle — Misdemeanor: The removal of cattle from a county without first having had any of the removed animals inspected, or without first have obtained a market consignment permit listing the animals, is a misdemeanor and a violation of 81-3-231 and this section. 29 A.G. Op. 69 (1956).

81-3-212. Exceptions.

Compiler's Comments

1989 Amendment: Deleted former (2) that read: "(2) transported by railroad consigned to and which, without leaving the custody of the carrier, does reach a market at which the department regularly maintains a stock inspector and a loading tally has been filed by the shipper with the carrier as provided in 81-4-607"; near beginning of (2) and (3), after "horse-drawn vehicle", deleted "railroad car"; in (4), after "purpose of", deleted "shipment by railroad or"; in (5), after "reaches", deleted "by means other than railroad"; deleted former (7) that read: "(7) when hauled by truck or trailer from one county to an adjoining county within the state for the purpose of shipment by railroad at which shipping point the department maintains a stock inspector or where a deputy state stock inspector is available and for which a transportation permit has been obtained in the manner provided by law"; inserted (6) relating to transportation of livestock to a veterinarian; and made minor changes in phraseology. Amendment effective March 20, 1989.

81-3-213. Inspection of livestock removed from state.

Compiler's Comments

1989 Amendment: Near beginning deleted reference to 81-3-212(2); and made minor changes in punctuation and style. Amendment effective March 20, 1989.

Administrative Rules

ARM 32.18.201 Presentation of livestock for brand inspection — length of time inspection effective.

81-3-214. Entry permit.

Compiler's Comments

1989 Amendment: Deleted former (1), (2), and part of (3) that read: "(1) Except as provided in subsections (2) and (3) of this section, any person owning livestock imported into this state or his agent must notify the department or a salaried employee of the department of the number, breed, type, and age of the livestock, its location, and the purpose for which it has been brought into the state. Such notification shall be made within 48 hours after the arrival of the livestock in the state. Livestock so moved may not be commingled with any livestock already in Montana until inspected for brands and marks in daylight by a state stock inspector or deputy state stock inspector. The fees for this inspection shall be the same as those imposed for county-line or change-of-ownership inspections. The fees paid to state stock inspectors shall be remitted to the department for deposit in the state special revenue fund for the use of the department.

(2) Livestock consigned to a licensed livestock market or for immediate slaughter to a licensed slaughter facility at which preslaughter inspection is maintained is exempt from the requirements of this section.

(3) Livestock moved between Montana and an adjacent state for graze on a regular basis and as part of the usual operation of a farm or ranch shall be exempt from the notice and inspection requirements of this section, provided a"; near beginning substituted "must be" for "has been" and at end substituted "section" for "subsection"; and made minor changes in phraseology. Amendment effective March 20, 1989.

1983 Amendments: Chapter 277 substituted references to state special revenue fund for references to earmarked revenue fund.

Chapter 444, in (3), substituted a fee established by the department for a $5 permit fee for an entry permit.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

ARM 32.18.201 Presentation of livestock for brand inspection — length of time inspection effective.

ARM 32.18.203 Import transportation permit.

81-3-221. Brands fraudulently changed.

Case Notes

Immunity From Liability: Employees of the state Livestock Commission (now Board of Livestock) who, with probable cause, seized and killed animals to establish whether brand had been altered or defaced were not liable for wrongful conversion. Johnson v. Furgeson, 158 M 170, 489 P2d 1032 (1971).

Collateral References

Animals *key* 11.

3A C.J.S. Animals §25.

4 Am. Jur. 2d Animals §§12, 13.

81-3-222. Compensation for animals killed.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

81-3-231. Penalties.

Compiler's Comments

1989 Amendments: Chapter 166 at end of (1)(d) deleted "or does not file a loading tally with the carrier as provided in 81-4-607"; deleted former (3) that read: "(3) A person who ships by railroad carrier and the railroad carrier transporting livestock for which a loading tally has been filed as provided by 81-4-607 and for which shipment of livestock an inspection has not been made which after shipment causes or permits the livestock to leave the custody of the railroad carrier at a place other than where this state regularly maintains a stock inspector is guilty of a misdemeanor and is punishable as provided in subsection (6) of this section"; in three places in (3) inserted "transportation permit" and near end, after "constable", deleted "gross vehicle weight enforcement officer"; and corrected internal references. Amendment effective March 20, 1989.

Chapter 217 in (3) changed "patrolman" to "patrol officer".

1987 Amendment: In second sentence of (6), after "section", inserted "except those assessed and collected in a justice's court".

1985 Amendment: Near end of (4) after "constable", inserted "gross vehicle weight enforcement officer".

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Attorney General's Opinions

Removal of Cattle — Misdemeanor: The removal of cattle from a county without first having had any of the removed animals inspected, or without first having obtained a market consignment permit listing the animals, is a misdemeanor and a violation of 81-3-211 and this section. 29 A.G. Op. 69 (1956).

CHAPTER 4
CONTAINMENT OF LIVESTOCK

Chapter Law Review Articles

Searching for the Montana Open Range: A Judicial and Legislative Struggle to Balance Tradition and Modernization in an Evolving West, Archer, 63 Mont. L. Rev. 197 (2002).

Animal Behavior Evidence, Muckelston, 31 Mont. L. Rev. 257 (Spring 1970).

The Range Cattle Industry: Its Effect on Western Land Law, Scott, 28 Mont. L. Rev. 155 (Spring 1967).

Animals at Large on the Highway, Murphy, 10 Mont. L. Rev. 109 (Spring 1949).

Cows in Hot Water; Regulation of Livestock Grazing Through the Federal Clean Water Act, Frank, 35 Santa Clara L. Rev. 1269 (1995).

Liability for Damages Caused by Escaped Livestock, Turner, 24 Colo. Law. 1581 (1995).

'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy, Feller, 25 Envtl. L. 703 (1995).

Determining Liability of Ranchers and Farmers for Injuries Caused by Fencing or Not Fencing Rangelands, Palmer, 14 J. Agric. Tax'n & L. 25 (1992).

Grazing Rights: Time for a New Outlook, Jackson, 32 Nat. Resources J. 623 (1992).

Home on the Range, Knox, 14 Am. Law. 112 (1992).

Livestock in Wilderness: A Review and Forecast, McClaran, 20 Envtl. L. 857 (1990).

Fence Laws Under Scrutiny, 25 Law Soc'y J. 51 (1987).

Kansas Fence Laws and Trespassing Livestock, Brownback, 56 J. Kan. B.A. 15 (1987).

Owners of Dogs and Horses; What Theories of Liability Apply?, Frankovich, 22 Trial 30(7) (1986).

Reforming Federal Grazing Law: Will Congress Pass Needed Legislation Before the Cows Come Home?, Borchers, 13 J. Legis. 216 (1986).

Torts—Injury-by-Animal Law Exception to Traditional Common Law Premises Liability, 24 Washburn L.J. 676 (1985).

Animal Trespass: Torts, Gilbride, 14 Creighton L. Rev. 454 (1980).

Liability for Damages Resulting From a Collision Between a Motor Vehicle and an Animal at Large on a Highway, Kennedy, 8 Willamette L.J. 183 (1972).

Chapter Collateral References

3A C.J.S. Animals §§238, 241, 248.

37 Am. Jur. POF2d Damages for Loss of or Injury to Animal, pp. 639 through 680.

37 Am. Jur. POF2d Justifiable Destruction of Animal, pp. 711 through 737.

Liability for killing or injuring, by motor vehicle, livestock or fowl on highway. 55 ALR 4th 822, superseding 20 ALR 2nd 1053.

Liability of governmental entity for damage to motor vehicle or injury to person riding therein resulting from collision between vehicle and domestic animal at large in street or highway. 52 ALR 4th 1200.

Liability for personal injury or death caused by trespassing or intruding livestock. 49 ALR 4th 710.

Liability for damage to motor vehicle or injury to person riding therein from collision with runaway horse, or horse left unattended or untied in street. 49 ALR 4th 653.

Livestock or animal insurance: risks and losses. 47 ALR 4th 772.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway. 29 ALR 4th 431.

Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway. 21 ALR 4th 132.

Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR 4th 994.

Preservation of Agricultural Lands: Alternative Approaches, 1976 Interim Report, Montana Legislative Council.

Public Access to Public Lands, 1976 Interim Report, Montana Legislative Council.

Part 1
Fences

Part Case Notes

Allowing Disrepair of Fence Violation of Public Policy: It was against the public policy of Montana to allow sagged or fallen fencing wire to clutter the range and become a menace to persons riding or walking over it. Van Voast v. Blaine County, 118 M 375, 167 P2d 563 (1946).

Damages Granted for Trespassing Cattle — Sufficient Fence: A landowner who had a fence that was not a legal fence but that was sufficient to turn away cattle was entitled to damages for injury caused by defendant's trespassing cattle. Davis v. Desch, 118 M 252, 164 P2d 1015 (1946).

Part Collateral References

Animals *key* 92.
3A C.J.S. Animals §§243, 246, 247.
4 Am. Jur. 2d Animals §§59 through 64.
22 Am. Jur. POF2d Malicious Design and Construction of Fence, pp. 683 through 719.
Liability for injury or death from collision with guy wire. 8 ALR 5th 177 §§11-15, 21.
Validity of statutes requiring the construction of fences—modern cases. 87 ALR 4th 1129.
Restrictive covenants as to height of structures or buildings. 1 ALR 4th 1021.
Zoning regulations prohibiting or limiting fences, hedges, or walls. 1 ALR 4th 373.
Fence as nuisance. 80 ALR 3d 962.

81-4-101. Legal fences defined.

Case Notes

Cause of Action for Erection of Spite Fence Solely Intended to Injure Neighbor — Availability of Injunctive Relief or Nuisance Claim — Bordeaux Overruled: Kottas built a 200-foot long, 7 feet 3 inches to 7 feet 9 inches high wooden fence that obstructed Haugen's view. Haugen sought injunctive relief for removal of the fence, alleging that it was a spite fence. The District Court concluded that it was indeed a spite fence, but declined to issue an injunction or recognize any remedy under Montana law, citing Bordeaux v. Greene, 22 M 254, 56 P 218 (1899), in holding that a person with a legal right can enforce the enjoyment of that right without inquiry into motive. The Supreme Court noted the many changes in property law since 1899 and overruled Bordeaux, adopting instead the rationale in Sundowner, Inc. v. King, 509 P2d 785 (Idaho 1973). Sundowner rejected the older rule that erection of a spite fence is not an actionable wrong and held that a property owner cannot erect a structure for the sole purpose of injuring a neighbor, such as a spite fence, which is of no beneficial use to the owner but is erected and maintained for the purpose of annoying a neighbor. A spite fence gives rise to an action for both injunctive relief and damages and may also be addressed through a nuisance claim. The Supreme Court reversed for a determination of the proper remedy. Haugen v. Kottas, 2001 MT 274, 307 M 301, 37 P3d 672 (2001).

Purpose of Legal Fence Statutes Is to Prevent Trespass by Livestock, Not Create Cause of Action for Motorists: Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. Larson-Murphy argued that the defendants were negligent per se for failing to maintain a legal fence as required by law. The Supreme Court held that its past decision in Indendi v. Workman, 272 M 64, 899 P2d 1085 (1995), was incorrect in substituting the court's judgment for the Legislature's by creating a statutory duty on livestock owners for maintaining legal fences for the protection of motorists. The Supreme Court stated that the purpose of legal fence statutes is to prevent livestock from trespassing on the land of others and that the statutes apply strictly to the relationship between the livestock owners and landowners. The Supreme Court held that the statutes requiring a legal fence do not create any statutory duty on the part of livestock owners with respect to motorists; therefore, a violation of the statutes cannot serve as the basis for a finding of negligence per se in the case of an injured motorist. The Supreme Court went on to state that whether or not a livestock owner has violated common-law duty of care with respect to fencing livestock in areas where injuries to motorists may be foreseeable is for the finder of fact and depends on the individual circumstances involved in each case. Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

Failure to Maintain Legal Fence as Basis for Finding of Negligence Per Se: Nothing in this section limits the civil liability of the owner of a defective fence to injury to livestock or precludes

liability for other types of injuries to persons or property resulting from the livestock owner's failure to properly contain animals by means of a legal fence. Therefore, a violation of this section can be the basis for a finding of negligence per se when that violation results in injury to a motorist or passenger traveling on the highways. Indendi v. Workman, 272 M 64, 899 P2d 1085, 52 St. Rep. 644 (1995), overruled, to the extent that Indendi holds that a violation of this section may serve as a basis for a finding of negligence per se with regard to an injury to a motorist on a public highway, in Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000). See also VanLuchene v. St., 244 M 397, 797 P2d 932 (1990).

Trespass on Unfenced Lands:

One turning his cattle out to graze unrestrained on lands where he had a right to do so was under no obligation to prevent them from entering on another's uninclosed premises and was not responsible for damage occasioned by their entry thereon through following their natural instincts, but absence of lawful fence did not justify willful trespass. Dunbar v. Emigh, 117 M 287, 158 P2d 311 (1945).

A lawful fence entirely surrounding his lands was a condition precedent to the right of a landowner to recover damages from owners of livestock trespassing thereon unless the latter, with knowledge of the private ownership of unfenced land, willfully herded them thereon or drove them to a point so near the boundaries that they were certain to go upon and feed thereon. Schreiner v. Deep Creek Stock Ass'n, 68 M 104, 217 P 663 (1923).

Where a livestock owner, claiming a strip of land 30 feet wide and one-half mile in length within plaintiff's inclosure, turned his cattle loose under circumstances which showed that it was intended that they should go into plaintiff's inclosure and graze upon his lands, he was liable for the damage done by them to plaintiff's pasture, the fact that plaintiff did not maintain any fence between the strip and defendant's land being no defense. Dorman v. Erie, 63 M 579, 208 P 908 (1922).

Right to Build Fence: The provisions prescribing what are legal fences and defining the duty to maintain and repair partition fences did not affect the right of an adjoining owner to build a division fence partly on the other's land. Hoar v. Hennessy, 29 M 253, 74 P 452 (1903).

Collateral References

Animals *key* 92.

3A C.J.S. Animals §§246, 247.

4 Am. Jur. 2d Animals §64.

Constitutionality of fencing and stock laws. 6 ALR 212, supplemented by 18 ALR 67.

81-4-102. Construction of auto pass not to deprive legal fence of character.

Case Notes

Purpose of Legal Fence Statutes Is to Prevent Trespass by Livestock, Not Create Cause of Action for Motorists: Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. Larson-Murphy argued that the defendants were negligent per se for failing to maintain a legal fence as required by law. The Supreme Court held that its past decision in Indendi v. Workman, 272 M 64, 899 P2d 1085 (1995), was incorrect in substituting the court's judgment for the Legislature's by creating a statutory duty on livestock owners for maintaining legal fences for the protection of motorists. The Supreme Court stated that the purpose of legal fence statutes is to prevent livestock from trespassing on the land of others and that the statutes apply strictly to the relationship between the livestock owners and landowners. The Supreme Court held that the statutes requiring a legal fence do not create any statutory duty on the part of livestock owners with respect to motorists; therefore, a violation of the statutes cannot serve as the basis for a finding of negligence per se in the case of an injured motorist. The Supreme Court went on to state that whether or not a livestock owner has violated common-law duty of care with respect to fencing livestock in areas where injuries to motorists may be foreseeable is for the finder of fact and depends on the individual circumstances involved in each case. Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

Failure to Maintain Legal Fence as Basis for Finding of Negligence Per Se: Nothing in 81-4-101 limits the civil liability of the owner of a defective fence to injury to livestock or precludes liability for other types of injuries to persons or property resulting from the livestock owner's failure to properly contain animals by means of a legal fence. Therefore, a violation of 81-4-101 can be the basis for a finding of negligence per se when that violation results in injury to a motorist or

passenger traveling on the highways. Indendi v. Workman, 272 M 64, 899 P2d 1085, 52 St. Rep. 644 (1995), overruled, to the extent that Indendi holds that a violation of 81-4-101 may serve as a basis for a finding of negligence per se with regard to an injury to a motorist on a public highway, in Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000). See also VanLuchene v. St., 244 M 397, 797 P2d 932 (1990).

Failure to Provide Auto Pass — No Illegal Fence: Where appellant contended that under this section the Department of Highways' (now Department of Transportation's) failure to provide an auto pass resulted in an illegal fence, the court held that this section merely allows auto passes without making an otherwise legal fence illegal and that failure to provide an auto pass did not invoke liability under 81-4-103. Ambrogini v. Todd, 197 M 111, 642 P2d 1013, 39 St. Rep. 400 (1982).

81-4-103. Civil liability.

Case Notes

Purpose of Legal Fence Statutes Is to Prevent Trespass by Livestock, Not Create Cause of Action for Motorists: Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. Larson-Murphy argued that the defendants were negligent per se for failing to maintain a legal fence as required by law. The Supreme Court held that its past decision in Indendi v. Workman, 272 M 64, 899 P2d 1085 (1995), was incorrect in substituting the court's judgment for the Legislature's by creating a statutory duty on livestock owners for maintaining legal fences for the protection of motorists. The Supreme Court stated that the purpose of legal fence statutes is to prevent livestock from trespassing on the land of others and that the statutes apply strictly to the relationship between the livestock owners and landowners. The Supreme Court held that the statutes requiring a legal fence do not create any statutory duty on the part of livestock owners with respect to motorists; therefore, a violation of the statutes cannot serve as the basis for a finding of negligence per se in the case of an injured motorist. The Supreme Court went on to state that whether or not a livestock owner has violated common-law duty of care with respect to fencing livestock in areas where injuries to motorists may be foreseeable is for the finder of fact and depends on the individual circumstances involved in each case. Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

Failure to Maintain Legal Fence as Basis for Finding of Negligence Per Se: Nothing in 81-4-101 limits the civil liability of the owner of a defective fence to injury to livestock or precludes liability for other types of injuries to persons or property resulting from the livestock owner's failure to properly contain animals by means of a legal fence. Therefore, a violation of 81-4-101 can be the basis for a finding of negligence per se when that violation results in injury to a motorist or passenger traveling on the highways. Indendi v. Workman, 272 M 64, 899 P2d 1085, 52 St. Rep. 644 (1995), overruled, to the extent that Indendi holds that a violation of 81-4-101 may serve as a basis for a finding of negligence per se with regard to an injury to a motorist on a public highway, in Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000). See also VanLuchene v. St., 244 M 397, 797 P2d 932 (1990).

Collateral References

Animals *key* 101.

3A C.J.S. Animals §273.

81-4-104. Barbed wire fences to be kept in repair.

Collateral References

4 Am. Jur. 2d Animals §64.

81-4-105. Fallen wire fencing declared nuisance — abatement.

Case Notes

Duty of City to Inspect City Property for Hazards: Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. Plaintiff contended that the city was negligent in allowing a dangerous and hazardous condition to exist on a public right-of-way and guilty of negligence per se under this section for allowing a public nuisance. The District Court granted summary judgment, determining as a matter of law that the city owed plaintiff no duty of care because: (1) she was not walking on a sidewalk, street, or path of any kind; (2) the city did not invite her to travel in that area; and (3)

there were no city lights or signs in the vicinity. On appeal, plaintiff cited Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748 (1997), contending that the city ignored its duty to maintain the public streets, sidewalks, and rights-of-way within corporate limits in a reasonably safe condition for public travel by never going onto the premises, mowing it, raking it, or removing debris and that if routine maintenance had been done, the wire would have been found and removed. The Supreme Court agreed. The city's contention that it did not owe a duty of care in this case, because there was nothing in the area suggesting that it was a walkway or inviting the public to use it as such, failed under the Richardson test because of the city's neglect in exercising ordinary care or skill in the management of its property. Reasonable minds could differ on whether the city should have taken some action to inspect or maintain the property, so summary judgment was improper and thus reversed for a jury determination of negligence, including possible contributory negligence. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

Failure to Establish Negligence Per Se When City Not Owner of Fence That Caused Injury: Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. Plaintiff contended that the city was negligent per se for creating or maintaining a public or private nuisance in violation of this section. The District Court found, and the Supreme Court agreed, that the city was not negligent per se because in order to establish negligence per se, it must be proved among other things that a defendant violated a particular statute and that the statute was intended to regulate a member of the defendant's class. This section applies to the owner of a nuisance fence, but nothing in the record indicated that the city owned a fence in the area of the accident that would make the city a member of the regulated class or that the city created or maintained a nuisance fence. The city could not be in violation of a statute that it had no duty to observe. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

Collateral References

4 Am. Jur. 2d Animals §54.

Fence as nuisance. 80 ALR 3d 962.

Part 2
Animals Unlawfully Running at Large

Part Law Review Articles

Searching for the Montana Open Range: A Judicial and Legislative Struggle to Balance Tradition and Modernization in an Evolving West, Archer, 63 Mont. L. Rev. 197 (2002).

Res Ipsa Loquitur and the Great Cattle Caper: Inferred Negligence in Escaped Livestock—Automobile Collisions, Wall, 75 Neb. L. Rev. 308 (1996).

Liability for Damages Caused by Escaped Livestock, Turner, 24 Colo. Law. 1581 (1995).

Part Collateral References

3A C.J.S. Animals §§238, 241, 248.

4 Am. Jur. 2d Animals §§48 through 54.

Keeping horses as nuisance. 27 ALR 3d 627.

Keeping pigs as nuisance. 2 ALR 3d 931.

81-4-201. Animals running at large.

Compiler's Comments

1995 Amendment: Chapter 206 inserted "ostriches, rheas, emus"; and made minor changes in style.

Applicability: Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

1993 Amendment: Chapter 417 inserted "alpacas"; and made minor changes in style.

1989 Amendment: Inserted reference to llamas and bison; and made minor change in phraseology. Amendment effective March 20, 1989.

Case Notes

Livestock on Roadway — Coverage of Statute: Plaintiff sued defendant alleging that injuries he sustained in a motorcycle accident were caused by the presence of defendant's goats on the road. Defendant contended that 81-4-201 and 81-4-202, enacted in 1895, were enacted to protect the property of landowners, and therefore motorists were not a protected class under the statutes. Defendant moved for summary judgment. The court found that the continuing in effect of these

statutes and their amendment in 1945 was part of the historical process of conforming the open-range law to the needs of the modern world. The court held that the complaint stated a cause of action and denied the motion for summary judgment. Read v. Buckner, 514 F. Supp. 281, 38 St. Rep. 735 (D.C. Mont. 1981).

Trespassing Stock — Fence of Landowner: When a defendant turned his goats out without fencing them and without a herder, the court did not err in holding that the plaintiff was not precluded from recovering by reason of the condition of his fences. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

81-4-202. Penalties.

Compiler's Comments

1993 Amendment: Chapter 8 in (1) substituted fine of not more than $500 for former fine of $10 for first offense and $20 for each subsequent offense; and made minor changes in style.

1987 Amendment: In (2), after "section", inserted "except those collected in a justice's court".

Case Notes

Livestock on Roadway — Coverage of Statute: Plaintiff sued defendant alleging that injuries he sustained in a motorcycle accident were caused by the presence of defendant's goats on the road. Defendant contended that 81-4-201 and 81-4-202, enacted in 1895, were enacted to protect the property of landowners, and therefore motorists were not a protected class under the statutes. Defendant moved for summary judgment. The court found that the continuing in effect of these statutes and their amendment in 1945 was part of the historical process of conforming the open-range law to the needs of the modern world. The court held that the complaint stated a cause of action and denied the motion for summary judgment. Read v. Buckner, 514 F. Supp. 281, 38 St. Rep. 735 (D.C. Mont. 1981).

Collateral References

Animals *key* 57; Fines *key* 20.

3A C.J.S. Animals §169; 36A C.J.S. Fines §19.

81-4-203. Open range defined.

Case Notes

Open-Range No Duty Rule Not Applicable to Legal Relationship Between Livestock Owners and Motorists: Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. The Supreme Court held that the no duty rule under the open-range doctrine does not apply to the legal relationship between livestock owners and motorists. However, the law of the open range remains the law of the state, and the term "open range" includes all highways outside of private enclosures used by the public unless modified by the Legislature. (See 27-1-724 enacted in 2001.) Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

Absence of Proof of Open Range or Fenced Highway — Directed Verdict Improper: Indendi hit a horse on Highway 84, killing the animal, sustaining personal injuries, and totaling her vehicle. She alleged negligence on the part of the horse owner as well as violations of fencing and livestock herding laws and open-range exceptions. The horse owner counterclaimed for loss of the horse. The District Court directed a verdict in favor of the horse owner. A directed verdict may be granted only when it appears that the nonmoving party cannot recover on any view of the evidence, including the legitimate inferences drawn from that evidence. Absent proof that the land was open range and that Highway 84 was a fenced highway, it was improper for the court to direct a verdict premised on the horse owner's satisfaction of the duty exclusion in 60-7-202(2). Indendi v. Workman, 272 M 64, 899 P2d 1085, 52 St. Rep. 644 (1995), following Ambrogini v. Todd, 197 M 111, 642 P2d 1013 (1982).

Livestock Wandering on Open Range — Public Nuisance Doctrine Inapplicable: As a matter of law, the public nuisance abatement statutes should not be used to require a livestock owner to prevent stock from running free on county roads in an open range area. State ex rel. Martin v. Finley, 227 M 242, 738 P2d 497, 44 St. Rep. 1050 (1987), followed in Williams v. Selstad, 235 M 137, 766 P2d 247, 45 St. Rep. 2254 (1988).

Overgrazing Damages Remanded — No Offset — Open Range Law: The District Court ruled that Helehan was liable for $3,000 in overgrazing damages caused to Ueland's property by horses allowed on Helehan's land and that Ueland was not entitled to reimbursement for a $3,000 fence.

The court offset these amounts. The Supreme Court remanded, finding that the costs did not offset since damages flowed from Helehan to Ueland but not from Ueland to Helehan. However, the error was harmless since under Montana's open range law Helehan could not be legally obligated to restrain the horses and could not be held liable for damages occurring prior to the time the fence was built. Helehan v. Ueland, 223 M 228, 725 P2d 1192, 43 St. Rep. 1679 (1986).

Erosion of Open Range Law: Generally, an open range designation implies that an owner is not liable for his wandering livestock. Prior to 1974, a rancher was liable only for willful failure to keep his livestock off a federal-aid primary highway. However, with the 1974 amendment of 60-7-201, ranchers are now liable for negligent conduct that results in the presence of their cattle on the rights-of-way of such highways. Ambrogini v. Todd, 197 M 111, 642 P2d 1013, 39 St. Rep. 400 (1982).

81-4-205. Male equine animals running at large as nuisance — abatement.

Collateral References

Nuisances *key* 61.
66 C.J.S. Nuisance §32.
4 Am. Jur. 2d Animals §72.
Keeping horses as nuisance. 27 ALR 3d 627.

81-4-207. Castration of animals running at large — notice to owner — expense and charges.

Case Notes

Notice to Owner: The notice requirements of this section were irrelevant to an action against the owner of a trespassing mule for personal injuries sustained in attempting to remove the mule. Ekwortzel v. Parker, 156 M 477, 482 P2d 559 (1971).

Collateral References

Animals *key* 51, 52.
3A C.J.S. Animals §§159 through 162.

81-4-208. Killing of animal running at large — notice — posting and service.

Collateral References

Animals *key* 49, 52.
3A C.J.S. Animals §§159 through 162.
4 Am. Jur. 2d Animals §58.

81-4-209. Penalty for violations.

Compiler's Comments

1995 Amendment: Chapter 92 after "misdemeanor" substituted "punishable as provided in 46-18-212" for "and upon conviction thereof shall be fined not less than $10 or more than $25"; and made minor changes in style.

Collateral References

Animals *key* 56.
3A C.J.S. Animals §168.

81-4-210. Only purebred bulls to run at large — limitation on time.

Case Notes

Hold the Bull: Livestock owners were properly required to confine their bull until they demonstrated that the animal was purebred in accordance with statutory requirements imposing procedural certification or grading requirements. State ex rel. Martin v. Finley, 227 M 242, 738 P2d 497, 44 St. Rep. 1050 (1987).

Collateral References

Animals *key* 50(5).

81-4-211. Female breeding cattle, purebred bull to accompany.

Case Notes

Hold the Bull: Livestock owners were properly required to confine their bull until they demonstrated that the animal was purebred in accordance with statutory requirements imposing procedural certification or grading requirements. State ex rel. Martin v. Finley, 227 M 242, 738 P2d 497, 44 St. Rep. 1050 (1987).

81-4-212. Castration of violating bulls.

Case Notes

Inquiry as to Ownership: When defendant found a purebred dairy bull running at large in his pasture, it would not have been either unnatural or unreasonable for the defendant to have contacted his neighbor, the plaintiff, to ascertain what, if anything, he knew about the bull. By failing to do this, the defendant was liable to the plaintiff, the owner of the bull, for castrating it. Holden v. Varner, 128 M 211, 272 P2d 1008 (1954).

81-4-213. Penalty.

Compiler's Comments

1995 Amendment: Chapter 92 after "punishable" substituted "as provided in 46-18-212" for "by a fine of not less than $25 or more than $250"; and made minor changes in style.

81-4-214. Branding animals running at large — running irons prohibited.

Compiler's Comments

1993 Amendment: Chapter 417 near middle, after "llama", inserted "alpaca"; and made minor changes in style.

1989 Amendment: Near middle inserted "llama, bison"; and made minor changes in grammar and phraseology. Amendment effective March 20, 1989.

81-4-215. Liability of owners of stock for trespass.

Compiler's Comments

1993 Amendment: Chapter 417 near beginning, after "llamas", inserted "alpacas" and after "or occupant of the enclosure" deleted "which may be sustained thereby"; and made minor changes in style.

1989 Amendment: Near beginning inserted "llamas". Amendment effective March 20, 1989.

Case Notes

Purpose of Legal Fence Statutes Is to Prevent Trespass by Livestock, Not Create Cause of Action for Motorists: Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. Larson-Murphy argued that the defendants were negligent per se for failing to maintain a legal fence as required by law. The Supreme Court held that its past decision in Indendi v. Workman, 272 M 64, 899 P2d 1085 (1995), was incorrect in substituting the court's judgment for the Legislature's by creating a statutory duty on livestock owners for maintaining legal fences for the protection of motorists. The Supreme Court stated that the purpose of legal fence statutes is to prevent livestock from trespassing on the land of others and that the statutes apply strictly to the relationship between the livestock owners and landowners. The Supreme Court held that the statutes requiring a legal fence do not create any statutory duty on the part of livestock owners with respect to motorists; therefore, a violation of the statutes cannot serve as the basis for a finding of negligence per se in the case of an injured motorist. The Supreme Court went on to state that whether or not a livestock owner has violated common-law duty of care with respect to fencing livestock in areas where injuries to motorists may be foreseeable is for the finder of fact and depends on the individual circumstances involved in each case. Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

Erosion of Open Range Law: Generally, an open range designation implies that an owner is not liable for his wandering livestock. Prior to 1974, a rancher was liable only for willful failure to keep his livestock off a federal-aid primary highway. However, with the 1974 amendment of 60-7-201, ranchers are now liable for negligent conduct that results in the presence of their cattle on the rights-of-way of such highways. Ambrogini v. Todd, 197 M 111, 642 P2d 1013, 39 St. Rep. 400 (1982).

Criminal Sanctions Not Available: Available remedies for damage caused by trespassing cattle did not include a criminal sanction. St. v. Blakely, 181 M 118, 592 P2d 501, 36 St. Rep. 567 (1979).

Complaint — Sufficiency:

In action to restrain trespass by livestock and to recover for partial loss of a growing crop of barley then being trampled and grazed down by livestock after defendant had removed a long-standing section line fence bounding one side of a field that plaintiff had just planted in barley, the complaint alleging a malicious removal of the fence was sufficient to state a cause of

action for trespass of cattle upon plaintiff's property, although he did not allege a secure enclosure of the barley field but did so testify. Thompson v. Mattuschek, 134 M 500, 333 P2d 1022 (1959).

In an action on an implied contract to recover the reasonable value of the pasturage of livestock, the complaint alleging ownership and right of possession in plaintiff, the ownership of the animals in defendant, that the lands were enclosed by a fence that the defendant broke down, that the defendant pastured the animals on the land, and the reasonable value of the pasturage per head a month, stated a cause of action. Dorman v. Erie, 63 M 579, 208 P 908 (1922).

Range Law: Under common law, livestock had to be fenced in, but under range law, they had to be fenced out. Thompson v. Mattuschek, 134 M 500, 333 P2d 1022 (1959).

Trespass on Unfenced Land:

Under the fence statute, one turning his livestock at large on land where he had the right to do so was not liable in damages for their invasion of private lands of another failing to maintain lawful fence, though he expected and intended such trespass to be committed. Dunbar v. Emigh, 117 M 287, 158 P2d 311 (1945).

When a plaintiff, the owner of unenclosed lands within a forest reserve in which defendants had a permit to graze their cattle, in his action for damages for depasturing his land relied upon the allegation in the answer that the defendants were running their cattle "under herd" and "in charge of herders" as an admission that the animals were placed upon his premises by the defendants' agents and did not introduce evidence that they were willfully or negligently driven or permitted to remain thereon, it appearing on the contrary that the herders endeavored to keep them off his premises and drove them therefrom when found there, a judgment in his favor was unwarranted under the above rules. Schreiner v. Deep Creek Stock Ass'n, 68 M 104, 217 P 663 (1923).

When a livestock owner, claiming a strip of land 30 feet wide and one-half mile in length within plaintiff's enclosure, turned his cattle loose under circumstances which showed that it was intended that they should go into plaintiff's enclosure and graze upon his lands, he was liable for the damage done by them to plaintiff's pasture. The fact that the plaintiff did not maintain any fence between the strip and defendant's land was no defense. Dorman v. Erie, 63 M 579, 208 P 908 (1922).

The owners of animals could not knowingly and willfully drive or herd them upon the lands of another, whether such lands were protected by an enclosure or not, and to avoid encroaching upon his neighbor, he must at his peril ascertain the line at which his rights end and his neighbor's begin. Herrin v. Sieben, 46 M 226, 127 P 323 (1912), overruled on other grounds in Simonson v. McDonald, 131 M 494, 311 P2d 986 (1957).

This section and the custom of the state making the maintenance of a legal fence by a landowner a prerequisite to recovery for trespass by domestic animals of another did not charge the landowner with the duty to keep cattle lawfully at large from coming on his land or make their entry thereupon rightful so as to make him liable for injuries to such animals caused by the existence of dangerous agencies on the land, but not wantonly or intentionally caused. Beinhorn v. Griswold, 27 M 79, 69 P 557 (1902).

There could be no recovery for damages sustained to the owner of unenclosed lands by reason of sheep straying or being driven thereupon and destroying the grass and verdure unless it appeared that they were maliciously driven upon such lands for the purpose of causing injury. Fant v. Lyman, 9 M 61, 22 P 120 (1889).

A lawful fence entirely surrounding the grounds or premises entered or some obstruction equivalent thereto was a condition precedent to the right to bring an action against the owner of trespassing animals for damages sustained by reason of such trespass. Smith v. Williams, 2 M 195 (1874).

Herd Animals: The provisions of this section applied to all domestic animals but had no application to animals in charge of a herder. Herrin v. Sieben, 46 M 226, 127 P 323 (1912), overruled on other grounds in Simonson v. McDonald, 131 M 494, 311 P2d 986 (1957).

Unlawful Fencing of Public Domain: A person who unlawfully fenced a portion of the public domain acquired only a tortious possession that did not authorize him to maintain an action against another for depasturing such land or entitle him to restrain the latter by injunction from continuing to depasture the land. Clemmons v. Gillette, 33 M 321, 83 P 879 (1905).

Nonapplicability to Willful Appropriation of Another's Herd: This section applied to trespasses committed by animals running at large without the knowledge of the owner and not to a case where one knowingly and willfully appropriated the use of another's land. Monroe v. Cannon, 24 M 316, 61 P 863 (1900). See also Rea Bros. Sheep Co. v. Rudi, 46 M 149, 127 P 85 (1912); Light v. U.S., 220 US 523, 55 L Ed 570, 31 S Ct 485 (1911); Musselshell Cattle Co. v. Woolfolk, 34 M 126, 85 P 874 (1906).

Legal Fence: A reasonable and substantial compliance with the statute is all that was required, and an immaterial variation in the height of the fence from that of a lawful fence did not defeat the action. Smith v. Williams, 2 M 195 (1874).

Collateral References

Animals *key* 48.

Liability for injury to trespassing stock from poisonous substance or other conditions on the premises. 12 ALR 3d 1103; 33 ALR 448.

Liability for personal injury or death caused by trespassing or intruding livestock. 88 ALR 2d 709, superseded by 49 ALR 4th 710.

Scienter as condition of liability for damage by trespassing animals. 33 ALR 1305.

Injunction against repeated or continuing trespasses on real property by livestock. 32 ALR 463, supplemented by 60 ALR 2d 310.

Validity, construction, and effect of statute eliminating scienter as condition of liability for injury by animals. 1 ALR 1113, supplemented by 142 ALR 436.

81-4-217. Retention of trespassing stock.

Compiler's Comments

1995 Amendment: Chapter 92 in third sentence of (3), at beginning, substituted "owner or person in charge of the animal" for "defendant" and in two places substituted "claimant" for "plaintiff"; in (4), after "misdemeanor", substituted "punishable as provided in 46-18-212" for "and shall be fined not less than $100 or more than $500"; and made minor changes in style.

1983 Amendment: In (1), reduced the written notice period from 72 to 24 hours and deleted a final sentence that read: "In all cases a copy of the notice shall also be posted at a point where the animal was taken."

Case Notes

Dismissal for Insufficient Evidence Not Appealable: Where the defendants were charged with the theft of calves belonging to another and the charges were dismissed for insufficient evidence because the State did not prove the defendants' failure to give notice under 81-4-217, the dismissal of the charges could not be appealed by the State. Under the rationale of St. v. Cool, 174 M 99, 568 P2d 567 (1977) (citing U.S. v. Ball, 163 US 662 (1895), and Fong Foo v. U.S., 369 US 141 (1962)), a dismissal for insufficient evidence under the circumstances of this case operates as an acquittal and an appeal constitutes a violation of the defendants' rights against double jeopardy. St. v. Greenwalt, 204 M 196, 663 P2d 1178, 40 St. Rep. 767 (1983).

Personal Injury in Removing Animal: The notice requirements of this section were irrelevant to an action against the owner of a trespassing mule for personal injuries sustained in attempting to remove the mule. Ekwortzel v. Parker, 156 M 477, 482 P2d 559 (1971).

Constitutionality: This statute is constitutional. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

Extent of Damages — Evidence: When evidence was conflicting as to the value of goats and as to the extent of damages and there was ample evidence to show that the value of goats was not disproportionate to damage caused, the Supreme Court could not say that trial court was not justified in retaining all the goats to satisfy his claim. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

Fence — Necessity: Under some circumstances a person was permitted to take animals into possession regardless of whether the premises were enclosed by a legal fence. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

Injury to Animals: When the evidence was conflicting as to whether goats were injured by failure of the taker up to milk them, the trial court did not err in not awarding damages on a cross-complaint especially when the owner could have milked them himself where confined or could have regained possession of them by giving bond. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

Notice — Waiver of Defects: When the owner of goats was personally served with notice and went and examined the goats in the corral and also examined the field in which they were grazing to determine damage, he waived any defect in notice. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

Place of Posting Notice: A notice, required to be posted under former law (deleted by amendment, 1983), where goats were confined was a notice where they were "taken up", although the place where they were found grazing was from one to one and one-half miles from the place where they were confined. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

Grazing District Law — Effect:

No provision of the grazing district law (Title 76, ch. 16) gave the owner of land within a grazing district, but not owned or controlled by it, the right to impound livestock of another on such land or claim a lien for the keep thereof under this section. McKee v. Clark, 115 M 438, 144 P2d 1000 (1943).

Under law pertaining to open range, when plaintiff's land was unfenced and there was no evidence that defendant herded his horses upon the plaintiff's land or overstocked his own range so that horses would be compelled to go on plaintiff's land for food, the plaintiff was not entitled to any damages for trespass of the horses or compensation for care and feed for them while he held them impounded. McKee v. Clark, 115 M 438, 144 P2d 1000 (1943).

Jurisdiction of Court: When the plaintiff might have sued under this section for $350 because of the wrongful rescue of animals which had been trespassing upon his premises, but his demand was for only $286, a Justice's Court had jurisdiction of the cause. Reynolds v. Smith, 48 M 149, 135 P 1190 (1913).

Collateral References

Animals *key* 95(1).
3A C.J.S. Animals §§252, 255.
4 Am. Jur. 2d Animals §52.

81-4-218. Marking land and mining claims in national forest.

Collateral References

Woods and Forests *key* 8.
98 C.J.S. Woods and Forests §§8 through 13.

81-4-220. Marking — right of action against trespassing stock.

Case Notes

Mining Claims: This section was held inapplicable in its then-existing form to unpatented mining claims. Ward v. Chevallier Ranch Co., 138 M 144, 354 P2d 1031 (1960).

Collateral References

Animals *key* 48.
4 Am. Jur. 2d Animals §63.

Part 3
Herd Districts

Part Case Notes

Notice to Landowners Jurisdictional: Prior to amendment by Ch. 171, L. 1931, the notice required by 81-4-301 through 81-4-304 to be given by the Board of County Commissioners of the presentation of a petition for the creation of a herd district to landowners in the proposed district was jurisdictional, substantial compliance with the requirements of the statutes being indispensable to action by the Board. State ex rel. Keane v. Bd. of County Comm'rs, 83 M 540, 273 P 290 (1929).

Width of District at Point Where City Located: When the record on appeal did not show that a county seat lying within the district was an incorporated city, the contention of relator that upon elimination of the area embraced within the city limits the district was less than 3 miles in width, contrary to the former provisions of 81-4-301 through 81-4-304, could not be upheld. State ex rel. Keane v. Bd. of County Comm'rs, 83 M 540, 273 P 290 (1929).

Width of District Measured at Right Angles: When a petition for the creation of a herd district, lying north and south, showed that its eastern boundary was a river bank and that its width, measured at right angles to the base line (a line projected as nearly parallel to the course of the river), was at all points at least 3 miles in width, this was sufficient despite the fact that at the point where the river formed a bend toward the west extending about 2 miles within the territory of the proposed district, the distance between the peak of the bend and a point on the western boundary, when measured at an acute angle northwestward, was but a mile and a half. The width of a tract of land must be measured at right angles to its length. State ex rel. Keane v. Bd. of County Comm'rs, 83 M 540, 273 P 290 (1929).

Part Law Review Articles

Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management, Pendery, 27 Envtl. L. 513 (1997).

The Rise and Fall of Grazing Reform (Fifty Years of the Bureau of Land Management), Arruda & Watson, 32 Land & Water L. Rev. 413 (1997).

The Fight for Sustainable Resource Management in Idaho, Bloch, 16 J. Energy Nat. Resources & Envtl. L. 351 (1996).

81-4-301. Herd districts — creation, size, and location.

Compiler's Comments

1999 Amendment: Chapter 138 in (5) at beginning deleted "Upon petition of any owner or possessor of lands lying contiguous and adjoining any herd district theretofore created and upon like hearing and notice as hereinabove provided for, such lands shall be included in said herd district and become a part thereof"; and made minor changes in style. Amendment effective October 1, 1999.

Validation: Sec. 5, Ch. 488, L. 1979, provided: "No herd district established prior to the effective date of this act [April 9, 1979] may be held invalid because the boundaries do not follow section lines."

Attorney General's Opinions

Boundaries of Proposed District: The boundaries of a proposed herd district cannot overlap an existing district. 28 A.G. Op. 21 (1959).

Petition to Be Filed — Need Not Be Recorded: The petition for the creation of a herd district must be filed with the County Clerk and Recorder but need not be recorded. 28 A.G. Op. 21 (1959).

Collateral References

Animals *key* 50(2).

3A C.J.S. Animals §§143, 151, 152.

4 Am. Jur. 2d Animals §61.

81-4-302. Dissolution.

Collateral References

Animals *key* 50(2).

3A C.J.S. Animals §§143, 151, 152.

81-4-303. Exclusion of government land.

Attorney General's Opinions

"Government Section" Defined: The term "government section" as used in the herd district law is land lying within lines marked by government survey. 28 A.G. Op. 21 (1959).

Percentage of Cultivated Land for Withdrawal: No more than 15% of the tract of land proposed for withdrawal from a herd district can be under cultivation. 28 A.G. Op. 21 (1959).

81-4-304. Joint herd districts.

Collateral References

Animals *key* 50(2).

3A C.J.S. Animals §§143, 151, 152.

81-4-305. Changing time when herd districts will be in effect — petition — notice — hearing.

Attorney General's Opinions

Area to Be Used As Qualifying Basis for Petition: When a change of time for a herd district is sought, the area of the district at the time the petition for change is presented is the area to be used as the qualifying basis for the petition. 28 A.G. Op. 21 (1959).

Withdrawal or Addition of Names to Petition: Landowners may withdraw or add their names to the petition to organize or change a herd district up until the hour set for hearing the petition. 28 A.G. Op. 21 (1959).

81-4-306. Penalty for permitting animals to run at large in herd districts.

Compiler's Comments

1993 Amendment: Chapter 417 in two places in (1), after "llamas", inserted "alpacas"; and made minor changes in style.

1989 Amendment: In two places in (1) inserted reference to llamas and bison; and made minor changes in phraseology. Amendment effective March 20, 1989.

Case Notes

Open-Range No Duty Rule — Applies Only to Relationship Between Livestock Owner and Motorists: Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. The Supreme Court stated that open-range laws allow certain livestock to legally occupy a highway but that state laws also permit a motorist to legally occupy the same highway. There is no statute that provides that a livestock owner is not liable for injuries suffered by motorists colliding with the livestock owner's livestock. Therefore, the Supreme Court stated that any assertion of legal duties arising from the legal relationship between owners of livestock and motorists is beyond the scope of Montana's statutory open-range doctrine. The Supreme Court held that because both livestock and a motorist may have an equal right to lawfully occupy a highway, the livestock owner and the motorist each owe the other a legal duty to use the highway so as not to injuriously interfere with the other's right of use. Therefore, ascertaining the precise standard of care that each owes the other must be viewed in light of the circumstances under which the harm occurs. The Supreme Court reversed the directed verdict in favor of the defendants and remanded the case for a determination by the trier of fact to determine if the bull's owners had violated their duty of care to Larson-Murphy. (See 27-1-724 enacted in 2001.) Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

Open-Range No Duty Rule Not Applicable to Legal Relationship Between Livestock Owners and Motorists: Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. The Supreme Court held that the no duty rule under the open-range doctrine does not apply to the legal relationship between livestock owners and motorists. However, the law of the open range remains the law of the state, and the term "open range" includes all highways outside of private enclosures used by the public unless modified by the Legislature. (See 27-1-724 enacted in 2001.) Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

Horse on County Highway — No Duty to Motorists — Open Range Doctrine Not Changed: Plaintiff sued for injuries she received when a horse ran onto a county highway located within a herd district. The lower court granted defendants summary judgment on the basis that the livestock owners owed no duty to the plaintiff as a matter of law. The Supreme Court affirmed. The herd district statutes were designed only to protect other landowners and thus were not exceptions to the open-range doctrine. The herd district statutes were not designed to protect motorists, but were only intended to protect landowners and owners of livestock. Williams v. Selstad, 235 M 137, 766 P2d 247, 45 St. Rep. 2254 (1988), overruled, to the extent that Selstad holds that the open-range no duty rule applies to the legal relationship between livestock owners and motorists, in Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000) (see 27-1-724 enacted in 2001).

Strict Compliance Necessary: The provisions of the herd law had to be strictly followed in order to afford protection to those responsible for the impounding and sale of animals under its authority, and where they are not so followed, the taking constitutes a taking of private property without due process of law and a conversion of the property. Jorgenson v. Story, 78 M 477, 254 P 427 (1927).

Collateral References

Animals *key* 50(1), 50(4).

3A C.J.S. Animals §§157, 168.

81-4-307. Trespassing animals in herd district — retention for damages and costs.

Compiler's Comments

1999 Amendment: Chapter 51 in throughout section substituted reference to "costs" for reference to "charges"; in (1) near middle of third sentence before "certified letter" deleted "registered or"; and made minor changes in style. Amendment effective March 15, 1999.

Case Notes

Strict Compliance Necessary: The provisions of the herd law had to be strictly followed in order to afford protection to those responsible for the impounding and sale of animals under its authority, and where they are not so followed, the taking constitutes a taking of private property without due process of law and a conversion of the property. Jorgenson v. Story, 78 M 477, 254 P 427 (1927).

Collateral References

Animals *key* 51.

3A C.J.S. Animals §§159, 252 through 257.

4 Am. Jur. 2d Animals §52.

Liability for injury to trespassing stock from poisonous substances or other conditions on the premises. 12 ALR 3d 1103; 33 ALR 448.

Liability for personal injury or death caused by trespassing or intruding livestock. 88 ALR 2d 709, superseded by 49 ALR 4th 710.

Scienter as condition of liability for damage by trespassing animals. 33 ALR 1305.

Injunction against repeated or continuing trespasses on real property by livestock. 32 ALR 463, supplemented by 60 ALR 2d 310.

81-4-310. Annexation into existing herd district.

Compiler's Comments

2001 Amendment: Chapter 512 in (1) near middle of second sentence after "signed by" substituted "the owners or possessors of at least 55% of the affected land" for "all affected owners or possessors of land". Amendment effective May 1, 2001.

Applicability: Section 5, Ch. 512, L. 2001, provided: "[This act] applies to herd districts created or annexation actions that occur after [the effective date of this act]." Effective May 1, 2001.

Effective Date: This section is effective October 1, 1999.

81-4-311. Duty to build and maintain fences.

Compiler's Comments

Effective Date: Section 4, Ch. 512, L. 2001, provided: "[This act} is effective on passage and approval." Approved May 1, 2001.

Applicability: Section 5, Ch. 512, L. 2001, provided: "[This act] applies to herd districts created or annexation actions that occur after [the effective date of this act]." Effective May 1, 2001.

81-4-322. Horse herd districts — size — location — petition — notice and hearing — abolishment.

Collateral References

4 Am. Jur. 2d Animals §61.

81-4-328. Liability of officers.

Collateral References

37 Am. Jur. POF2d Justifiable Destruction of Animal, pp. 711 through 737.

Construction of provisions of statute or ordinance governing occasion, time, or manner of summary destruction of domestic animals by public authorities. 42 ALR 4th 839.

Personal liability of public officer for killing or injuring animal while carrying out statutory duties with respect to it. 2 ALR 3d 822.

Part 4
Impoundment of Livestock in Municipalities

81-4-401. Certain livestock not to run at large in municipalities.

Compiler's Comments

1993 Amendment: Chapter 417 inserted "alpacas"; and made minor changes in style.

1989 Amendment: Inserted reference to llamas and bison; and made minor changes in phraseology. Amendment effective March 20, 1989.

Collateral References

4 Am. Jur. 2d Animals §21.

Liability for killing or injuring, by motor vehicle, livestock or fowl on highway. 55 ALR 4th 822, superseding 20 ALR 2d 1053.

Liability of governmental entity for damage to motor vehicle or injury to person riding therein resulting from collision between vehicle and domestic animal at large in street or highway. 52 ALR 4th 1200.

Liability for damage to motor vehicle or injury to person riding therein from collision with runaway horse, or horse left unattended or untied in street. 49 ALR 4th 653.

Livestock or animal insurance: risks and losses. 47 ALR 4th 772.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway. 29 ALR 4th 431, superseding 59 ALR 2d 1328.

Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway. 21 ALR 4th 132, superseding 59 ALR 2d 1328.

Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR 4th 994.

81-4-402. Punishment for permitting trespass of livestock.

Compiler's Comments

1993 Amendment: Chapter 417 inserted "alpacas"; and made minor changes in style.

1989 Amendment: Inserted reference to llamas and bison; and made minor changes in phraseology. Amendment effective March 20, 1989.

81-4-403. Impounding animals — duties of cities and towns.

Collateral References

Animals *key* 51.
3A C.J.S. Animals §162.
4 Am. Jur. 2d Animals §§49, 52, 53.

Part 5
Roundup of Abandoned Horses

Part Case Notes

Constitutionality: One had no right to use his property so as to injure others and no vested right to the enjoyment of property if he failed to pay taxes thereon; hence this part, designed to rid the public range of abandoned horses, i.e., such as are unbranded or escaped taxation the previous year and as such declared a public nuisance, was not objectionable as retroactive legislation as interfering with the owner's vested right in the animals. The law afforded him an opportunity to protect his right if he saw fit to do so and in effect did no more than provide a further means of enforcing his obligations not to use his property so as to injure others and to pay taxes on the animals. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

Strict Compliance Required: To afford protection to those in charge of a roundup of abandoned horses and their subsequent sale, the provisions of this part had to be strictly followed, and if not and the sale was held before the hour of 8 a.m. (see 81-4-510), it was illegal and constituted a conversion of the animals. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

Part Law Review Articles

Equine Endeavors: Hobby vs. Business, Paris & Schenkel, 63 Fla. B.J. 33 (1989).
Public Lands, Land Use and Indians, Brock, 2 Nat. Resources & Env't 58(2) (1987).

81-4-501. Definitions.

Collateral References

Animals *key* 58, 60.
3A C.J.S. Animals §123.
4 Am. Jur. 2d Animals §§50, 56.

81-4-502. Abandoned horses on public range declared public nuisance subject to condemnation — right of owner.

Collateral References

Nuisance *key* 61.
66 C.J.S. Nuisance §32.
4 Am. Jur. 2d Animals §72.
Keeping horses as nuisance. 27 ALR 3d 627.

81-4-503. Roundup of abandoned horses — petition — expenses.

Collateral References

Animals *key* 61.
3A C.J.S. Animals §§124, 126.
4 Am. Jur. 2d Animals §58.

81-4-506. Sale of abandoned horses.

Collateral References
4 Am. Jur. 2d Animals §§58, 69.

81-4-507. Gathering horses in roundup district before roundup unlawful — rights of owner.

Collateral References
Animals *key* 61.
3A C.J.S. Animals §§127, 131.

81-4-510. Notice of sale of abandoned horses — form — time of sale — title.

Compiler's Comments
1999 Amendment: Chapter 51 in (1) in notice form in two places after "day of ...." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

Case Notes
Strict Compliance Required: To afford protection to those in charge of a roundup of abandoned horses and their subsequent sale, the provisions of this section had to be strictly followed, and if not and the sale was held before the hour of 8 a.m., it was illegal and constituted a conversion of the animals. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

Collateral References
4 Am. Jur. 2d Animals §§58, 69.

81-4-511. Assessment of horses taken in roundup.

Compiler's Comments
1993 Special Session Amendment: Chapter 27 at beginning substituted "Following a roundup held pursuant to this part, the department of revenue shall" for "It shall be the duty of the county assessor"; and made minor changes in style. Amendment effective January 1, 1994.
Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Collateral References
Taxation *key* 70.
84 C.J.S. Taxation §121.

81-4-513. Report of roundup foreman — disposition of copies.

Compiler's Comments
1993 Special Session Amendment: Chapter 27 in last sentence substituted "department of revenue" for "county assessor"; and made minor changes in style. Amendment effective January 1, 1994.
Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Case Notes
Failure to Make Report: The owner of abandoned range horses seeking to recover funds in the county treasury realized from their sale could claim only the balance in the county treasury over and above the charges against the horses for taxes, penalties, and roundup fees. Therefore, when there was no balance to be claimed, the owner's property rights were not affected by failure of the roundup foreman to make the report required by this section within the proper time. His contention that this section and 81-4-512 construed together were unconstitutional if not construed in a certain way could not be considered. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

81-4-515. Liability of officers and employees.

Collateral References
Counties *key* 88.
20 C.J.S. Counties §128.
37 Am. Jur. POF2d Justifiable Destruction of Animal, pp. 711 through 737.
Construction of provisions of statute or ordinance governing occasion, time, or manner of summary destruction of domestic animals by public authorities. 42 ALR 4th 839.
Personal liability of public officer for killing or injuring animal while carrying out statutory duties with respect to it. 2 ALR 3d 822.

81-4-516. Limitation of powers or duties of officers.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 near end substituted "the department of revenue" for "assessors"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Collateral References

Counties *key* 83; Taxation *key* 319(1).

20 C.J.S. Counties §117; 84 C.J.S. Taxation §462.

Part 6
Estrays

Part Case Notes

Power to Seize Livestock: Under former section 81-4-609 (repealed, 1989), the state Livestock Commission (now Board of Livestock) could seize any Montana livestock at any market outside the state where its inspector had reason to believe that the animals were stolen or where brands upon them appeared to have been altered or obliterated, leaving their ownership in doubt, and hold the proceeds pending decision as to their ownership. Schoenborn v. Williams, 83 M 477, 272 P 992 (1928).

Part Law Review Articles

The Wild Free-Roaming Horses and Burros Act: A Western Melodrama, Pitt, 15 Envtl. L. 503 (1985).

81-4-601. Estray defined.

Compiler's Comments

1993 Amendment: Chapter 417 in introductory clause inserted "alpaca".

1989 Amendment: Near beginning of introductory clause inserted "llama, bison". Amendment effective March 20, 1989.

81-4-602. Estrays — department authorized to take possession.

Collateral References

Animals *key* 60, 61.

3A C.J.S. Animals §§123, 124.

4 Am. Jur. 2d Animals §58.

81-4-603. Taking up and disposition of estrays — advertisement.

Compiler's Comments

1989 Amendment: At end of (4) substituted "upon payment to the department of the cost of caring for the estray as determined by the department" for "without cost or expense to the owner". Amendment effective March 20, 1989.

Collateral References

4 Am. Jur. 2d Animals §§52, 53.

81-4-604. Sale at public auction — branding.

Collateral References

4 Am. Jur. 2d Animals §58.

81-4-605. Expenses, how paid — disposition of proceeds of sale.

Compiler's Comments

1983 Amendment: In (1) after "selling of the estray" inserted "including but not limited to labor, feed, supplies, and veterinary services"; and inserted (2) allowing the Department to adopt rules and establish fees for handling of estrays.

Statement of Intent: The statement of intent attached to Ch. 444, L. 1983, provided: "A statement of intent is required for Senate Bill 259 because section 4 [amending 81-1-102] grants the Department of Livestock authority to charge fees commensurate with costs and section 12 [amending this section] grants authority to establish rules for handling estrays.

The Legislature intends that the fees be set in an amount sufficient to provide funds to administer the function for which the fee is charged. Fees shall not be set so high as to generate revenue in excess of expenses. The Legislature intends that a penalty be established by rule for failure to apply for renewal of a license required by 81-22-208. The penalty should be sufficient to encourage renewal of licenses.

The Department is required by law to process estrays at livestock markets. Section 12 [amending this section] specifically grants the Department authority to establish rules for the handling of estrays. It is the intent of the Legislature that the rules provide for collecting, holding, advertising, and selling of estrays in an expeditious manner while facilitating the movement of livestock and also protecting the property interests of the owner of the livestock."

81-4-606. Publication of description of estrays sold — disposition of proceeds remaining in state treasury.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

81-4-621. Penalties.

Compiler's Comments

1995 Amendment: Chapter 92 after "punishable" substituted "as provided in 46-18-212" for "by a fine of not less than $25 or more than $100 or by imprisonment in the county jail not exceeding 60 days or by both such fine and imprisonment"; and made minor changes in style.

1989 Amendment: Deleted former (2) and (3) that read: "(2) Every person, agent, firm, or corporation violating the provisions of 81-4-607 shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $300 or imprisoned in the county jail not to exceed 6 months or both fined and imprisoned.

(3) Any person, agent, firm, corporation, pool, or roundup association who shall ship cattle from this state and shall fail to make such inspection or tally at point of loading or who shall fail to file a true and correct tally, to the best of his knowledge and belief, of all the brands of cattle in such shipment with the railroad agent at the point of shipment or who shall fail to forward a true and correct copy, duly signed by him as party making the shipment, to the stock inspector at point of destination or any person who shall accompany a shipment of cattle as the shipper in charge from this state and shall fail to take a description of any and every animal taken out in transit and hand such description to the stock inspector at point of destination or any stock inspector at market points who shall fail to make inspection as provided in 81-4-609 shall be deemed guilty of a misdemeanor and shall be subject to a fine of not less than $50 or more than $500 for each and every offense. The fines so collected, except those collected in a justice's court, shall be turned into the general fund of the county where conviction is had, and any stock inspector, sheriff, or other police officer shall have power to make arrests to enforce the provisions of this part." Amendment effective March 20, 1989.

1987 Amendment: In last sentence of (3), after "collected", inserted "except those collected in a justice's court".

Collateral References

Animals *key* 64.

3A C.J.S. Animals §133.

CHAPTER 5
UNLAWFUL TRANSPORTING OR DRIVING OF LIVESTOCK

Chapter Law Review Articles

The Range Cattle Industry: Its Effect on Western Land Law, Scott, 28 Mont. L. Rev. 155 (Spring 1967).

Animals at Large on the Highway, Murphy, 10 Mont. L. Rev. 109 (Spring 1949).

Res Ipsa Loquitur and the Great Cattle Caper: Inferred Negligence in Escaped Livestock—Automobile Collisions, Wall, 75 Neb. L. Rev. 308 (1996).

Liability for Damages Caused by Escaped Livestock, Turner, 24 Colo. Law. 1581 (1995).

Liability for Damages Resulting from a Collision Between a Motor Vehicle and an Animal at Large on a Highway, Kennedy, 8 Willamette L. J. 183 (1972).

Chapter Collateral References

Liability for damage to motor vehicle or injury to person riding therein from collision with runaway horse, or horse left unattended or untied in street. 49 ALR 4th 653.

Livestock or animal insurance: risks and losses. 47 ALR 4th 772.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway. 29 ALR 4th 431.

Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway. 21 ALR 4th 132.

Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR 4th 994.

Liability for killing or injuring, by motor vehicle, of livestock or fowl on highway. 20 ALR 2d 1053, superseded by 55 ALR 4th 822.

Agricultural Land Taxation in Montana: A Report to the 49th Legislature, Joint Interim Subcommittee No. 1, Montana Legislative Council (1984).

Montana's Greenbelt Law: A Report to the 47th Legislature, Revenue Oversight Committee, Montana Legislative Council (1980).

Preservation of Agricultural Lands: Alternative Approaches, 1976 Interim Report, Montana Legislative Council.

Public Access to Public Lands, 1976 Interim Report, Montana Legislative Council.

Part 1
Unlawful Driving of Animals

81-5-101. Moving livestock from customary range forbidden.

Compiler's Comments

1995 Amendment: Chapter 92 in (1), before "customary range", inserted "owner's", after "owner" substituted "shall upon conviction be punished" for "is punishable", increased imprisonment from 90 days to 6 months, and increased fine from $100 to $500; inserted (2) concerning penalty for a person who negligently moves or causes to be moved certain livestock; inserted (3) requiring complaint to the Department prior to the imposition of the penalty; and made minor changes in style.

1993 Amendment: Chapter 417 after "llamas" inserted "alpacas"; and made minor changes in style.

1989 Amendment: Inserted reference to swine, llamas, and bison. Amendment effective March 20, 1989.

1983 Amendment: Substituted "moves" for "drives" and "moved" for "driven".

Collateral References

4 Am. Jur. 2d Animals §143.

81-5-102. Driving animals upon railroad track.

Compiler's Comments

1981 Amendment: Subsections (3) and (4) of sec. 7, Ch. 198, L. 1981, provided: "(3) There is added to those sections listed in subsection (4) of this section, following any language in those sections specifying the term of imprisonment for which an offender may be imprisoned but without specifying a fine that may be ordered to be paid, the words "or shall be punished by a fine of not more than $50,000 or by both such fine and imprisonment", or other similar language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment. The code commissioner shall change the listed sections in accordance with this section and may make minor incidental adjustments consistent with this section as may be necessary to reflect the intent of this section without changing the meaning of the listed sections as amended by this section.

(4) 13-27-205, 13-27-206, 19-11-207 [renumbered 19-18-207, 1993], 20-9-435, 23-5-106 (repealed, 1989), 30-13-142, 32-1-236, 32-1-473, 32-1-505, 45-5-104, 45-5-204, 45-5-105, 45-5-201, 45-5-203, 45-5-204, 45-5-304, 45-5-505, 45-5-603, 45-5-613, 45-5-621, 45-6-101 through 45-6-103, 45-6-204, 45-6-301, 45-6-316, 45-6-317, 45-6-325, 45-6-327, 45-7-101, 45-7-102, 45-7-201, 45-7-206 through 45-7-208, 45-8-106, 45-8-215, 45-8-318, 45-8-334, 45-8-335, 45-9-101(4), 45-9-102(4), 45-9-103(3), 45-9-107, 46-18-213, 46-18-502, 46-31-204, 50-38-107, 61-3-604, 81-5-102, and

81-9-118." See 46-18-231, also enacted by Ch. 198, L. 1981, which is related to the amendment of this section.

Collateral References

Animals *key* 91, 97.
3A C.J.S. Animals §§241, 242, 244, 248.
4 Am. Jur. 2d Animals §142.

81-5-104. Stolen livestock — seizure and forfeiture of vehicle and certain other property used in theft or transportation.

Compiler's Comments

1995 Amendment: Chapter 206 in (1) inserted "ostrich, rhea, emu"; and made minor changes in style.

Applicability: Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

1993 Amendments — Composite Section: Chapter 108 in (1), near beginning of first sentence after "vehicle", inserted "money, equipment, or personalty", before "transportation" inserted "theft or", and at end, after "unlawful", deleted "and such vehicle shall be forfeited to the state" and near beginning of second sentence, after "vehicle", inserted "money, equipment, or personalty"; and made minor changes in style.

Chapter 417 in (1), after "llama", inserted "alpaca"; and made minor changes in style.

Chapter 417 in (1) would have used "listed animals" rather than "stolen livestock". Because "livestock" is defined as a more inclusive term, the codifier has chosen to use that term rather than "listed animals".

1989 Amendment: In (1) inserted reference to llama and bison. Amendment effective March 20, 1989.

1985 Amendment: In (1), near end of first sentence, after "forfeited to", deleted "and confiscated by", at beginning of second sentence substituted "Any vehicle" for "Any such vehicle", and at end of second sentence, after "seized and held", deleted remainder of sentence that read: "and, upon conviction in a proceeding in the name of the state of Montana against such vehicle or against such vehicle and the owner before any district court or judge thereof, shall be confiscated and sold"; inserted (2) outlining forfeiture proceedings; in (3) in introductory clause substituted "A vehicle is not subject to forfeiture under this section" for "Such vehicle shall not be confiscated or subject to forfeiture"; and at end of (3)(a), substituted "or" for "and".

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

81-5-109. Presumption — hearing — disposition of vehicle and other property.

Compiler's Comments

1993 Amendment: Chapter 108 in (1), before "transportation", inserted "theft or"; in (4), in two places after "vehicle", inserted "money, equipment, or personalty"; and made minor changes in style.

81-5-110. Sale at public auction — retention of property.

Compiler's Comments

2001 Amendment: Chapter 554 in (3) at end substituted "deposited in the state general fund" for "placed in the special revenue account created in 81-5-111(2) for use by the department for personnel training or enforcement purposes". Amendment effective July 1, 2001.

1993 Amendment: Chapter 108 in (1), at beginning after "Vehicles", inserted "equipment, and personalty" and substituted "may" for "shall"; inserted (2) allowing the Department to retain vehicles, equipment, and personalty for official use; and inserted (3) providing for placement of forfeited money in the special revenue account.

1985 Amendment: At beginning of sentence substituted "Vehicles forfeited under 81-5-109 shall be sold" for "Such sale shall be"; after "public auction" deleted "and otherwise"; and near end of sentence substituted "may be sold" for "may be made".

81-5-111. Disposition of proceeds.

Compiler's Comments

2001 Amendment: Chapter 554 in (2) deleted former first sentence that read: "There is an account in the state special revenue fund" and at end substituted "state general fund" for "account, are statutorily appropriated, as provided in 17-7-502, and must be used by the department for personnel training or enforcement purposes"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 108 in (1), near beginning of first sentence, substituted "retaining the vehicle, equipment, or personalty" for "keeping the property", after "cost of the sale" substituted "the officer making the sale or the department, if it retains the vehicle, equipment, or personalty" for "so far as the balance of the sale proceeds permit", and near end, after "all liens", inserted "to the extent the balance of sale proceeds permit" and in second sentence, after "vehicle", inserted "equipment, or personalty", before "illegal" inserted "theft or", and after "transportation" deleted "and shall pay the balance of the proceeds to the treasurer of this state to be credited to the department of livestock fund"; inserted (2) establishing a state special revenue fund account and statutorily appropriating account proceeds for Department use; and made minor changes in style.

81-5-112. Permit system for transportation of sheep — penalty.

Compiler's Comments

Repeal of Termination Date: Section 1, Ch. 211, L. 1993, repealed sec. 4, Ch. 175, L. 1989, which provided that this section terminated September 30, 1993. Repealer effective July 1, 1993.

1989 Statement of Intent: The statement of intent attached to Ch. 175, L. 1989, provided: "A statement of intent for this bill is necessary because it requires the department of livestock to adopt rules implementing a permit system for the transportation of sheep within or out of the state. The legislature intends that the rules be designed to provide the owner with protection against the theft of his sheep by requiring a permit for the removal of sheep:

(a) from one county to another county within the state; and

(b) out of the state.

Provision must be made for the form of the permit and for issuance of the permit by state livestock inspectors. The department shall also determine a fee for the issuance of the permit, commensurate with the cost of operating the permit system.

It is the intent of the legislature that the department of livestock monitor this permit system to determine the system's effectiveness prior to the termination date of this legislation."

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

ARM 32.18.205 Sheep permit before removal from county.

Collateral References

3A C.J.S. Animals §122.

CHAPTER 6
LIVESTOCK PROTECTIVE ASSOCIATIONS

Chapter Administrative Rules

Title 32, chapter 22, ARM Vertebrate pest control.

Part 1
Livestock Protective Committees

81-6-101. Petition for county livestock protective committee — members — term.

Compiler's Comments

2001 Amendment: Chapter 574 at end of (5) deleted "and provided further that the levy as provided in 81-6-104 hereof shall, in the case of sheep, not exceed 5 cents per head"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: In (1), at end of first sentence after "to do so", inserted "set up a county livestock protective committee of three members. The petition or petitions must be", after

"petitioners" changed "owning" to "must own", and after "cattle" substituted "in the county" for "as shown by the most recent completed assessment records of the county assessor, set up a county livestock protective committee of three members".

Collateral References

Counties *key* 21 ½.

20 C.J.S. Counties §30.

81-6-104. Fee — special fund.

Compiler's Comments

2001 Amendment: Chapter 574 near beginning substituted "imposition of a fee" for "levy of a tax"; near middle after "commissioners" substituted "shall impose the fee, to be collected and deposited" for "shall thereupon be empowered to levy such tax, to be collected as other taxes on personal property and when collected to be deposited"; before "special deputy" substituted "livestock" for "stockmen's"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Near beginning substituted "cattle 9 months of age or older" for "assessable cattle".

81-6-106. Discontinuing county livestock protective committee.

Compiler's Comments

2001 Amendment: Chapter 574 in second sentence in two places substituted "fee imposed" for "levy made"; and made minor changes in style. Amendment effective July 1, 2001.

Part 2
Cattle Protective Districts

81-6-204. Fee — deposit of proceeds.

Compiler's Comments

2001 Amendment: Chapter 574 near beginning after "commissioners" substituted "imposition of a fee" for "levy of a tax"; near middle after "commissioners" substituted "shall impose the fee, to be collected and deposited" for "shall thereupon be empowered to levy such tax, to be collected as other taxes on personal property and when collected to be deposited"; near end before "special deputy" substituted "livestock" for "stockmen's"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Near beginning substituted "cattle 9 months of age or older" for "assessable cattle".

81-6-205. Removal of area from protective district — discontinuance of district — fee saved.

Compiler's Comments

2001 Amendment: Chapter 574 in second sentence after "affect any" substituted "fee imposed" for "levy made" and after "proceeds of any" substituted "fee imposed" for "levy made"; and made minor changes in style. Amendment effective July 1, 2001.

81-6-209. Fee — deposit of proceeds.

Compiler's Comments

2001 Amendment: Chapter 574 near beginning substituted "imposition of a fee" for "levy of a tax"; near middle after "commissioners" substituted "shall impose the fee, to be collected and deposited" for "shall thereupon be empowered to levy such tax, to be collected as other taxes on personal property and when collected to be deposited"; before "special deputy" substituted "livestock" for "stockmen's"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Substituted "cattle 9 months of age or older" for "assessable cattle".

81-6-210. Discontinuance of district — fee saved.

Compiler's Comments

2001 Amendment: Chapter 574 in second sentence in two places substituted "fee imposed" for "levy made"; and made minor changes in style. Amendment effective July 1, 2001.

Part 3
Livestock Crimestoppers

Part Compiler's Comments

Source: 1979 N.M. Laws, Ch. 142 (Title 29, art. 12, N.M. Stat. Ann. (1978)).

Statement of Intent: The statement of intent attached to HB 667 (Ch. 571, L. 1983) provided: "A statement of intent is required for this bill because it grants rulemaking authority to the Department of Livestock for the purpose of administering the Livestock Crimestoppers Program.

It is contemplated that the Department establish rules for instituting an award program, including criteria to be used in determining who will receive the rewards and the amount of the rewards in order to guarantee that the rewards be granted through a reasonable and consistent procedure.

It is also contemplated that the Department delineate rules for guaranteeing the confidentiality of persons providing crime-related information. These rules must be in accordance with the constitutional right to know and the right of privacy, so that confidentiality will be maintained only when "the demand of individual privacy clearly exceeds the merits of public disclosure".

It is further intended that, to facilitate the transmitting of crime-related information from the public to the Department, the Department establish a toll-free telephone number throughout the state. This toll-free number should be publicized statewide on the radio and in the press."

Part Collateral References

What constitutes offense of cruelty to animals—modern cases. 6 ALR 5th 733.

81-6-302. Definitions.

Compiler's Comments

1995 Amendment: Chapter 206 inserted (3) defining livestock to include ostriches, rheas, and emus; and made minor changes in style.

Applicability: Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

81-6-313. Powers and duties of department — rules.

Compiler's Comments

Statement of Intent: The statement of intent attached to HB 667 (Ch. 571, L. 1983) provided: "A statement of intent is required for this bill because it grants rulemaking authority to the Department of Livestock for the purpose of administering the Livestock Crimestoppers Program.

It is contemplated that the Department establish rules for instituting an award program, including criteria to be used in determining who will receive the rewards and the amount of the rewards in order to guarantee that the rewards be granted through a reasonable and consistent procedure.

It is also contemplated that the Department delineate rules for guaranteeing the confidentiality of persons providing crime-related information. These rules must be in accordance with the constitutional right to know and the right of privacy, so that confidentiality will be maintained only when "the demand of individual privacy clearly exceeds the merits of public disclosure".

It is further intended that, to facilitate the transmitting of crime-related information from the public to the Department, the Department establish a toll-free telephone number throughout the state. This toll-free number should be publicized statewide on the radio and in the press."

CHAPTER 7
PREDATORY ANIMAL CONTROL

Chapter Law Review Articles

The Right to Kill Wild Animals in Defense of Person or Property, Bender, 31 Mont. L. Rev. 235 (Spring 1970).

Who Is The Predator and Who Is The Prey? The Endangered Species Act and the Reintroduction of Predator Species Into the Wild, Matthews, 6 Envtl. Law. 183 (1999).

Part 1
Predatory Animal Control

Part Collateral References
4 Am. Jur. 2d Animals §§156 through 159.

81-7-101. Definition.

Compiler's Comments
2001 Amendment: Chapter 316 deleted references to gray wolf and lynx, inserted reference to red fox, and after "other" inserted "individual". Amendment effective April 21, 2001.
Contingent Effective Date Repealed: Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.
1995 Amendment: Chapter 244 in contingent version substituted "predatory animal" for "wild animal" and inserted "gray wolf"; and made minor changes in style.
Contingent Effective Date: Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

Collateral References
Bounties *key* 8.
77 C.J.S. Rewards and Bounties §46.

81-7-102. Department to supervise destruction of predatory animals — cooperation with other agencies — administration of money.

Compiler's Comments
2001 Amendment: Chapter 316 in (1) near beginning of first sentence after "destruction" deleted "extermination"; and made minor changes in style. Amendment effective April 21, 2001.
Contingent Effective Date Repealed: Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.
1995 Amendment: Chapter 244 in contingent version in three places substituted "predatory animals" for "wild animals"; and made minor changes in style.
Contingent Effective Date: Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

Administrative Rules
Title 32, chapter 22, ARM Vertebrate pest control.

81-7-103. Administration of funds by department.

Compiler's Comments
2001 Amendment: Chapter 316 in first sentence near beginning after "predatory animal" deleted "extermination and"; and made minor changes in style. Amendment effective April 21, 2001.
1987 Amendment: In first sentence, before "under 81-7-104", substituted "allocated for this purpose" for "from the levy".

Collateral References
Bounties *key* 8.
77 C.J.S. Rewards and Bounties §46.

81-7-104. Predator control money — use of proceeds

Compiler's Comments
2001 Amendments — Composite Section: Chapter 316 in (1) in last sentence after "animal destruction" deleted "extermination"; in (2) in second sentence after "systematic destruction" deleted "extermination"; and made minor changes in style. Amendment effective April 21, 2001.
Chapter 574 in (1) and (2) near beginning after "department" deleted "of livestock"; in (1) in first sentence after "from the" substituted "fee" for "levy"; and made minor changes in style. Amendment effective July 1, 2001.

Contingent Effective Date Repealed: Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

1995 Amendment: Chapter 244 in contingent version in two places substituted "predatory animals" for "wild animals"; and made minor changes in style.

Contingent Effective Date: Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

1987 Amendment: In (1), after "department of", substituted "livestock shall allocate a portion of the money from the levy under 15-24-921" for "revenue shall annually levy an ad valorem tax on all livestock in the state of Montana", after "protecting" substituted "livestock in the state" for "them", and deleted former third sentence that read: "The tax levy may not exceed in any one year 15 mills on the taxable value of all sheep and 10 mills on the taxable value of other livestock"; at beginning of (2) deleted "The moneys received from the tax levies shall be transmitted monthly with other taxes for state purposes by the county treasurer of each county to the state treasury. The state treasurer shall place the money in the state special revenue fund with the other moneys as provided in 81-7-119" and at beginning of second sentence substituted "Money designated for predator control" for "All the moneys"; and made minor changes in phraseology.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund (see 1987 amendment).

1981 Amendment: Increased the maximum mill levy on sheep from 7.5 mills to 15 mills in (1); and increased the maximum mill levy on other livestock from 5 mills to 10 mills in (1) (see 1987 amendment).

Coordination — Effectiveness Contingent: Section 3, Ch. 445, L. 1981, provided: "This act is effective only if Senate Bill 47 is passed by the 47th legislature and approved by the governor." Senate Bill 47 (Ch. 330, L. 1981) was approved April 11, 1981.

81-7-105. Disposition of proceeds from sale of skins, hides, and specimens — presenting to museums.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

81-7-111. Evidence of killing by bounty claimant.

Compiler's Comments

1997 Amendment: Chapter 214 in (2), after "section", deleted "for wolves and coyotes" and at end substituted "the skins of other animals subject to this section" for "scalps of wolves and coyotes herein provided"; in (3) deleted reference to 81-7-119; and made minor changes in style.

81-7-113. Claim for bounty.

Compiler's Comments

2001 Amendment: Chapter 574 in (2) in first sentence near beginning after "two" substituted "residents" for "resident taxpayers" and after "that they are" substituted "residents paying fees" for "resident taxpayers" and at beginning of second sentence substituted "An individual" for "A taxpayer"; and made minor changes in style. Amendment effective July 1, 2001.

81-7-114. Certificate and record of sheriff.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) in second sentence after "affidavits" deleted "of taxpayers" and deleted former fourth sentence that read: "When a doubt exists as to the kind of skin presented, whether wolf or coyote, the certificate must be issued for the lesser bounty." Amendment effective July 1, 2001.

1997 Amendment: Chapter 214 in (1), in first sentence at beginning, inserted reference to receipt of affidavit required pursuant to 81-7-113 and near middle, after "person", inserted "claiming a bounty", in second sentence inserted reference to 81-7-113, and in seventh sentence, near end, deleted reference to 81-7-119; and made minor changes in style.

81-7-118. Fee for purpose of paying bounty claims — limitation on fee.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 257 in two places substituted reference to department of revenue for reference to state treasurer. Amendment effective July 1, 2001.

Chapter 574 in first sentence near middle substituted "fee recommended by the department to be assessed" for "levy recommended by the department to be made"; deleted former second sentence that read: "The tax in any 1 year may not exceed 7.5 mills on the taxable value of the livestock"; and in third sentence substituted "fees imposed must be sent annually to the state treasurer" for "taxes levied must be sent annually with other taxes to the state treasurer". Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

Contingent Effective Date Repealed: Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

1997 Amendment: Chapter 214 at end of third sentence deleted reference to 81-7-119; and made minor changes in style.

1995 Amendment: Chapter 244 in contingent version in two places substituted "predatory animals" for "wild animals"; and made minor changes in style.

Contingent Effective Date: Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Collateral References

Taxation *key* 70.

84 C.J.S. Taxation §121.

81-7-120. Use of funds remaining after payment of bounties — sale of furs, skins, and specimens — presentation to museums.

Compiler's Comments

1997 Amendment: Chapter 214 in (1) and in second sentence of (2) deleted reference to 81-7-119; and made minor changes in style.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

81-7-121. Falsifying certificates or affidavits — penalty.

Compiler's Comments

1997 Amendment: Chapter 214 deleted reference to 81-7-119; and made minor changes in style.

Collateral References

Forgery *key* 7(5); Perjury *key* 7.

37 C.J.S. Forgery §§26, 32; 70 C.J.S. Perjury §23.

81-7-122. Penalty for fraudulent claims.

Compiler's Comments

1997 Amendment: Chapter 214 in second sentence substituted "person, if any, reporting the evasion or violation" for "informer" and at end deleted reference to 81-7-119; and made minor changes in style.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Collateral References

Fraud *key* 68.

37 C.J.S. Fraud §154.

Part 2
County Bounty Program

81-7-201. County fee for bounties on predatory animals.

Compiler's Comments

2001 Amendment: Chapter 574 near beginning after "owners" deleted "agent", before "51%" substituted "of not less than" for "representing", near middle after "asking for the" substituted "imposition of a fee" for "levy of a tax" and after "commissioners" substituted "shall impose the fee on" for "to make the levy, which may not exceed 50 mills on the dollar of the taxable value of"; deleted former last sentence that read: "The tax shall be assessed and collected in the same manner as all other state and county taxes"; and made minor changes in style. Amendment effective July 1, 2001.

Collateral References

Counties *key* 192.
20 C.J.S. Counties §193.

81-7-202. Signers of petition — time for presenting — limitation on bounties — bounty inspectors.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) near beginning substituted "owners or agents of the owners" for "owners, agent, or agents" and near middle after "county" deleted "as ascertained from the assessment books of such county"; in (2) in second sentence near beginning substituted "fee" for "levy"; and made minor changes in style. Amendment effective July 1, 2001.

81-7-203. County bounty fund.

Collateral References

Counties *key* 161.
20 C.J.S. Counties §154.

Part 3
County Predator Control for Protection of Sheep

Part Collateral References

4 Am. Jur. 2d Animals §§156 through 159.

81-7-303. County commissioners permitted to require per capita license fee on sheep.

Compiler's Comments

1999 Amendment: Chapter 285 in (1) near middle inserted reference to 15-24-903 and near end substituted "subject to the per capita levy under the provisions of Title 15, chapter 24, part 9" for "subject to taxation under the provisions of 15-24-301"; in (2) near middle of first sentence substituted "upon the assessment record" for "upon the property tax record"; and made minor changes in style. Amendment effective January 1, 2003.

Saving Clause: Section 29, Ch. 285, L. 1999, was a saving clause.

Severability: Section 30, Ch. 285, L. 1999, was a severability clause.

1993 Special Session Amendment: Chapter 27 in (1), at end of first sentence, deleted "for sheep so owned or possessed by him in the county"; in (2), in first sentence, substituted "tax record" for "tax rolls" and "department of revenue" for "county assessor"; in (3), after "placed", deleted "by the treasurer"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1981 Amendment: Substituted "in an amount to be determined by the board on a per head basis" for "of not exceeding 50 cents per head" in (1).

81-7-305. Duty of county commissioners — petition of sheep owners — license fees.

Compiler's Comments

1981 Amendment: Deleted language referring to the 50 cents per head limitation in both (1) and (2).

Part 4
Dogs

Part Law Review Articles

Humane Concerns About Dangerous-Dog Laws, Lockwood, 13 U. Dayton L. Rev. 267 (1988).

Taking the Bite Out of Pit Bull Attacks: Is There an Answer?, Oropallo, 15 Ohio N.U.L. Rev. 83 (1988).

The Bark Stops Here. (Mediation Court for Animal Nuisances), Moss, 74 A.B.A. J. 31(1) (1988).

And They Call It Puppy Law, Surasky, 15 Student Law. 6 (1987).

Bark! Objection! Woof! (Dog Named as Plaintiff), Gutman, 13 Litigation 62 (1987).

Strict Liability for Harm by Dogs: A Comparative Survey, Kodilinye, 16 Anglo-Am. L. Rev. 174 (1987).

Owners of Dogs and Horses; What Theories of Liability Apply?, Frankovich, 22 Trial 30(7) (1986).

The Pit Bull and the Prosecutor: Getting One Leg Up on the Dog Owner, Kowalski, 27 Mun. Att'y 12 (1986).

Dogs in the Slammer: Canines Get Tough Sentences, Lane, 71 A.B.A.J. 36 (May 1985).

The New Breed of Municipal Dog Control Laws: Are They Constitutional?, Marmer, U. Cin. L. Rev. 1067 (1984).

Part Collateral References

37 Am. Jur. POF2d Damages for Loss of or Injury to Animal, pp. 639 through 680.

Intentional provocation, contributory or comparative negligence, or assumption of risk as defense to action for injury by dog. 11 ALR 5th 127.

What constitutes offense of cruelty to animals—modern cases. 6 ALR 5th 733.

Liability for injuries inflicted by dog on public officer or employee. 74 ALR 4th 1120.

Who "harbors" or "keeps" dog under animal liability statute. 64 ALR 4th 963.

Modern status of rule of absolute or strict liability for dog bite. 51 ALR 4th 446.

Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR 4th 994.

Keeping of dogs as enjoinable nuisance. 11 ALR 3d 1399.

Amount of damages for killing or injuring dog. 1 ALR 3d 1022.

Measure and elements of damages for killing or injuring dog. 1 ALR 3d 997.

Civil liability of landowner for killing or injuring trespassing dog. 15 ALR 2d 578.

81-7-401. Killing of dogs harassing, destroying, or injuring stock — notice to owner — penalty.

Compiler's Comments

1995 Amendment: Chapter 206 in (1) inserted "including ostriches, rheas, and emus".

Applicability: Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

1993 Amendment: Chapter 106 inserted (1) defining harasses; in (2), near middle after "its owner", substituted "and on property owned, leased, or controlled by the livestock owner, harasses, kills, wounds, or injures" for "shall kill, wound, or injure any" and substituted "owner" for "master"; in (2)(a) substituted "the owner of the livestock or an agent or employee of the owner" for "any person"; in (2)(b), after "when", inserted "reasonably", after "notified" inserted "after due process", and after "24 hours" inserted "of notification"; inserted (3) requiring that a dog not be killed in a manner that will endanger a person; in (4) substituted "herding livestock" for "acting" and in two places substituted "owner" for "master"; inserted (5) excluding a dog engaged in sport hunting or predator control; inserted (6) providing a penalty; and made minor changes in style.

Case Notes

Lack of Evidence of Harassment by Dog — Conviction Upheld Despite Misapplication of Statute: Walter shot a dog on March 7, 1993, and was subsequently convicted of misdemeanor cruelty to animals under 45-8-211. Walter defended on the basis that his actions were justified under this section. The Supreme Court held that Walter, the state, and the District Court applied the version of this section effective October 1993, but should have applied the version effective in March that did not authorize the shooting of a dog that harasses livestock. However, the Supreme Court also found that the Deputy Sheriff witness testified that there was no evidence that the dog was harassing livestock, as the owner of the sheep testified. Citing St. v. Bower, 254 M 1, 833 P2d

1106 (1992), the Supreme Court noted that the credibility of witnesses and weight of evidence are for the trier of fact to determine and, citing Higham v. Red Lodge, 247 M 400, 807 P2d 195 (1991), that the Supreme Court will affirm a correct result regardless of the reasoning used by the lower court. Because there was no evidence of any action by the dog falling within either version of this section the Supreme Court affirmed the conviction. St. v. Walter, 266 M 429, 880 P2d 1346, 51 St. Rep. 903 (1994).

Application of Section: This section applied to any dog regardless of its value. Granier v. Chagnon, 122 M 327, 203 P2d 982 (1949).

"Livestock" Defined: "Livestock" as employed in this section meant domestic animals or beasts generally collected, used, or raised on a farm or ranch, such as cattle, sheep, swine, goats, horses, mules, donkeys, and similar stock. (See 1995 amendment.) Granier v. Chagnon, 122 M 327, 203 P2d 982 (1949).

Sufficiency of Evidence: In action for damages for killing of dog, evidence that defendant had suffered the loss of several sheep due to unidentified raiders and that on one occasion when there was a disturbance among the sheep, the defendant with others went to the place from which the sheep came and finding a dog tearing at a freshly killed sheep, killed the dog, was sufficient to sustain a verdict in favor of defendant although there was no evidence that anyone had seen the dog kill the sheep. Granier v. Chagnon, 122 M 327, 203 P2d 982 (1949).

Collateral References

Animals *key* 84.
3A C.J.S. Animals §§283 through 285, 290, 291.
4 Am. Jur. 2d Animals §§162, 163, 165.
37 Am. Jur. POF2d Justifiable Destruction of Animal, pp. 711 through 737.

81-7-402. Liability of owner of dog for damages to livestock or poultry.

Case Notes

Common-Law Rule Regarding Killing of Dog in Defense of Property Not Abrogated by Statute: The defendant acted reasonably under the common law when he shot the dog that was killing his chickens. At common law, an owner of domestic fowl has a right to kill a dog attacking or menacing their safety if it is necessary for their protection, and that right was not abrogated by this section on the subject that does not limit, either expressly or impliedly, that right. Grabenstein v. Sunsted, 237 M 254, 772 P2d 865, 46 St. Rep. 780 (1989). See also St. v. Walter, 266 M 429, 880 P2d 1346, 51 St. Rep. 903 (1994).

Collateral References

4 Am. Jur. 2d Animals §§107 through 111.
37 Am. Jur. POF2d Damages for Loss of or Injury to Animal, pp. 639 through 680.

81-7-403. Dogging livestock.

Compiler's Comments

1993 Amendment: Chapter 106 at end increased penalty from $50 to $500.

Collateral References

4 Am. Jur. 2d Animals §§107 through 111.

Part 5
Aerial Hunting of Predatory Animals

81-7-501. Aerial hunting prohibited — exceptions.

Compiler's Comments

Contingent Effective Date Repealed: Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

1995 Amendment: Chapter 244 in contingent version in three places substituted "predatory animals" for "wild animals"; and made minor changes in style.

Contingent Effective Date: Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

1983 Amendment: In (1) inserted last sentence requiring the permit to specify the species to be hunted and the area over which hunting may take place.

81-7-502. Rulemaking authority.

Compiler's Comments

Statement of Intent: The statement of intent attached to SB 497 (Ch. 704, L. 1979) provided: "Section 4 [81-7-503] of this bill requires the Department of Livestock to adopt rules regulating aerial hunting. It is the intent of this bill that any rules so adopted not interfere with the needs of livestock producers protecting their livestock from predation. At the same time it is the intent of this bill that such rules protect the interests of persons who do not wish aerial hunting to occur over land in their control. Finally, such rules shall reflect the purpose that aerial hunting is permitted for the purpose of reducing livestock losses due to predation." The reference in this statement of intent to section 4 is apparently in error. Section 2, codified as 81-7-502, is apparently the correct reference, because it provides for rulemaking authority.

Administrative Rules

Title 32, chapter 22, subchapter 1, ARM Aerial hunting.

81-7-503. Residency requirement.

Compiler's Comments

1983 Amendment: Inserted "Permits issued to nonresidents may be used only:"; and inserted (1) and (2) specifying where permits may be used.

Administrative Rules

ARM 32.22.103 Vertebrate pest control — aerial hunting — duration of permits — fee.

81-7-504. Duration of permit — fee.

Compiler's Comments

1983 Amendments: Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted fee established by the department for a permit for $50 or a portion thereof if a period of less than 1 year.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

ARM 32.22.102 Vertebrate pest control — aerial hunting — issuance of permits.

81-7-505. Resident landowners authorized to aerially hunt over their own lands without permit — conditions.

Compiler's Comments

Contingent Effective Date Repealed: Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

1995 Amendment: Chapter 244 in contingent version substituted "predatory animals" for "wild animals"; and made minor changes in style.

Contingent Effective Date: Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

1983 Amendment: Near end of first sentence substituted "aerially" for "aerial".

81-7-511. Penalty — revocation of permit.

Compiler's Comments

1983 Amendment: Substituted present language for: "(1) Any person violating any provision of this part who is permitted to engage in aerial hunting pursuant to this part is guilty of a misdemeanor.

(2) A conviction for a violation of subsection (1) is punishable by a fine of not more than $500.

(3) Any person who is not permitted to engage in aerial hunting pursuant to this part who violates any provisions of this part is guilty of a misdemeanor, and upon conviction is punishable by a fine of not less than $250 or more than $1,000. A subsequent conviction under this subsection is punishable by a fine of not less than $500 or more than $1,000.

(4) The justice court has jurisdiction over violations of this part.

(5) The department may revoke or suspend the permit of anyone violating its terms."

Administrative Rules

ARM 32.22.106 Vertebrate pest control — aerial hunting — revocation, suspension, or modification of permit.

Part 6
County Predator Control for Protection of Cattle

81-7-603. County commissioners permitted to levy per capita license fee on cattle.

Compiler's Comments

1999 Amendment: Chapter 285 in (1) in first sentence inserted reference to 15-24-903 and near end substituted "subject to the per capita levy under the provisions of Title 15, chapter 24, part 9" for "subject to taxation under the provisions of 15-24-301"; and in (2) in first sentence substituted "upon the assessment record" for "upon the property tax record". Amendment effective January 1, 2003.

Saving Clause: Section 29, Ch. 285, L. 1999, was a saving clause.

Severability: Section 30, Ch. 285, L. 1999, was a severability clause.

CHAPTER 8
MARKETING

Chapter Administrative Rules

Title 32, chapter 15, ARM Marketing of livestock.

Chapter Law Review Articles

Animal Farm: EPA Issues a Plan on Concentrated Livestock-Feeding Operations, Schauer, 111 L.A. Daily J. 7 (1998).

Removing Nontariff Barriers to Trade Under the Canada-United States Trade Agreement: The Case for Reciprocal Beef Grading, Kerr, 14 J. Agric. Tax'n & L. 273 (1992).

The Toothless Cow, the Little Bull That Couldn't, and Udder Matters: Livestock Warranties and the Uniform Commercial Code, Looeny, Ann. Ark. L. Notes 75 (1990).

Agricultural Perspectives on Growth Management, McCaffrey, 1 J. Land Use & Envtl. L. 171 (1985).

Choice of Law in Interstate Livestock Sales: Nonuniform Warranty Provisions Under the U.C.C., Grossman, 30 S.D.L. Rev. 214 (1985).

The Uniform Commercial Code as Applied to Implied Warranties of Merchantability and Fitness in the Sale of Horses, Cohan, 73 Ky. L.J. 665 (1985).

Horse-Tradin': Legal Implications of Livestock Auction Bidding Practices (Agricultural Law Symposium), Kershen, 37 Ark. L. Rev. 119 (1984).

Do Statutory Exclusions of Implied Warranties in Livestock Sales Immunize Sellers From Liability?, Uchtmann & Sarhan, 8 Okla. City U.L. Rev. 21 (1983).

I.R.C. 1231 and the Sale of Livestock (Recent Tax Cases and Rulings), Bock, 5 Agric. Tax'n & L. 169 (1983).

Implied Warranties in Livestock Sales: Case History and Recent Developments, Eftink, 4 Agric. L.J. 207 (1982).

What Warranties Do Farmers Give When They Sell Their Livestock?, Purcell, 2 Agric. L.J. 117 (1980).

Chapter Collateral References

Liability of auctioneer under doctrine of strict products liability. 83 ALR 4th 1188.

Livestock or animal insurance: risks and losses. 47 ALR 4th 772.

Extent of liability of seller of livestock infected with communicable disease. 14 ALR 4th 1096.

Part 2
Livestock Markets and Dealers

Part Compiler's Comments

Transition: Section 34, Ch. 566, L. 1979, provided: "Licenses and certificates issued before and still in effect on July 1, 1979, are valid until May 1, 1980, unless suspended or revoked pursuant to this act. The actions of persons holding such existing licenses and certificates are governed by this act."

Severability: Section 35, Ch. 566, L. 1979, provided: "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Part Law Review Articles

Meat and Poultry Inspection in the Year 2000, Houston, 43 Food Drug Cosm. L.J. 369 (1988).

81-8-212. Purpose.

Collateral References

52 Am. Jur. 2d Markets and Marketing §2.

81-8-213. Definitions.

Compiler's Comments

1995 Amendment: Chapter 160 inserted definition of custodial account for shippers' proceeds or custodial account; in definition of livestock dealer inserted (a)(iii) concerning purchases on a commission or fee basis for others or for dealer or market and inserted (b) excluding a farmer or rancher; inserted definition of satellite video livestock auction market or video auction market; and made minor changes in style.

1989 Amendment: Inserted definition of immediate resale; substituted definition of livestock dealer for former definition that read: ""Livestock dealer" means a person engaged in the business of buying or selling livestock. It does not include a farmer or rancher who buys or sells livestock in the ordinary course of his farming or ranching operation"; and made minor changes in form. Amendment effective April 1, 1989.

1985 Amendment: Deleted former (4) that read: ""Livestock broker" means a business, not including facilities, conducted for the receiving, handling, and care of livestock and involving livestock purchased by it for its own account for resale, for the account of any principal for delivery to him, or for slaughter. It does not include a farmer or rancher who buys or sells livestock in the ordinary course of his farming or ranching operation"; and in definition of livestock dealer substituted "a person engaged in the business of buying or selling livestock" for "a business conducted in facilities utilized for the receiving, handling, and care of livestock purchased by it for its own account for resale, for the account of any principal for delivery to him, or for slaughter".

81-8-214. Regulation of certain nonmarket sales.

Compiler's Comments

1995 Amendment: Chapter 11 in (2)(e), after "bond", inserted "or its equivalent"; and made minor changes in style.

Severability: Section 5, Ch. 11, L. 1995, was a severability clause.

Administrative Rules

Title 32, chapter 15, subchapter 7, ARM Association and test station sales.

81-8-215. Quarantine of diseased animals.

Administrative Rules

ARM 32.15.204 Animal health requirements for livestock markets — quarantine pens.
ARM 32.15.207 Handling of animals found to be diseased or condemned.

Collateral References

4 Am. Jur. 2d Animals §§42, 43.

81-8-216. Penalties.

Compiler's Comments

1993 Amendment: Chapter 5 in (3) made separate felony offenses of the knowing failure to establish a custodial account and the improper use of a custodial account; and made minor changes in style.

1989 Amendment: Near beginning of (1) inserted "knowingly"; and inserted (3) setting penalty for misuse and abuse of a custodial account.

1987 Amendments: Chapter 370 in (1), in two places, deleted reference to 81-8-257.

Chapter 557 near beginning of (2), after "section", inserted "except those assessed and collected in a justice's court".

1985 Amendment: In (1) near middle of second sentence, after "rules adopted", substituted "to implement those sections" for "under 81-8-231"; and inserted (2) providing for the disposition of fines.

Collateral References

52 Am. Jur. 2d Markets and Marketing §§13, 28, 29.

81-8-231. Duties of department.

Compiler's Comments

1995 Amendment: Chapter 11 at end of (1) inserted "and periodically audit the records of those markets and dealers".

Severability: Section 5, Ch. 11, L. 1995, was a severability clause.

1985 Amendment: In (1), (2), and (4) after "livestock markets," deleted "livestock brokers".

Statement of Intent: The statement of intent attached to HB 800 (Ch. 566, L. 1979) provided: "The purpose of the 'Montana Livestock Marketing Act' as stated in the bill is to simplify, clarify, and modernize the law governing livestock marketing businesses and livestock marketing transactions; to promote open, free, and competitive factors in the market place in relation to all market conditions involving the sale and purchase of livestock; and to encourage, stimulate, and stabilize the livestock economy of the state.

The Department of Livestock is given, under section 4 [81-8-231], authority to enforce and to adopt rules necessary to carry out the act. It is the legislative intent in delegating this rulemaking authority that the discretion granted the Department of Livestock is for the purpose of supervising and regulating livestock markets, livestock brokers, and livestock dealers in the state; of regulating the properties, facilities, operations, services, and practices of all livestock markets, livestock brokers, and livestock dealers; and of supervising and regulating livestock markets in all matters affecting the relationship between the livestock market and owners of livestock and between the livestock markets and purchasers of livestock.

A major concern of the act is to establish stiff penalties for unfair, deceptive, and fraudulent market practices. It is intended that by providing stricter penalties and that by giving the Department of Livestock authority to assess civil penalties for some violations, livestock marketing in Montana will be strengthened.

It is the intent of this bill that in the adoption of rules under section 4 [81-8-231] and in the general enforcement of this act that the Livestock Department's first function is to protect livestock producers consigning livestock to markets or selling livestock to or through dealers and brokers. Secondly, it is the intent of the legislature that so long as the purpose of protecting livestock producers is met, the enforcement and rules under this act not unduly interfere with the operations of the businesses of livestock markets, livestock dealers, and livestock brokers."

Administrative Rules

Title 32, chapter 15, ARM Marketing of livestock.

Collateral References

52 Am. Jur. 2d Markets and Marketing §§15 through 24.

81-8-233. Title warranty of livestock sold.

Compiler's Comments

1985 Amendment: Near beginning of first sentence, after "livestock market," deleted "livestock broker".

Case Notes

Duty of Livestock Market — Meaning of "Rightful Owner": The term "rightful owner" in this section refers to the owner as determined by the Department of Livestock under 81-3-203. A livestock market has no duty to go beyond the directions of the state inspector in the certificate of inspection in ascertaining the name of the true owner of cattle. Eberl v. Scofield, 244 M 515, 798 P2d 536, 47 St. Rep. 1780 (1990).

81-8-234. Financial responsibility.

Compiler's Comments

1985 Amendment: Near beginning of (1) after "livestock market", deleted "livestock broker".

81-8-235. Penalties for financial violations.

Compiler's Comments

1985 Amendment: In (3) substituted present language providing a penalty for issuance of bad checks and failure to make good a check within 5 days after notice of nonpayment for "The maker of any bankable instrument who knowingly and without right fails to honor or causes another to dishonor that instrument once it is issued or delivered in payment for a livestock purchase is guilty of a felony and on conviction may be imprisoned for not more than 5 years or fined not more than $10,000, or both".

Collateral References

52 Am. Jur. 2d Markets and Marketing §28.

81-8-236. Injunctive remedy.

Compiler's Comments

1985 Amendment: In first and second sentences deleted references to "livestock broker".

Collateral References

52 Am. Jur. 2d Markets and Marketing §29.

81-8-251. Certificate to operate livestock market required — application.

Attorney General's Opinions

Applicability to National Farmers Organization: The Livestock Dealer Act (81-8-201 through 81-8-210, since repealed) did not require the licensing of the National Farmers Organization as a livestock dealer in order to lawfully act in the sale of livestock owned by its members. 37 A.G. Op. 91 (1977).

Collateral References

52 Am. Jur. 2d Markets and Marketing §16.

81-8-252. Hearing on application for certificate — decision.

Compiler's Comments

1987 Amendment: Near end of (1) inserted language excluding financial statement; and made minor changes in phraseology.

81-8-256. Fee to operate livestock market.

Compiler's Comments

1983 Amendments: Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted a fee established by the department for a fee of $100.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

81-8-271. License to operate as livestock dealer — application.

Compiler's Comments

1995 Amendment: Chapter 11 in (1)(d), after "bond", inserted "or its equivalent"; and made minor changes in style.

Severability: Section 5, Ch. 11, L. 1995, was a severability clause.

1989 Amendment: In (1)(d) substituted "proof of acquisition of a bond from the packers and stockyards administration of the United State department of agriculture" for "a detailed financial statement setting forth all assets and liabilities of the applicant pertinent to the business for which the license is sought"; and made minor changes in phraseology. Amendment effective April 1, 1989.

1985 Amendment: In (1) near beginning of first and second sentences, before "livestock dealer", deleted "livestock broker or"; deleted former (1)(e) that read: "if the applicant is a livestock dealer, a description of the facilities at which he proposes to operate"; in (2) before "livestock dealer's license", deleted "livestock broker's or"; and inserted (3) requiring an agent of

a livestock dealer to possess a livestock dealer's license when engaging in the purchase or sale of livestock.

Collateral References
52 Am. Jur. 2d Markets and Marketing §17.

81-8-272. Issuance of livestock dealer's license.

Compiler's Comments
1985 Amendment: Near middle of section substituted "operate as a livestock dealer" for "engage in the business specified in his application".

81-8-273. Refusal to issue or renew license.

Compiler's Comments
1989 Amendment: Deleted former (1)(g) that read: "(g) has not filed a surety bond in the form and amount required under 81-8-277"; and made minor changes in form. Amendment effective April 1, 1989.
1985 Amendment: Inserted (1)(j) requiring nonissuance or nonrenewal of license for an applicant suspended under the Packers and Stockyards Act; and inserted (2) providing a 1-year period following license refusal prior to reapplication.

81-8-274. Suspension or revocation of license.

Compiler's Comments
1985 Amendment: Near beginning of (1) before "livestock dealer", deleted "livestock broker or".

81-8-275. Termination of license.

Compiler's Comments
1989 Amendment: Deleted second sentence that read: "Termination of the license will automatically occur if the bond required by 81-8-277 is terminated"; and made minor change in phraseology. Amendment effective April 1, 1989.

81-8-276. Annual fee and financial statement.

Compiler's Comments
1989 Amendment: Near middle of first sentence inserted "when requested by the department shall". Amendment effective April 1, 1989.
1985 Amendment: At beginning of section before "dealers", deleted "brokers and livestock".
1983 Amendment: Substituted a fee established by the department for a fee of $50.

Administrative Rules
ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

81-8-278. Records.

Compiler's Comments
1985 Amendment: At beginning of first and second sentences, before "livestock dealer", deleted "livestock broker or".

81-8-279. Penalties.

Compiler's Comments
1989 Amendment: In (1), near beginning, deleted reference to 81-8-277; and made minor changes in phraseology. Amendment effective April 1, 1989.
1987 Amendment: Near beginning of (2), after "section", inserted "except those assessed and collected in a justice's court".
1985 Amendment: In middle of (1) after "department", substituted "to implement those sections" for "under 81-8-231"; and inserted (2) providing for disposition of fines.

Collateral References
52 Am. Jur. 2d Markets and Marketing §§28, 29.

Part 3
Security Interests Concerning Livestock

Part Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the notice and opportunity to be heard requirements as guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Part Law Review Articles

Cattle Breeding Syndications: Selected Securities and Tax Issues, Janvey & Bringardner, 8 J. Agric. Tax'n & L. 326 (1987).

Rohweder v. Aberdeen Production Credit Association: Attachment of Security Interests and the Bailment-Conditional Sale Problem, Saladino, 19 Creighton L. Rev. 1083 (1986).

Part Collateral References

The Economic Problems of Agriculture in Montana: A Report to the 50th Legislature, Joint Interim Subcommittee on Agricultural Problems, Mont. Leg. Council (1987).

81-8-301. Notices of security agreements — renewals — assignments.

Compiler's Comments

1981 Amendment: Substituted the second sentence in (1), providing for departmental transfer of copies of notices and brands to the central livestock markets, for "The department shall also list the notices in the offices of the stock inspectors employed by the department and stationed at the central livestock markets where records are kept of marks and brands."; inserted "and a copy is transferred" after "is filed" in the fourth sentence of (1); added the last sentence in (1) disallowing Department liability for proceeds of livestock sold through a livestock market by a debtor; inserted (2) relating to renewal of notices of security interests; inserted (3) relating to renewal of assignments of security interests; inserted (4) requiring termination of notices upon failure to renew; and inserted (5) requiring immediate filing of satisfactions of security agreements with the Department.

Attorney General's Opinions

Title Information: In enacting this section the Legislature did not intend to require the Department to act as an insurer of title to livestock; rather, the intent was to provide a clearinghouse at each major market where title information on branded livestock would be readily available. 38 A.G. Op. 69 (1980).

Change of Policy — Registering Security Interest in Livestock: By following the Montana Administrative Procedure Act, Title 2, ch. 4, part 3, the Department could adopt a new policy interpreting its responsibilities under this section. The policy did not need to provide the markets with tally sheets giving the state of title of individual animals or groups of animals. 38 A.G. Op. 69 (1980).

81-8-302. Contents of notices.

Compiler's Comments

1995 Amendment: Chapter 11 inserted last sentence requiring a notice of security agreement to be signed by the affected debtor or proper legal authority; and made minor changes in style.

Severability: Section 5, Ch. 11, L. 1995, was a severability clause.

81-8-303. Duty of secured parties to file satisfactions of security agreements.

Collateral References

Animals *key* 3; Secured Transactions *key* 100, 201 through 207.

3A C.J.S. Animals §18; 79 C.J.S. Secured Transactions §§127 through 129.

81-8-304. Fees.

Compiler's Comments

1983 Amendments: Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444, near end of section after "cost to the department", deleted "not to exceed $15".

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Title 32, chapter 15, subchapter 6, ARM Brand-Mortgage filings.

81-8-305. Department of livestock not responsible for collection or payment of money under security agreements.

Case Notes

Seizure and Sale by Inspector: When a livestock inspector seized and sold a cow under the provisions of section 3327.1, R.C.M. 1935 (now repealed), believing it to have been stolen, and at the time there were notices of a chattel mortgage and a renewal thereof on file in the office of the state Livestock Commission (now Board of Livestock), contention of claimant of the animal that the inspector had no reason for suspecting the animal had been stolen but acted as a collector of the mortgage contrary to the provisions of law was not meritorious. Bohart v. Songer, 110 M 405, 101 P2d 64 (1940).

81-8-311. Range stock — taking possession under process.

Case Notes

Burden of Proof: In an action for damages for the conversion of certain horses, alleged to have been attached as range stock, the complaint had to show that the horses referred to were range stock within the meaning of the statute. Harmon v. Comstock Horse & Cattle Co., 9 M 243, 23 P 470 (1890).

Collateral References

Animals *key* 100(7); Attachment *key* 164; Execution *key* 129.

3A C.J.S. Animals §159; 7 C.J.S. Attachment §§223, 225, 226; 33 C.J.S. Executions §97.

81-8-312. Possession under a mortgage — how acquired.

Case Notes

Sale Fraudulent as Against Creditors: When the purchaser of a band of horses, then on the open range, did not take actual possession of them or file a copy of the bill of sale with a notice of his claim in the proper office, as required by this section, or rebrand them, he did not obtain constructive possession of them as against the claim of the vendor's creditors. As to them the transaction was fraudulent in law. Anderson v. Hoffman, 99 M 146, 43 P2d 644 (1935).

81-8-315. Sale of property under supplementary writ.

Collateral References

Execution *key* 99, 213, et seq.

33 C.J.S. Executions §§85, 196, 197.

Part 4
Sale of Baby Animals

Part Collateral References

Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself. 44 ALR 3d 1008.

81-8-401. Certain dealings in baby animals unlawful.

Compiler's Comments

1985 Amendment: In (1) at beginning inserted exception clause and at end after "corporation", deleted "other than a hatchery, feed store, or breeder of fowl or rabbits"; and near end of (2) deleted "avicultural" before "breeding".

81-8-402. Penalties.

Compiler's Comments

1985 Amendment: Near middle of section substituted "one excepted in 81-8-401(2)" for "a hatchery, feed store, or breeder of fowl or rabbits".

Part 5
Sale of Registered Livestock

81-8-501. Sale of animals under false registration certificates — changing markings — auctioneer.

Collateral References
Animals *key* 16, 17.
3A C.J.S. Animals §§31, 32.
4 Am. Jur. 2d Animals §§86, 87.

81-8-503. Expenditures for purebred livestock shows and sales.

Compiler's Comments
2001 Amendment: Chapter 574 near middle substituted "an amount" for "not to exceed a sum equal to a levy of one-fourth mill on the taxable property of the county"; and made minor changes in style. Amendment effective July 1, 2001.

81-8-504. Tax levy authorized.

Compiler's Comments
2001 Amendment: Chapter 574 near middle of first sentence substituted "levy a tax on the taxable value of all taxable property" for "levy annually a tax not to exceed one-fourth mill on the taxable property"; and made minor changes in style. Amendment effective July 1, 2001.
1999 Amendment: Chapter 584 inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.
Severability: Section 172, Ch. 584, L. 1999, was a severability clause.
Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Part 7
Quality Label

Part Law Review Articles
Labeling Claims for Meat and Poultry Products, Brewington, 44 Food Drug Cosm. L.J. 325 (1989).

81-8-702. Montana quality label.

Collateral References
Food *key* 3.
36A C.J.S. Food §§12(8), 13, 15.

81-8-705. Wrongful use of label — penalty — injunction — prosecutions.

Collateral References
Food *key* 16.
36A C.J.S. Food §30.

Part 9
Beef Promotion and Marketing

81-8-901. Beef promotion and marketing — powers and duties of department.

Compiler's Comments
1995 Statement of Intent: The statement of intent attached to Ch. 102, L. 1995, provided: "A statement of intent is required for this bill because [section 1] [81-8-901] grants rulemaking authority to the department of livestock to implement the provisions of this bill. It is intended that the department adopt rules regarding the collection of the assessment on livestock in a manner that ensures reimbursement for the department's administrative costs without imposing liability on the department for collection of the assessment or linking collection with the department's regular livestock inspection duties."

CHAPTER 9
SLAUGHTER

Chapter Administrative Rules

Title 32, chapter 6, ARM Animal feeding, slaughter, and disposal.

Chapter Collateral References

Hog breeding, confining, or processing facility as constituting nuisance. 93 ALR 5th 621.

Part 1
General Provisions

81-9-112. Inspection and marking of hides and meat of slaughtered cattle — records — bill of sale — when inspection not necessary.

Compiler's Comments

1987 Amendment: In (1), at beginning, substituted "All slaughtering establishments required to be licensed under 81-9-201" for "All butchers and meat peddlers"; and in (2), near middle of second sentence, substituted "the name and address of the establishment or person" for "the butcher's or peddler's name, the place of business".

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Title 32, chapter 18, subchapter 4, ARM Marking of beef and veal hides and carcass parts.

Collateral References

Animals *key* 15; Food *key* 3; Hawkers and Peddlers *key* 2.

3A C.J.S. Animals §117; 36A C.J.S. Food §12(7); 39A C.J.S. Hawkers and Peddlers §5.

81-9-113. Fees for inspection.

Compiler's Comments

1983 Amendments: Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted a fee established by the department for a fee of 25 per head.

81-9-114. Duty to report violations.

Compiler's Comments

1989 Amendment: Near beginning inserted "the department or"; and made minor changes in phraseology. Amendment effective March 21, 1989.

1987 Amendment: Substituted present section (see 1987 Session Law) for former section that read: "It is made the duty of any butcher or meat peddler licensed under the provisions of 81-9-102 to report any violation of 81-9-112 to the sheriff of the county wherein such violation shall occur and of which such butcher or meat peddler has knowledge, and for his failure so to do, such butcher or meat peddler shall suffer a revocation of his license and no license shall again be issued to such person until the expiration of 1 year from the date of such revocation."

81-9-115. Unlawful to purchase uninspected hide or carcass — exception.

Compiler's Comments

1987 Amendment: Near end of second sentence substituted "licensed meat establishment" for "licensed butcher or peddler" and made minor changes in phraseology.

81-9-116. Officers' authority concerning enforcement — seizure and sale of meat held in violation.

Compiler's Comments

1987 Amendment: Near middle of first sentence substituted "meat establishments required to be licensed under 81-9-201" for "butcher shops, slaughterhouses, and other places of business of meat peddlers and butchers" and at end of second sentence substituted "may seize the same" for "shall have authority to seize and take the same".

81-9-118. Penalties for violation or falsifying records.

Compiler's Comments

1981 Amendment: Subsections (3) and (4) of sec. 7, Ch. 198, L. 1981, provided: "(3) There is added to those sections listed in subsection (4) of this section, following any language in those sections specifying the term of imprisonment for which an offender may be imprisoned but without specifying a fine that may be ordered to be paid, the words "or shall be punished by a fine of not more than $50,000 or by both such fine and imprisonment", or other similar language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment. The code commissioner shall change the listed sections in accordance with this section and may make minor incidental adjustments consistent with this section as may be necessary to reflect the intent of this section without changing the meaning of the listed sections as amended by this section.

(4) 13-27-205, 13-27-206, 19-11-207 [renumbered 19-18-207, 1993], 20-9-435, 23-5-106 (repealed, 1989), 30-13-142, 32-1-236, 32-1-473, 32-1-505, 45-5-104, 45-5-204, 45-5-105, 45-5-201, 45-5-203, 45-5-204, 45-5-304, 45-5-505, 45-5-603, 45-5-613, 45-5-621, 45-6-101 through 45-6-103, 45-6-204, 45-6-301, 45-6-316, 45-6-317, 45-6-325, 45-6-327, 45-7-101, 45-7-102, 45-7-201, 45-7-206 through 45-7-208, 45-8-106, 45-8-215, 45-8-318, 45-8-334, 45-8-335, 45-9-101(4), 45-9-102(4), 45-9-103(3), 45-9-107, 46-18-213, 46-18-502, 46-31-204, 50-38-107, 61-3-604, 81-5-102, and 81-9-118." See 46-18-231, also enacted by Ch. 198, L. 1981, which is related to the amendment of this section.

Part 2
Slaughterhouses
Meat and Poultry Inspection

Part Compiler's Comments

Statement of Intent: The statement of intent attached to Ch. 577, L. 1987, provided: "This bill requires a statement of intent because section 4 [81-9-220] requires the board of livestock to adopt rules implementing the state meat inspection program. Section 4 [81-9-220] indicates the scope of the rules. It is intended that the rules conform in all respects to the requirements of the Federal Meat Inspection Act and the Federal Poultry Products Inspection Act, in order to qualify the state program under those acts. It is also intended that the program be developed and administered in cooperation with the food safety and inspection service, United States department of agriculture, to ensure that it is at least "equal to" the requirements contained in the federal law."

Part Law Review Articles

From Hoof to Hamburger: the Fiction of a Safe Meat Supply, Lassiter, 33 Willamette L. Rev. 411 (1997).

The Federal Government's Inspection and Labeling of Meat and Poultry Products: Is It Sufficient to Protect the Public's Health, Safety, and Welfare?, Manoukian, 21 W. St. U.L. Rev. 563 (1994).

Removing Nontariff Barriers to Trade Under the Canada-United States Trade Agreement: The Case for Reciprocal Beef Grading, Kerr, 14 J. Agric. Tax'n & L. 273 (1992).

Poisoned Food on a Fast Track Into the U.S.—Free Trade Agreements Don't Include Proper Inspection, Dodge & Law, 104 The Los Angeles Daily Journal, June 12, 1991, p. 6.

Meat and Poultry Inspection in the Year 2000, Houston, 43 Food Drug Cosm. L.J. 369 (1988).

Developments in the Residue Program at USDA-FSIS (Special Issue: Symposium on Chemical and Food Product Liability), Houston, 41 Food Drug Cosm. L.J. 438 (1986).

One Goal, Many Agencies: An Assessment of Pesticide Residue Regulation in Animal Feeds and Animal Meat Products, Dingel, 41 Food Drug Cosm. L.J. 467 (1986).

Protection v. Innovation in the Marketplace: A View From the Meat Industry, Wilmoth, 39 Food Drug Cosm. L.J. 81 (1984).

Meat Inspection Is a Lot of Bull, Leonard, Bus. & Soc. Rev. 56 (1983).

Food Safety at a Crossroad (Symposium for the 75th Anniversary of the 1906 Pure Food and Drugs Act and the Meat Inspection Act), Block, 37 Food Drug Cosm. L.J. 23 (1982).

Introduction: The History of the 1906 Pure Food and Drugs Act and the Meat Inspection Act (Symposium for the 75th Anniversary of the 1906 Pure Food and Drugs Act and the Meat Inspection Act), Johnson, 37 Food Drug Cosm. L.J. 5 (1982).

USDA and Progress of Federal Meat Inspection (Symposium for the 75th Anniversary of the 1906 Pure Food and Drugs Act and the Meat Inspection Act), McMillan, 37 Food Drug Cosm. L.J. 26 (1982).

81-9-201. Meat establishment license — fees and renewals.

Compiler's Comments

1997 Amendment: Chapter 366 in (2), in first sentence after "expire", substituted "each year on the anniversary date established by rule by the board of review established in 30-16-302 and must" for "on December 31 of the year in which they are issued and shall"; and made minor changes in style.

1997 Statement of Intent: The statement of intent attached to Ch. 366, L. 1997, provided: "A statement of intent is required for this bill because [section 1] [30-16-104] grants rulemaking authority to the board of review established in 30-16-302 for the purpose of implementing a one-stop business licensing pilot project required by the 54th Legislature."

1987 Amendment: In (1) substituted first sentence concerning license requirement for "It is unlawful for a person, firm, or corporation to maintain or conduct a slaughterhouse, meat packinghouse, or meat depot in this state without having a license issued by the department"; in (2), in two places, changed "place" to "establishment"; and inserted (3) establishing a penalty.

1983 Amendments: Chapter 444 substituted a fee established by the department for $1 for a license and provided for deposit in the department's earmarked revenue fund instead of the state general fund.

Chapter 281, in second sentence, substituted "state special revenue fund" for "earmarked revenue fund".

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Attorney General's Opinions

Application to Poultry: A person, firm, or corporation maintaining a slaughterhouse, meatpacking house, or meat depot in Montana, even though confining his activities solely to poultry, shall subject himself to inspection, regulation, and licensing by the Livestock Sanitary Board (now Department of Livestock). 29 A.G. Op. 50 (1962).

Collateral References

Animals *key* 15.

3A C.J.S. Animals §117; 36A C.J.S. Food §12; 93 C.J.S. Warehousemen and Safe Depositaries §4.

81-9-202. Exceptions of certain producers of meats.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 418 in first sentence of (1) and near end of (2)(b) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 near end of (1) substituted "department of public health and human services" for "department of health and environmental sciences"; in (2)(a), after "supervision or regulation", inserted "by the department of public health and human services" and at end, after "for sale", substituted "at those facilities" for "thereat by the department of health and environmental sciences, nor does this section limit the"; in (2)(b) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Collateral References

Animals *key* 15; Food *key* 3, 5, 6; Warehousemen *key* 6.

3A C.J.S. Animals §117.

81-9-216. Short title.

Collateral References

36A C.J.S. Food §§7, 12, 15.

35 Am. Jur. 2d Food §13.

81-9-217. Definitions.

Compiler's Comments

1999 Amendment: Chapter 574 in definition of livestock after "equines and" substituted "alternative livestock" for "game farm animals"; and made minor changes in style. Amendment effective October 1, 1999.

Collateral References

35 Am. Jur. 2d Food §§11, 19 through 30, 33, 34.

81-9-218. Exemptions.

Compiler's Comments

1989 Amendment: Deleted former (2) that read: "(2) a person engaged in custom slaughtering of livestock and preparation of the carcasses and parts and meat food products thereof only with respect to the slaughter of livestock delivered by the owner for custom slaughter and the preparation of the carcasses for use by the owner in his own household or by members of his household or nonpaying guests"; inserted (2) relating to custom slaughtering; and made minor changes in form. Amendment effective March 21, 1989.

81-9-220. Rules.

Compiler's Comments

Statement of Intent: The statement of intent attached to Ch. 577, L. 1987, provided: "This bill requires a statement of intent because section 4 [81-9-220] requires the board of livestock to adopt rules implementing the state meat inspection program. Section 4 [81-9-220] indicates the scope of the rules. It is intended that the rules conform in all respects to the requirements of the Federal Meat Inspection Act and the Federal Poultry Products Inspection Act, in order to qualify the state program under those acts. It is also intended that the program be developed and administered in cooperation with the food safety and inspection service, United States department of agriculture, to ensure that it is at least "equal to" the requirements contained in the federal law."

Administrative Rules

ARM 32.6.712 Food safety and inspection service (meat, poultry).

81-9-226. Chief meat inspector — deputies — qualifications.

Compiler's Comments

1989 Amendment: Deleted second sentence of (1) that read: "Such person must be a veterinarian licensed in Montana who has practiced veterinary medicine for 5 years or longer." Amendment effective March 21, 1989.

81-9-228. Inspection stamps.

Compiler's Comments

1989 Amendment: In (2) changed "offered" to "offer".

81-9-231. Condemnation and appeal.

Collateral References

36A C.J.S. Food §§50 through 56.

81-9-232. Regulation of equine, alternative livestock ranch animal, or rabbit carcasses or products.

Compiler's Comments

2001 Amendment: Chapter 7 at beginning of (1) after "Equines" substituted "alternative livestock ranch" for "game farm"; near beginning of (2) after "equine" substituted "alternative livestock ranch" for "game farm"; and made minor changes in style. Amendment effective October 1, 2001.

81-9-233. Cooperation with state and federal authorities.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 418 in (1), in two places, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1), in two places, substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Pursuant to an executive order issued under the authority contained in sec. 569, Ch. 546, the state laboratory is within the Department of Environmental Quality.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Collateral References

36A C.J.S. Food §8.

81-9-234. Violations — penalties.

Collateral References

36A C.J.S. Food §§39 through 49, 59.

Part 3
Rendering or Disposal Plants

81-9-301. Licensing of rendering or disposal plants.

Compiler's Comments

1983 Amendments: Chapter 444, in (2), substituted a fee established by the department for a license fee of $5; and in (3) provided for deposit in the department's earmarked revenue fund instead of the state general fund.

Chapter 281, in (3), substituted "state special revenue fund" for "earmarked revenue fund".

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Collateral References

Animals *key* 15.

3A C.J.S. Animals §117.

81-9-302. Power of department to adopt and enforce rules.

Administrative Rules

Title 32, chapter 6, ARM Animal feeding, slaughter, and disposal.

Title 32, chapter 6, subchapter 11, ARM Rendering plants — vehicles and equipment.

Part 4
Hide Dealers

81-9-411. Hide dealer or buyer's license fee — disposition of proceeds.

Compiler's Comments

1983 Amendments: Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted a fee established by the department for a $5 annual license fee.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Collateral References

Licenses *key* 33.

53 C.J.S. Licenses §56.

81-9-423. Mutilation or concealment of hides a felony.

Collateral References

Licenses *key* 41.

53 C.J.S. Licenses §63.

CHAPTER 20
POULTRY AND EGGS

Chapter Administrative Rules
Title 32, chapter 3, ARM Disease control.
Title 32, chapter 12, ARM Eggs.

Chapter Collateral References
Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion. 58 ALR 4th 7.

Part 1
Poultry

Part Law Review Articles
Measuring Productivity in an Integrated Poultry Operation, Steedle & Darazsdi, 161 J. Acct. 142 (1986).

81-20-101. Poultry industry — powers and authority of department.

Administrative Rules
Title 32, chapter 3, ARM Disease control.
Title 32, chapter 3, subchapter 1, ARM General disease control provisions.
Title 32, chapter 3, subchapter 2, ARM Importation of animals and semen into Montana.
Title 32, chapter 3, subchapter 15, ARM Poultry.
ARM 32.3.2301 Control of biologics.
Title 32, chapter 6, subchapter 1, ARM Animal foods.
Title 32, chapter 6, subchapter 8, ARM Sanitary requirements for poultry slaughterhouses, packinghouses, and meat depots.
Title 32, chapter 12, ARM Eggs.

Attorney General's Opinions
No Department Authority to Confiscate and Destroy Poultry: The Livestock Sanitary Board (now Department of Livestock) is not empowered by 46-209, R.C.M. 1947 (now 81-20-101, MCA) to return to the consignor or confiscate and destroy poultry infected with or exposed to any infectious, contagious, communicable, or dangerous poultry disease when imported into Montana. 27 A.G. Op. 14 (1957).

81-20-103. Violation.

Collateral References
Animal *key* 35.
3A C.J.S. Animals §97.

81-20-104. Civil liability.

Collateral References
Animals *key* 28 through 37.
3A C.J.S. Animals §§66 through 98.
Keeping poultry as nuisance. 2 ALR 3d 965.

Part 2
Eggs

81-20-201. Wholesale egg dealer's and egg grader's licenses — exemptions — fee.

Compiler's Comments
2001 Amendment: Chapter 225 in (1) near middle after "obtaining a" inserted "wholesale egg dealer's" and deleted former second sentence that read: "A licensee shall send to the department the reports that are requested by the department"; in (2) near middle of first sentence after "dealers" deleted "buying eggs for sale at retail and for dealers" and deleted former third sentence that read: "Licenses expire each year on the anniversary date established by rule by the board of review established in 30-16-302"; at end of (3)(a) substituted "25 cases a month over a 12-month period" for "25 cases per month"; inserted (3)(b) concerning license exemption for buying eggs for

sale at retail; in (4) substituted "an average of 25 cases of eggs a month over a 12-month period" for "25 cases of eggs per month" and after "consumers shall" deleted "when selling candled eggs"; inserted (6) concerning sending information to department; and made minor changes in style. Amendment effective April 12, 2001.

1997 Amendment: Chapter 366 in (1), in fifth sentence after "expire", substituted "each year on the anniversary date established by rule by the board of review established in 30-16-302" for "March 31 each year after the date of issuance"; in (3), at end of fourth sentence after "expires", substituted "each year on the anniversary date established by rule by the board of review established in 30-16-302" for "March 31 each year after the date of issuance"; and made minor changes in style.

1997 Statement of Intent: The statement of intent attached to Ch. 366, L. 1997, provided: "A statement of intent is required for this bill because [section 1] [30-16-104] grants rulemaking authority to the board of review established in 30-16-302 for the purpose of implementing a one-stop business licensing pilot project required by the 54th Legislature."

1983 Amendment: In (1), substituted fees established by the department for a $5 fee for retail sales and $20 for wholesale; in (3) substituted a fee established by the department for a $5 grader's license fee.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.
ARM 32.12.1002 Application and fee for grader's license.
ARM 32.12.1003 License examination.
ARM 32.12.1004 Annual license renewal.

Collateral References

Food *key* 3.
36A C.J.S. Food §12.
35 Am. Jur. 2d Food §35.

81-20-203. Candling eggs intended for human consumption — candling defined.

Administrative Rules

ARM 32.12.1001 Licensing egg graders — definitions.

81-20-204. Certificate of candling or packing.

Administrative Rules

ARM 32.12.103 Size of certificate of candling.
ARM 32.12.104 Eggs defined unfit for human consumption.

81-20-205. Egg — when defined as unfit for human food.

Compiler's Comments

Adulterated Food — Federal Law: The definition of adulterated food in the Federal Food, Drug, and Cosmetic Act is contained in United States Code, Title 21, sec. 342.

Administrative Rules

ARM 32.12.101 Eggs — definitions.
ARM 32.12.104 Eggs defined unfit for human consumption.

Collateral References

Food *key* 5, 6.
36A C.J.S. Food §§15, 16.

81-20-207. Rules to be adopted by department of livestock.

Administrative Rules

Title 32, chapter 12, ARM Eggs.

Collateral References

Agriculture *key* 1.
3 C.J.S. Agriculture §19.

CHAPTER 21
DAIRY PRODUCTS

Chapter Law Review Articles

The SPS Agreement of the World Trade Organization and the International Trade of Dairy Products, Stewart & Johanson, 54 Food & Drug L.J. 55 (1999).

Just What Is a Concentrated Animal Feeding Operation Under the Clean Water Act?, Mollnow, 60 Alb. L. Rev. 239 (1996).

Udder Truth: Labels for Genetically Engineered Food, Smith, 17 Legal Times 23 (1994).

Biotech Runs a Gauntlet on Its Way to the Grocery Store, Roush, 104 The Los Angeles Daily Journal, August 20, 1991, p. 6.

Current Labeling Issues Concerning Dairy Products, Lake & Newberry, 45 Food Drug Cosm. L.J. 273 (1990).

Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine, Miller, 77 Calif. L. Rev. 83 (1989).

Agriculture: Dairy Produce Proceeds, Bothwell, 19 Pac. L.J. 467 (1988).

State Fluid Milk Regulation: Antitrust and Price Controls, Greco, 32 Antitrust Bull. 165 (1987).

Food Security Act of 1985: Dairy Industry Changes, Fox, 31 S.D.L. Rev. 512 (1986).

Milk Orders: Selected Topics, Foley, 31 S.D.L. Rev. 406 (1986).

Antitrust Action Against Milk Marketing Cooperatives—Shaking Up the Milk Industry, Cook, 34 Drake L. Rev. 493 (1985).

Retail Price Controls in the Dairy Industry: A Political Coalition Argument, Johnson, 28 J.L. & Econ. (1985).

Buttering Up Congress and Milking Consumers, Smith, Bus. & Soc. Rev. 34 (1982).

Chapter Collateral References

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion. 58 ALR 4th 7.

Part 1
Regulation of Dairies Selling Milk or Cream for Public Consumption

81-21-101. Definitions.

Compiler's Comments

1983 Amendment: Inserted (2) defining public consumption.

81-21-102. Licensing of milk plants and dairies selling milk or cream for public consumption.

Compiler's Comments

1983 Amendment: In (4), substituted fees established by the department for $50 for a milk factory, $50 for a fluid milk plant, and $5 for a dairy.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Case Notes

Prosecution of Violations: Defendants convicted of violating this section were entitled to a new trial when it was insinuated that one of the defendants was not going to speak truthfully and county prosecutor threatened defendant with perjury charges. St. v. Peterson, 138 M 257, 356 P2d 925 (1960).

Collateral References

Food *key* 3.

36A C.J.S. Food §12.

3 Am. Jur. 2d Agriculture §§28, 29, 32, 36 through 38; 35 Am. Jur. 2d Food §§39, 44.

Construction and application of regulations as to milk. 122 ALR 1062.

Constitutionality of regulations as to milk. 18 ALR 235, supplemented by 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243; and 155 ALR 1383.

81-21-103. Exceptions of certain producers of dairy products.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 418 in (1) and (2)(b) substituted "department of public health" for "department of health and environmental sciences"; in (2)(a), after "supervision or regulation", inserted "by the department of public health and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 at end of (1) substituted "department of public health and human services" for "department of health and environmental sciences"; in (2)(a), after "supervision or regulation", inserted "by the department of public health and human services" and at end, after "for sale", substituted "at those facilities" for "thereat by the department of health and environmental sciences, nor does this section limit the"; in (2)(b) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

81-21-106. Civil liability.

Collateral References

Animals *key* 35.

CHAPTER 22
MANUFACTURED DAIRY PRODUCTS

Chapter Administrative Rules

Title 32, chapter 9, part 2, ARM Milk quality requirements.

Title 32, chapter 10, ARM Tester licensing.

Chapter Law Review Articles

Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine, Miller, 77 Calif. L. Rev. 83 (1989).

Agriculture: Dairy Produce Proceeds, Bothwell, 19 Pac. L.J. 467 (1988).

Chapter Collateral References

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion. 58 ALR 4th 7.

Part 1
Administration

81-22-101. Definitions.

Compiler's Comments

1997 Amendment: Chapter 42 deleted definition of cheese factory that read: ""Cheese factory" means a place where cheese, including cream cheese, cottage cheese, creamed cottage cheese, cheese curd, cottage cheese dressing, and low-fat counterparts of cheese, either cultured or directly acidified, is made for commercial purposes"; deleted definition of frozen dessert plant that read: ""Frozen dessert plant" means a place where products named in subsections (27)(a)(iii) through (27)(a)(ix) are made for commercial purposes"; deleted definition of fruit ice cream that read: ""Fruit ice cream" must conform to the requirements of ice cream, except that the fruit ingredients must be from sound, clean, and mature fruit, and it must contain not less than 9% of milk fat"; deleted definition of ice or ice sherbet that read: ""Ice" or "ice sherbet" is the pure, clean, frozen product made from water and sugar with harmless fruit or fruit juice flavoring, with or without harmless coloring or added stabilizer composed of wholesome edible material, and must contain not less than 35/100 of 1% of acid, as determined by titrating with standard alkali and expressed as lactic acid. It may not contain milk solids"; deleted definition of ice cream factory that

read: "An "ice cream factory" is a place where ice cream mix is frozen into ice cream for commercial purposes"; deleted definition of milk sherbet that read: ""Milk sherbet" is the pure, clean, frozen product made from milk product, water, and sugar, with harmless fruit or fruit juice flavoring and with or without harmless coloring, which must contain not less than 35/100 of 1% of acid, as determined by titrating with standard alkali and expressed as lactic acid, and with or without added stabilizer composed of wholesome edible material. It must contain not less than 4% by weight of solids"; deleted definition of raw milk or raw milk products that read: ""Raw milk" or "raw milk products" means milk or milk products that have not been treated by a process of pasteurization"; deleted definition of renovated butter or processed butter that read: ""Renovated butter" or "processed butter" is the product made by melting and reworking, without the addition or use of chemicals or substances except whole milk, cream, or salt, and must contain not less than 80% of milk fat"; deleted definition of skimmed milk cheese that read: ""Skimmed milk cheese" is the sound, solid, and ripened product made from skim milk by coagulating the casein with rennet or lactic acid, with or without ripening ferments and seasoning"; in definition of directly acidified deleted reference to direct acidification as part of defined term; in definition of French ice cream deleted references to cooked ice cream, ice custard, and parfaits as part of defined term; in definition of ice cream mix, in (b), expanded reference to include subsection (a)(vi) of definition of milk; adjusted subsection references; and made minor changes in style. Amendment effective March 12, 1997.

1993 Amendment: Chapter 10 in definition of Code of Federal Regulations substituted reference to Department of Health and Human Services for reference to Department of Health, Education, and Welfare; and made minor changes in style.

Administrative Rules

ARM 32.9.101 General licensing and provisions — definitions.

81-22-102. General authority of department.

Compiler's Comments

1983 Amendment: Inserted (3) requiring the Department to make rules and establish fees required under 81-23-202.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Title 32, chapter 9, subchapter 1, ARM Dairies and milk plants — general licensing and provisions.

Title 32, chapter 9, subchapter 2 through 8, ARM Milk quality requirements — processing of dairy products.

Title 32, chapter 10, ARM Tester licensing.

Collateral References

35 Am. Jur. 2d Food §§3, 6.

81-22-103. New or amended rules — mailing — hearing — judicial review.

Collateral References

35 Am. Jur. 2d Food §§6 through 10.

81-22-104. Enforcement of laws and rules — violation as misdemeanor.

Collateral References

35 Am. Jur. 2d Food §§13, 15, 19, 51 through 60.

81-22-105. Investigation of complaints and violations — injunction.

Collateral References

35 Am. Jur. 2d Food §13.

Part 2
Licensing Provisions

Part Collateral References

35 Am. Jur. 2d Food §§11, 44.

81-22-203. Renewal, suspension, or revocation of license — grounds — hearing — appeal to district court.

Administrative Rules
ARM 32.9.103 Licensing of persons engaged in production of milk for manufacturing purposes.
ARM 32.9.104 Plant licensing.

Collateral References
35 Am. Jur. 2d Food §45.

81-22-204. License required for milk or cream route.

Compiler's Comments
1983 Amendment: Substituted a fee established by the department for fee of $5 annually.

Administrative Rules
ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

Collateral References
35 Am. Jur. 2d Food §11.

81-22-205. Examination and licensing of persons engaged in testing.

Compiler's Comments
1983 Amendment: Near end of (1), substituted fee established by the department for license fee of $10.

Administrative Rules
ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.
Title 32, chapter 10, subchapter 2, ARM Licensing of milk and cream testers.

Collateral References
35 Am. Jur. 2d Food §11.

81-22-206. Licensing of graders, weighers, and samplers.

Administrative Rules
ARM 32.10.102 License required.
ARM 32.10.103 Application and fee for license.
ARM 32.10.104 License examination.
ARM 32.10.105 Qualifying for license.
ARM 32.10.106 Annual license renewal.

Collateral References
35 Am. Jur. 2d Food §11.

81-22-207. License — issuance and penalty.

Collateral References
35 Am. Jur. 2d Food §11.

81-22-208. Licenses and schedule of license fees.

Compiler's Comments
1995 Amendments — Composite Section: Chapter 418 in (2)(a) substituted "department of public health" for "Montana department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1)(a) substituted "department of public health and human services" for "Montana department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1983 Amendment: Substituted fees established by the department for $50 for manufactured dairy products plant, $5 for a cream station, $5 for a dairy producing milk for manufacturing

purposes, $5 for a grader-weigher-sampler, $10 for a tester, and $5 for a hauler; and in (2) substituted fee established by the department for penalty of $5 per month or fraction of a month after January 31.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.
ARM 32.2.402 Penalty fees for nonrenewal of licenses and permits.
ARM 32.10.103 Application and fee for license.
ARM 32.10.105 Qualifying for license.
ARM 32.10.106 Annual license renewal.

81-22-209. License requirements applicable.

Compiler's Comments

1995 Amendments: Chapter 418 at end substituted "department of public health" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Chapter 546 at end substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Part 3
Inspection

Part Collateral References

35 Am. Jur. 2d Food §13.

81-22-301. Tests and analyses — admissibility as evidence.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 4
Sanitation, Quality, and Labeling Requirements

Part Collateral References

35 Am. Jur. 2d Food §§15 through 30, 39 through 50.

81-22-401. Grading of milk — condemnation of unsafe milk.

Administrative Rules

ARM 32.9.301 Dairy animal health.

81-22-403. Plans for construction, remodeling, or relocation of manufacturing plant.

Compiler's Comments

1995 Amendment: Chapter 418 in (3), in two places, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

81-22-404. Removal or destruction of products in case of potential health hazards.

Compiler's Comments

1995 Amendments: Chapter 418 in (1) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1) substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Administrative Rules

ARM 32.9.301 Dairy animal health.

81-22-410. Manufacture, sale, or importation of products containing extraneous fats.

Administrative Rules

ARM 32.8.102 Milk and milk products which may be sold.

81-22-414. Pasteurization apparatus and records.

Compiler's Comments

1995 Amendments: Chapter 418 in (1), in last sentence, substituted "department, the department of public health" for "department of livestock, the department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1), in last sentence, substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Administrative Rules

ARM 32.9.417 and 32.9.418 Separators and pasteurization equipment requirements.

81-22-416. Milk and manufactured dairy products to conform to standards.

Administrative Rules

Title 32, chapter 8, ARM Fluid milk and grade A milk products — quality.

Title 32, chapter 9, subchapter 2, ARM Milk quality requirements.

81-22-417. Making or selling products in violation of chapter prohibited — penalty.

Collateral References

Food *key* 2, 13, 14.

36A C.J.S. Food §§6(4), 24, 25.

81-22-421. Labeling on manufactured dairy products to conform to requirements.

Compiler's Comments

1995 Amendments: Chapter 418 at end substituted "department or the department of public health" for "department of livestock or the department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 at end substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Administrative Rules

Title 32, chapter 8, subchapter 2, ARM Milk freshness dating.

ARM 32.9.506 Butter labeling.

ARM 32.9.606 Cheddar cheese labeling.

ARM 32.9.706 Cottage cheese labeling.

Part 6
Penalties

81-22-601. Penalties for violations.

Collateral References
35 Am. Jur. 2d Food §§56 through 60.

CHAPTER 23
MILK PRICE CONTROL

Chapter Compiler's Comments
Preamble: The preamble attached to Ch. 242, L. 1995, provided: "WHEREAS, the Legislature finds it appropriate to decontrol minimum wholesale, jobber, and retail milk prices; and

WHEREAS, it is necessary for the Board of Milk Control to adopt additional procedures and fair trade practices to promote the sale of Montana milk at competitive prices; and

WHEREAS, the Legislature encourages the use of Montana milk by Montana processors and the elimination of practices that encourage the purchase of Montana milk out of state for subsequent resale in Montana at a price lower than that established by the Board."

Chapter Administrative Rules
Title 32, chapter 23, ARM Milk control bureau.

Chapter Case Notes
Milk Pricing Control — Actions Compelled by Law Not Unfair Trade Practices: A third-party plaintiff brought an action for declaratory and injunctive relief against the operation and enforcement of certain milk pricing statutes, claiming those statutes violated the provisions of 30-14-205, and the third-party defendant moved to dismiss the claim on the grounds that it did not state a claim for relief. The court found that although the statutes challenged by the plaintiff did fix the price of milk, eliminate competition, and create a monopoly, the only reason whereby 30-14-224 could control was if that section expressly or impliedly repealed the Milk Price Control Act. The court found no such repeal had been intended by the Legislature. Hinshaw v. Beatrice Foods, Inc., 37 St. Rep. 1677 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

Milk Pricing Control — Violation of Equal Protection: A third-party plaintiff brought an action for declaratory and injunctive relief against the operation and enforcement of certain milk pricing statutes, claiming the statutes violated the Equal Protection Clause of the 14th amendment of the United States Constitution, and the defendant moved to dismiss the claim. The court found that the base plan established by the Board of Milk Control created a classification of milk producers based upon the past history of their deliveries to distributors and that while the states have wide discretion to make classifications in the area of economic regulation, it could not be said from the third-party complaint alone that there was no merit in the claimed denial of equal protection. Hinshaw v. Beatrice Foods, Inc., 37 St. Rep. 1677 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

Milk Pricing Control — Violation of Sherman Act by Private Actions Compelled by State Law: Although the base plan established by the Board of Milk Control creates a system whereby the price of milk is fixed, price competition is eliminated, and a select group is given a property right in a monopoly and therefore violates the concepts of sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), the act does not make private actions compelled by Montana statutes and orders of the Board unlawful. Under the rationale of Parker v. Brown, 317 US 341 (1943), private actions compelled by state law, which would otherwise violate the Sherman Act, are immune from the operation of the act under certain standards satisfied in this case. Hinshaw v. Beatrice Foods, Inc., 37 St. Rep. 1677 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

Chapter Law Review Articles
Got Federally Mandated Price Floors for Milk?, McNew, 113 L.A. Daily J. 6 (2000).

State Fluid Milk Regulation: Antitrust and Price Controls, Greco, 32 Antitrust Bull. 165 (1987).

Food Security Act of 1985: Dairy Industry Changes, Fox, 31 S.D.L. Rev. 512 (1986).

Milk Orders: Selected Topics, Foley, 31 S.D.L. Rev. 406 (1986).

Antitrust Action Against Milk Marketing Cooperatives—Shaking Up the Milk Industry, Cook, 34 Drake L. Rev. 493 (1985).

Retail Price Controls in the Dairy Industry: A Political Coalition Argument, Johnson, 28 J.L. & Econ. 55 (1985).

Part 1
General Administration

Part Collateral References

35 Am. Jur. 2d Food §§15 through 23, 39 through 50.

81-23-101. Definitions.

Compiler's Comments

1995 Amendments: Chapter 242 deleted definition of jobber prices that read: ""Jobber prices" means those prices at which milk owned by a distributor is sold, in bulk or in packages, to a jobber or independent contractor"; deleted definition of retail prices that read: ""Retail prices" means those prices at which milk owned by a retailer is sold, in bulk or in packages, over the counter at retail or for consumption on the premises"; deleted definition of wholesale prices that read: ""Wholesale prices" means those prices at which milk owned by a distributor is sold, in bulk or in packages, to a retailer"; and made minor changes in style. Amendment effective January 1, 1996.

Chapter 333 deleted definition of Department that read: ""Department" means the department of commerce provided for in Title 2, chapter 15, part 18"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in definition of person substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 56 in definition of person substituted "an individual" for "a person" and after "association" inserted reference to the prison dairy. Amendment effective February 19, 1993.

1981 Amendment: Substituted "department of commerce" for "department of business regulation" in (1)(g).

Case Notes

Wholesale Food Purchasing Organization Defined as Retailer: The Supreme Court determined that Associated Food Stores, owned by various independent retail stores and taxed as a cooperative, which purchased products from manufacturers for resale to retailers, was not a jobber as defined in ARM 8.79.101, but rather was a retailer under 81-23-101 and ARM 8.79.101, and therefore must pay the wholesale rather than jobber price for milk under Montana's milk price control law. St. Dept. of Commerce v. Gallatin Dairies, Inc., 221 M 492, 719 P2d 790, 43 St. Rep. 1001 (1986).

Chain Retailer "Distributing" to Its Stores Not Covered by Milk Control Law — What Is a Distributor: Albertson's proposed to purchase raw milk from a licensed distributor that it would take to a licensed processor in Wyoming and then distribute to its six retail stores in Montana. The Department of Business Regulation issued a declaratory ruling that Albertson's "may not carry out the business it proposes under the current statutory framework" of the milk control law. Albertson's sought judicial review, and the District Court held that Albertson's contemplated activity did not make it a distributor subject to licensing under the milk control law and that the law did not prohibit the proposed activity either expressly or by implication. The Supreme Court affirmed the District Court holding. Albertson's, Inc. v. Dept. of Business Regulation, 184 M 12, 601 P2d 43, 36 St. Rep. 1793 (1979).

81-23-102. Policy.

Compiler's Comments

1995 Amendment: Chapter 242 in (1)(k), after "unless the producers", deleted "distributors, and others engaged in the marketing of milk"; and made minor changes in style. Amendment effective January 1, 1996.

Case Notes

Minimum Prices: The means selected to attain the object set forth in this section was a procedure set forth in 81-23-301 (repealed, 1983) and 81-23-302 whereby the Milk Control Board (now Board of Milk Control) was empowered to establish marketing areas in the state and to

prescribe and enforce minimum producer, wholesale, and retail prices in such areas pursuant to the provisions of the (former) Milk Control Act (Title 81, ch. 23). (See 1995 amendment.) Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Purpose of Statutes: Because Title 81, ch. 23 (formerly the Milk Control Act), was aimed at activity injurious to health, it could be enforced by injunction under 81-23-406. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Reasonable Profit: Reasonable profit, as used in subsection (1)(k) of this section, contemplated a minimum price at which milk could be sold in view of surrounding circumstances. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Collateral References

Food *key* 2, 4, 4.5.
36A C.J.S. Food §§3, 14.
35 Am. Jur. 2d Food §§39 through 50.

81-23-103. General powers of department.

Compiler's Comments

1995 Amendments: Chapter 333 in (1), in second sentence after "health laws", deleted "or the law under which the department of livestock is constituted together with the department of livestock rules" and in third sentence, after "environmental sciences", deleted "the board of livestock"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in last sentence of (1) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in last sentence of (1) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Administrative Rules

Title 32, chapter 23, subchapter 1, ARM Purchase and resale of milk.
Title 32, chapter 23, subchapter 2, ARM Trade practices.
Title 32, chapter 23, subchapter 3, ARM Licensee assessments.
ARM 32.24.101 Organization of Board of Milk Control.
Title 32, chapter 24, subchapter 5, ARM Quota, pooling, utilization, and marketing rules.

Collateral References

Food *key* 1.9, 2, 4.5, 5, 6.
36A C.J.S. Food §4(2).
35 Am. Jur. 2d Food §§3, 6, 11 through 27, 39 through 50.

Validity of municipal ordinance imposing requirements on outside producers of milk to be sold in city. 14 ALR 2d 103.

81-23-104. Rules and orders.

Administrative Rules

Title 32, chapter 23, ARM Milk control bureau.
ARM 32.23.102 Transactions involving purchase and resale of milk within state.
ARM 32.23.201 Regulation of unfair trade practices.
ARM 32.23.301 Licensee assessments.
Title 32, chapter 24, subchapter 5, ARM Quota, pooling, utilization, and marketing rules.

Collateral References

35 Am. Jur. 2d Food §§3, 6 through 10, 13.

Constitutionality of regulations as to milk. 18 ALR 235, supplemented by 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243; 155 ALR 1383.

81-23-105. Testing of milk.

Compiler's Comments

1995 Amendment: Chapter 333 near end of (1), after "department", deleted "of commerce"; near beginning of (2), after "department", deleted "of commerce"; at end of (3), after

"department", deleted "of livestock"; near beginning of (4), after "department", deleted "of commerce"; and made minor changes in style. Amendment effective July 1, 1995.

1985 Amendment: In (1) before "establish a program", changed "shall" to "may".

1985 Appropriations Act — Milk Control Fees — Milk Testing Equipment: Section 17, Category C, Department of Livestock narrative of HB 500, "The General Appropriations Act of 1985", provided in part: "The appropriation in item 2 in fiscal 1986 includes $27,600 from the state special revenue fund for milk control authorized in section 81-23-202, MCA. The assessment authorized in section 81-23-202, MCA, in effect July 1, 1985, will not be reduced until this expenditure has been made. This amount has been generated under the provisions of section 81-23-105, MCA, for milk testing. This is to assist in the purchase of milk testing equipment authorized in this appropriation."

1981 Amendment: Substituted "department of commerce" for "department of business regulation" in (1), (2), and (4).

Administrative Rules

Title 32, chapter 23, subchapter 3, ARM Licensee assessments.

81-23-106. Application.

Attorney General's Opinions

Licensure of Out-of-State Producer, Distributor, or Producer-Distributor: A producer, distributor, or producer-distributor resident of another state may be required to obtain a license from the Department of Business Regulation (now Department of Commerce) under section 27-408, R.C.M. 1947 (now 81-23-201, MCA) before marketing its products in this state. 36 A.G. Op. 58 (1976).

Part 2
Licensing

Part Case Notes

Chain Retailer "Distributing" to Its Stores Not Covered by Milk Control Law: Albertson's proposed to purchase raw milk from a licensed distributor that it would take to a licensed processor in Wyoming and then distribute to its six retail stores in Montana. The Department of Business Regulation issued a declaratory ruling that Albertson's "may not carry out the business it proposes under the current statutory framework" of the milk control law. Albertson's sought judicial review, and the District Court held that Albertson's contemplated activity did not make it a distributor subject to licensing under the milk control law and that the law did not prohibit the proposed activity either expressly or by implication. The Supreme Court affirmed the District Court holding. Albertson's, Inc. v. Dept. of Business Regulation, 184 M 12, 601 P2d 43, 36 St. Rep. 1793 (1979).

Accrual of Cause of Action: Three-year Statute of Limitations provided under section 93-2607, R.C.M. 1947 (since repealed), did not bar action on milk distributor's bond where distributor had pursued administrative and court proceedings in intervening 3-year period and surety had knowledge of earlier proceedings since cause of action did not accrue until plaintiff had right of action and plaintiff had no right of action until administrative remedies had been exhausted. Mont. Milk Control Bd. v. Hartford Accident & Indem. Co., 153 M 299, 456 P2d 302 (1969).

Part Collateral References

35 Am. Jur. 2d Food §§11, 13, 15 through 27, 39 through 50.

81-23-201. Licenses to producers, producer-distributors, distributors, and jobbers.

Case Notes

Chain Retailer "Distributing" to Its Stores Not Covered by Milk Control Law: Albertson's proposed to purchase raw milk from a licensed distributor that it would take to a licensed processor in Wyoming and then distribute to its six retail stores in Montana. The Department of Business Regulation issued a declaratory ruling that Albertson's "may not carry out the business it proposes under the current statutory framework" of the milk control law. Albertson's sought judicial review, and the District Court held that Albertson's contemplated activity did not make it a distributor subject to licensing under the milk control law and that the law did not prohibit the proposed activity either expressly or by implication. The Supreme Court affirmed the District Court holding. Albertson's, Inc. v. Dept. of Business Regulation, 184 M 12, 601 P2d 43, 36 St. Rep. 1793 (1979).

Application of Section: The license fee exacted by this section and 81-23-202 applied to milk that was ultimately sold by a distributor outside an established market area. Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

Collection of License Fees: The Board of Milk Control (formerly the Montana Milk Control Board) could collect license fees based on the whole volume of milk sold by producer whether within a certain marketing area or anywhere else within the state of Montana. Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

Attorney General's Opinions

Licensure of Out-of-State Producer, Distributor, or Producer-Distributor: A producer, distributor, or producer-distributor resident of another state may be required to obtain a license from the Department of Business Regulation (now Department of Commerce) under this section before marketing its products in this state. 36 A.G. Op. 58 (1976).

81-23-202. Licenses — disposition of income.

Compiler's Comments

1995 Amendments: Chapter 242 in (4), in last sentence after "producer", deleted "wholesale, jobber, and retail". Amendment effective January 1, 1996.

Chapter 333 in (1), near middle of first sentence, substituted "department, as provided in 81-22-202" for "department of livestock"; in (4), at end of first sentence after "department", deleted "of livestock"; in (7), at beginning of first sentence, deleted "Except for the assessment provided for in subsection (4)" and in second sentence, in two places, inserted reference to chapter 22; deleted former (8) that read: "(8) The assessment provided for in subsection (4) must be deposited by the department in an account in the state special revenue fund. Money in the account must be used to carry out the purposes of Title 81, chapter 22"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 566 inserted (4) assessing a fee of 14.97 cents per hundredweight on class I milk; in (5), near end after "department", inserted "and the fee established in subsection (4)"; at beginning of (7) inserted exception clause; inserted (8) regarding deposit of the assessment in the state special revenue fund; and made minor changes in style. Amendment effective July 1, 1993.

Effective Date — Applicability: Section 2, Ch. 566, L. 1993, provided: "[This act] is effective July 1, 1993. Payment of the assessment in [section 1] [81-23-202] begins with the quarterly payment due on October 15, 1993."

1985 Appropriations Act — Milk Control Fees — Milk Testing Equipment: Section 17, Category C, Department of Livestock narrative of HB 500, "The General Appropriations Act of 1985", provided in part: "The appropriation in item 2 in fiscal 1986 includes $27,600 from the state special revenue fund for milk control authorized in section 81-23-202, MCA. The assessment authorized in section 81-23-202, MCA, in effect July 1, 1985, will not be reduced until this expenditure has been made. This amount has been generated under the provisions of section 81-23-105, MCA, for milk testing. This is to assist in the purchase of milk testing equipment authorized in this appropriation."

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Administrative Rules

ARM 32.2.401 Department of Livestock license fees, permit fees, and miscellaneous fees.

ARM 32.9.103 Licensing of persons engaged in production of milk for manufacturing purposes.

Case Notes

Application of Section: The license fee exacted by this section and 81-23-201 applied to milk that was ultimately sold by a distributor outside an established market area. Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

Collection of License Fees: The Board of Milk Control (formerly the Montana Milk Control Board) could collect license fees based on the whole volume of milk sold by producer whether within a certain marketing area or anywhere else within the state of Montana. Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

Attorney General's Opinions

Liability of Licensed Manufacturing and Distribution Branch of Chain for Assessment: The licensed manufacturing and distribution branch of a supermarket chain is liable for payment of the distributor's assessment in this section (former section 27-409, R.C.M. 1947) with respect to

raw milk or finished products imported from another state for ultimate sale within this state. 36 A.G. Op. 58 (1976).

Nonliability of Retail Branch of Supermarket Chain for Payment of Assessment: The retail branch of a supermarket chain is not liable for payment of the producer's and/or distributor's assessment specified in this section (former section 27-409, R.C.M. 1947) with respect to dairy products imported from another state for ultimate sale within this state. 36 A.G. Op. 58 (1976).

81-23-203. Application for licenses.

Compiler's Comments

1995 Amendment: Chapter 333 at end of first sentence substituted "prepared by the department and containing the information required by the department" for "prepared under authority of the department, and an applicant shall state facts concerning his circumstances and the nature of the business to be conducted which in the opinion of the department are necessary for the administration of this chapter" and in second sentence, after "department", deleted "of livestock"; and made minor changes in style. Amendment effective July 1, 1995.

Administrative Rules

ARM 32.9.103 Licensing of persons engaged in production of milk for manufacturing purposes.
ARM 32.9.104 Plant licensing.

81-23-204. Declining, suspending, and revoking licenses — penalties in lieu of suspension or revocation.

Compiler's Comments

1983 Amendments: Chapter 23, near end of (1), after "department may" deleted "at its discretion".

Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Case Notes

Action for Unpaid Fees: Under 81-23-406 the Milk Control Board (now the Board of Milk Control) could maintain an action against a dairy operator for unpaid license and assessment fees imposed upon him by the Board between 1958 and 1960 without suspending or revoking right of dairy operator to do business by using the provisions of this section. Mont. Milk Control Bd. v. Maier, 140 M 38, 367 P2d 305 (1961).

Collateral References

35 Am. Jur. 2d Food §45.

Part 3
Regulation of Milk Prices

Part Case Notes

Constitutionality: The price-fixing provisions of 81-23-301 (now repealed) did not offend due process. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Minimum Prices: The means selected to attain the object of Title 81, ch. 23 (formerly the Milk Control Act), set forth in 81-23-102 were the procedure outlined in 81-23-301 (now repealed). Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Part Collateral References

35 Am. Jur. 2d Food §§27, 46, 47.

81-23-302. Establishment of minimum prices.

Compiler's Comments

1999 Amendment: Chapter 416 in third sentence in (15)(a) after "mail" deleted "and by secret ballot" and deleted former fourth sentence that read: "The board shall keep confidential the vote of each producer, producer-distributor, and distributor voting in the referendum"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendments — Composite Section: Chapter 242 in (1), after "producer", deleted "wholesale, jobber, and retail" and after "class I" deleted "milk and minimum producer prices only for"; in (3), after "producers", deleted "distributors, jobbers, retailers"; in (4), in two places after "costs of production", deleted "and distribution"; deleted (5)(b), (5)(f), and (5)(g) concerning ability of consumers to purchase milk, cost of distributing milk, and cost of jobbing milk (see 1995

Session Law for text); deleted (7)(b) that read: "(b) wholesale prices for milk in class I shall be computed"; deleted (7)(c) that read: "(c) jobber prices for milk in class I shall be computed"; deleted (7)(d) that read: "(d) retail prices for milk in class I shall be computed"; in (8) deleted second sentence that read: "If the evidence presented to the board at any public hearing for the establishment of revision of milk pricing formulas is found by the board to require the establishment of separate and varying wholesale prices fo. any particular uses, the board shall designate the reasons therefor and establish such separate formulas"; inserted (10) requiring certain distributors to purchase milk from Montana producers; in (11) inserted last two sentences authorizing Board to adopt rules; adjusted subsection references; and made minor changes in style. Amendment effective January 1, 1996.

Chapter 333 at end of (17) substituted "by the department" for "by the milk control bureau of the department of commerce"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

1995 Statement of Intent: The statement of intent attached to Ch. 333, L. 1995, provided: "It is the intent of the legislature that the rules promulgated by the department of commerce regarding the control of milk prices will be continued and enforced by the department of livestock."

1987 Amendment: In (14)(a), near beginning of first sentence after "petition by", substituted "10% or 20 of the licensed producers in Montana, whichever is less, or upon petition by any licensed" for "any producer", in second sentence, near end, inserted "by mail and by secret ballot", and inserted third through fifth sentences relating to referendum (see 1987 Session Law for text); inserted (14)(b) outlining provisions the Board may include in the order establishing the statewide pooling arrangement; inserted (14)(c) allowing withdrawal of cash reserves to fund initial pool startup and requiring reimbursement; and inserted (14)(d) to provide that a pooling arrangement order may be rescinded or amended pending notice and hearing.

1983 Amendment: In (1), after "class III milk" deleted "in all areas of the state"; deleted former (5)(i), which read: "a reasonable return on necessary investment to all ordinarily efficient and economical milk dealers"; deleted former (10), which read: "The milk produced in one natural marketing area and sold in another natural marketing area shall be paid for by a distributor or dealer in accordance with the pricing order of the area where produced at the price therein specified of the class or use in which it is ultimately used or sold."; in (11), deleted references to a natural marketing area; at end of (12), after "formulas" deleted "in all market areas of the state"; in (14), deleted several references to marketing areas; and in (15), after "quota plans" deleted "or areawide".

1981 Amendment: Substituted "department of commerce" for "department of business regulation" in (17).

Administrative Rules

Title 32, chapter 24, ARM Board of Milk Control.

Case Notes

Constitutionality:

Since the Legislature of Montana in enacting this statute acted in the exercise of its police power to supervise the milk industry, Art. XV, sec. 20, 1889 Mont. Const. (not reenacted), had no application. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

The price-fixing provisions of this section did not offend due process and did not unconstitutionally delegate legislative power. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Nuisance: A sale of milk at a price less than the minimum prescribed by the Milk Control Board (now the Board of Milk Control) under this section, being a violation of 81-23-405, was a nuisance which could be enjoined by the Board under 81-23-406. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Authority for Institution of Proceedings: Petition disclosed that "unanimous consent of all members of the board" had been had prior to the institution of the proceeding as formerly required by 81-23-406, where the petition stated that the executive secretary of the board "as such administrative officer, has the authority of said Board to institute this action on their behalf under the provisions of R.C.M. 1947, section 27-424 [now 81-23-406]". State ex rel. Mont. Milk Control Bd. v. District Court, 138 M 179, 355 P2d 664 (1960).

Facts to Be Noticed by Board: If the Milk Control Board (now the Board of Milk Control) proposed to base any part of an official order fixing minimum prices upon facts within its own

knowledge, it had to give notice of the specific facts which it would consider. State ex rel. Mont. Milk Control Bd. v. District Court, 138 M 179, 355 P2d 664 (1960).

Retail Price: When the retail price charged for some of the milk was more than twice the price paid by the distributor to the producer, there was a violation of the statute. (See 1995 amendment.) Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

81-23-303. Rules of fair trade practices.

Compiler's Comments

2001 Amendment: Chapter 7 near middle of second sentence of introductory clause after "pursuant to" substituted "81-23-302(11)" for "81-23-302(10)". Amendment effective October 1, 2001.

1995 Amendment: Chapter 242 in second sentence of introductory clause, at beginning, inserted exception; deleted former (4) that read: "(4) the purchasing, processing, bottling, packaging, transporting, delivering, or otherwise handling of milk which is to be or is sold or otherwise disposed of at less than the minimum wholesale and minimum retail prices established by the board"; and made minor changes in style. Amendment effective January 1, 1996.

1983 Amendment: In (4), after "handling" deleted "in any marketing area".

Administrative Rules

ARM 32.23.201 Regulation of unfair trade practices.

Case Notes

Promotional Schemes: Contest awarding college scholarships to winning applicants was not prohibited by this section where applicants were not required to purchase dairy products in order to participate and contest did not directly or indirectly affect the price of milk charged by the dairy or paid by its customers. A promotional scheme intended to draw noncustomers into purchasing a dairy's milk products was not prohibited by this section unless the contest affected the price of milk charged by the dairy or paid by its customers. Jersey Creamery, Inc. v. Bd. of Milk Control, 160 M 249, 502 P2d 30 (1972).

Preparation of Rules:

This section was not intended to stand independently but rather as a mandatory guide for the Milk Control Board (now the Board of Milk Control) in preparing its rules. Mont. Milk Control Bd. v. Community Creamery Co., 139 M 523, 366 P2d 151 (1961).

Rules promulgated by the Milk Control Board (now the Board of Milk Control) governing unfair trade practices were invalid because they failed to encompass all five of the unfair methods of doing business that the Legislature expressly stated should be contained in their rules. Mont. Milk Control Bd. v. Community Creamery Co., 139 M 523, 366 P2d 151 (1961).

Validity of Rules: Rules governing unfair trade practices adopted by the Milk Control Board (now the Board of Milk Control) were invalid because they were not in accordance with the delegated authority of the Board. Mont. Milk Control Bd. v. Community Creamery Co., 139 M 523, 366 P2d 151 (1961).

Violation of Fair Trade Practices: A violation of fair trade occurred when a party violated properly promulgated rules of the Milk Control Board (now the Board of Milk Control), enacted pursuant to this section. Mont. Milk Control Bd. v. Community Creamery Co., 139 M 523, 366 P2d 151 (1961).

81-23-304. Limitation on extension of credit to retailers.

Compiler's Comments

1983 Amendment: At end of section after "department", substituted the hearing language for "in its discretion".

81-23-305. Financing prohibitions — producer and retailer.

Compiler's Comments

Severability Clause: Section 11, Ch. 107, L. 1971, was a severability clause.

Case Notes

Wholesale Food Purchasing Organization Defined as Retailer: The Supreme Court determined that Associated Food Stores, owned by various independent retail stores and taxed as a cooperative, which purchased products from manufacturers for resale to retailers, was not a jobber as defined in ARM 8.79.101, but rather was a retailer under 81-23-101 and ARM 8.79.101, and therefore must pay the wholesale rather than jobber price for milk under Montana's milk price control law. St. Dept. of Commerce v. Gallatin Dairies, Inc., 221 M 492, 719 P2d 790, 43 St. Rep. 1001 (1986).

Part 4
Enforcement

Part Collateral References
35 Am. Jur. 2d Food §§13, 44, 51 through 64.

81-23-401. Entry, inspection, and investigation.

Collateral References
Food *key* 16, 24.
36A C.J.S. Food §30.

81-23-402. Reports of dealers — accounting system — records.

Administrative Rules
ARM 32.23.101 Definitions.
ARM 32.23.102 Transactions involving purchase and resale of milk within state.

81-23-403. Disposition of fines.

Compiler's Comments
1987 Amendment: Near beginning of (1), after "court", inserted "other than a justice's court".
1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

81-23-405. Violations made misdemeanors — penalties.

Case Notes
Nuisance: A sale of milk at a price less than the minimum prescribed by the Milk Control Board (now the Board of Milk Control) under 81-23-302, being a violation of this section, was a nuisance which could be enjoined by the Board under 81-23-406. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).
Action for Unpaid Fees: Under 81-23-406 the Milk Control Board (now the Board of Milk Control) could maintain an action against a dairy operator for unpaid license and assessment fees imposed upon him by the Board between 1958 and 1960 without subjecting the dairy operator to penal provisions of this section. Mont. Milk Control Bd. v. Maier, 140 M 38, 367 P2d 305 (1961).

81-23-406. Additional remedies.

Compiler's Comments
1995 Amendment: Chapter 333 in fourth sentence substituted "department of livestock" for "department of commerce"; and made minor changes in style. Amendment effective July 1, 1995.
1981 Amendment: Substituted "department of commerce" for "department of business regulation".

Case Notes
Nuisance: A sale of milk at a price less than the minimum prescribed by the Milk Control Board (now the Board of Milk Control) under 81-23-302, being a violation of 81-23-405, was a nuisance which could be enjoined by the Board under this section. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

CHAPTER 30
PROTECTION OF FARM ANIMALS AND RESEARCH FACILITIES

Chapter Compiler's Comments
Effective Date: Section 6, Ch. 205, L. 1991, provided: "[This act] [Title 81, ch. 30] is effective on passage and approval." Approved March 27, 1991.

Chapter Law Review Articles
The Development of Anti-Cruelty Laws During the 1800's, Favre & Tsang, 1993 Det. C.L. Rev. 1 (1993).
Animal Rights: A Socio-Legal Perspective, Pocar, 19 J.L. & Soc'y 214 (1992).
Of Farm Animals and Justice, Wise, 3 Pace Envtl. L. Rev. 191 (1986).
Statutory Protection for Farm Animals, McCarthy & Bennett, 3 Pace Envtl. L. Rev. 229 (1986).

TITLE 82
MINERALS, OIL, AND GAS

CHAPTER 1
GENERAL PROVISIONS

Chapter Administrative Rules

Title 36, chapter 22, ARM Board of Oil and Gas Conservation.

Chapter Case Notes

Scoria Not Mineral With Respect to Mineral Reservation in Lease — Payments for Surface Damage From Removing Scoria Pass With Land: Farley argued that under a lease to Booth reserving mineral rights, Farley was entitled to receive the payments from Western Energy Company to compensate for surface damages incurred in removing scoria from the land. The Supreme Court held that scoria was used in road building, but it was not of a rare and exceptional quality that would make it a mineral with respect to the mineral reservation clause in a lease. Farley also argued that the payments for surface damage in removing the scoria were royalty payments and as such personal property that did not pass to Booth when Booth purchased the surface rights to the property. The Supreme Court held that regardless of whether a royalty interest is personal or real property was of no significance because the royalty was appurtenant to the land and passed to Booth upon purchase of the surface. Farley v. Booth Bros. Land & Livestock Co., 270 M 1, 890 P2d 377, 52 St. Rep. 46 (1995).

Mineral Lands Leasing Act: District Courts have discretion to deny or grant injunctive relief upon finding that the government is in violation of the Federal Coal Leasing Amendments Act of 1976. N. Cheyenne Tribe v. Hodel, 842 F2d 224 (9th Cir. 1988).

Indian Mineral Development Act: The tribe could unilaterally rescind a proposed mineral development agreement before action by the Secretary of the Interior. Quantum Exploration v. Clark, 780 F2d 1457 (9th Cir. 1988).

Oil and Gas Conveyances: Montana is an ownership-in-place state with regard to oil, gas, and other minerals. Title to the mineral interest in land may be separated from the rest of the fee simple title. Under a mineral deed conveyance, the grantee receives, among other incidents, the right to go on land and explore for and produce oil and gas. A mineral reservation right of entry is an easement and conveys no interest in the underlying oil, gas, or minerals or in oil, gas, or minerals produced from the land. The right of entry is an incorporeal hereditament. McDonald v. Unirex, Inc., 221 M 156, 718 P2d 316, 43 St. Rep. 709 (1986).

Chapter Law Review Articles

Cohabitation of Wilderness and Mining: Can the Marriage Be Saved?, Ruffatto & Ostby, 38 Rocky Mtn. Min. L. Inst. Proc. 11-1 (1992).

Coping With Mining Law Reform, Alfers, Hubbard, & Hayes, 37 Rocky Mtn. Min. L. Inst. Proc. 12-1 (1991).

Part 1
Geophysical Exploration

Part Administrative Rules

Title 36, chapter 22, ARM Board of Oil and Gas Conservation.

Part Case Notes

Right to Explore for Minerals as Including Right to Conduct Resource Inventory Operations: A mineral reservation executed in the 1940s, allowing the grantor to use the surface to explore for minerals, includes the right to conduct resource inventory operations and other activities necessary to compile the environmental information that must be obtained before the state will allow mining operations to commence. W. Energy Co. v. Genie Land Co., 195 M 202, 635 P2d 1297, 38 St. Rep. 1791 (1981).

Part Law Review Articles

Wrongful Geophysical Exploration, Rice, 44 Mont. L. Rev. 53 (1983).

Protectable Property Rights, Trade Secrets, and Geophysical Data, Griffin, 71 Den. U.L. Rev. 527 (1994).

Legal Aspects of Geophysical Exploration, Keller, 13 E. Min. L. Found. 17 (1992).

Reflections on Ownership, Protection and Transfer of Seismic Data: Are Their [sic] Bright Spots on the Horizon?, Savit, 37 Mtn. Min. L. Inst. Proc. 14 (1991).

Oil and Gas Under Navigable Rivers and Lakes, Anderson, 3 Nat. Resources & Env't 43(3) (1989).

Directional Drilling, Subsurface Trespass, and Conversion, McKinnis, 4 J. Min. L. & Pol'y 235 (1988).

Part Collateral References

Gas *key* 14.50.

58 C.J.S. Mines and Minerals §§41 through 46.

38 Am. Jur. 2d Gas and Oil §§100, 112 through 114, 129, 319, 320, 338.

Oil and gas farmout agreements. 65 ALR 5th 211.

Construction and application of "Mother Hubbard" or "cover-all" clause in gas and oil lease or deed. 80 ALR 4th 205.

Gas and oil lease force majeure provisions: construction and effect. 46 ALR 4th 976.

Liability of oil and gas lessee or operator for injuries to or death of livestock. 51 ALR 3d 304.

Construction of oil and gas lease as to the lessee's right and duty of geophysical or seismograph exploration or survey. 28 ALR 3d 1426.

Right and measure of recovery for breach of obligation to drill exploratory oil or gas wells. 4 ALR 3d 284.

Right of lessor to cancel oil or gas lease for breach of implied obligation to explore and develop further after initial discovery of oil or gas, in absence of showing reasonable expectation of profit to lessee from further drilling. 79 ALR 2d 792.

Implied obligation of lessee to conduct search for, or to develop or work premises for, minerals other than oil and gas. 76 ALR 2d 721.

Recovery in case geophysical or seismograph exploration or survey unauthorized. 67 ALR 2d 444.

Construction and application of Geothermal Steam Act of 1970 (30 U.S.C. §1001, et seq.) pertaining to leases of government lands for development of geothermal steam resources. 40 ALR Fed. 814.

82-1-101. Persons required to comply.

Compiler's Comments

1989 Amendment: Inserted (2)(c) regarding seismic shot holes. Amendment effective March 20, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 190, L. 1989, provided: "A statement of intent is required for this bill to provide further guidance to the board of oil and gas conservation on the content of rules addressing plugging and abandonment of seismic shot holes. The rules should describe:

(1) plugging requirements, which may vary with geologic conditions; and

(2) surface restoration requirements around the seismic shot hole."

1985 Amendment: In (1) after "purpose of", substituted "seismic exploration in which exploration entry is made upon the surface estate for the acquisition of geophysical data" for "geophysical exploration in which exploration the seismograph is utilized along with explosives for the determination of geophysical data"; and in (2) in two places substituted "seismic" for "geophysical".

1983 Amendment: Inserted (2) requiring Board to adopt rules regarding exploration crews and activities.

1983 Statement of Intent: The statement of intent attached to SB 350 (Ch. 116, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Board of Oil and Gas Conservation in section 1 [82-1-101(2)].

The intent is to provide the Board with the authority to adopt rules to identify geophysical exploration crews operating in this state and to designate areas where geophysical exploration may not be allowed. These powers are desirable so that landowners can readily identify the seismic crews operating on their land and to allow the Board to prohibit seismic shots in sensitive areas such as near wells and structures."

Administrative Rules

ARM 36.22.504 Identification.

82-1-103. Notice of intention to explore.

Administrative Rules

ARM 36.22.503 Notification.

ARM 36.22.601 Notice of intention and permit to drill.

82-1-104. Surety bond — restoration of surface.

Compiler's Comments

1985 Amendment: In (1) in first sentence, at beginning, inserted "Prior to performing such seismic activity", after "corporation" deleted "desiring to engage in such geophysical exploration", in three places substituted "seismic" for "geophysical", and inserted second sentence referring to court-determined forfeiture; in middle of (2) inserted "or other material approved by the board of oil and gas conservation"; and in (3) substituted "Upon completion of any seismic exploration, the person, firm, or corporation shall remove all stakes, markers, cables, ropes, wires, and debris or other material used in such exploration and shall also restore the surface around any shot holes as near as practicable to its original condition" for "The person, firm, or corporation shall also restore the surface around the same as near as practicable to its original condition".

1983 Amendment: Near middle of (2), deleted "replacing all drill cuttings and" before "filling the hole"; at end of first sentence in (2), substituted language following "capping the same" for "with an impervious material at least 1 foot in depth, the top of which shall be 4 feet below the surface of the land".

Administrative Rules

ARM 36.22.501 Shot location limitations.

ARM 36.22.502 Plugging and abandonment.

ARM 36.22.1307 Restoration of surface.

Case Notes

Existence of Contract — Payment of Tort Judgment for Drilling Damages as Precluding Determination: Plaintiffs sued defendant for damages claimed to have occurred to their farmlands when a seismographic hole drilled and shot by defendant brought a continuous water flow to the surface, damaging farmland. Defendants left the area and later tried unsuccessfully to plug the hole. The jury found for plaintiffs and awarded actual and punitive damages. Defendant paid the award for actual damages and appealed the award of punitive damages. Defendant claimed the case involved a contract and that punitive damages were not properly allowable. By satisfying the judgment for actual damages, defendant acceded to the correctness of the judgment and accepted its benefits. When a judgment is paid, it passes beyond the review of a superior court. The question of whether a contract existed was submitted to the jury. Their judgment was based on a tort theory, comparative negligence. Because this judgment was satisfied, the Supreme Court could not rule on whether a contract was involved. Dahl v. Petroleum Geophysical Co., 194 M 294, 632 P2d 1136, 38 St. Rep. 1474 (1981).

Sealing of Shot Holes: Sealing "shot" holes by pouring excess cuttings down them and plugging the orifice with an aluminum plug by forcing it down into the hole so that the top of the plug was below plow depth was in compliance with this section when the holes were only 4 ½ inches in diameter, in view of expert testimony that seismographic holes tend to slough and cave, releasing lateral support from materials around the hole and that the pressure from the weight of the earth above has a tendency to force the material toward the center, sealing the hole. Haynie v. N. Pacific Ry. Co., 158 M 247, 490 P2d 715 (1971).

Collateral References

58 C.J.S. Mines and Minerals §§335, 362 through 370, 381, 383.

Duty to plug abandoned oil or gas well taken out of production. 50 ALR 3d 240.

Duty of oil or gas lessee to restore surface of leased premises. 65 ALR 2d 1356, superseded by 62 ALR 4th 1153.

82-1-105. Exploration permit.

Administrative Rules

ARM 36.22.503 Notification.

ARM 36.22.601 Notice of intention and permit to drill.

82-1-106. County clerk to notify board of issuance of permit — compliance.

Administrative Rules

ARM 36.22.503 Notification.

ARM 36.22.601 Notice of intention and permit to drill.

82-1-107. Permitholder to furnish information to surface user.

Compiler's Comments

1985 Amendment: Throughout section substituted "seismic" for "geophysical"; at end of (1)(c) inserted "or, if self-insured, evidence of such self-insurance"; in (1)(e) substituted "a description of the planned seismic activity and where it will take place" for "a description of the surface areas where the planned geophysical activity will take place"; and inserted (2) requiring surface user to provide certain information to permitholder.

Administrative Rules

ARM 36.22.503 Notification.

ARM 36.22.601 Notice of intention and permit to drill.

82-1-108. Filing record of work performed.

Compiler's Comments

1985 Amendment: Near beginning of (1) and near middle of (2) substituted "seismic" for "geophysical"; and near end of (2) extended time in which record must be supplied from 10 to 30 days.

82-1-111. Definitions.

Compiler's Comments

Saving Clause: Section 6, Ch. 379, L. 1993, was a saving clause.

Case Notes

Coal Seam Methane Gas Not Part of Coal Estate — Ownership of and Right to Develop: In 1984, Carbon County gave a deed to Reserve's predecessor in interest conveying all "coal and coal rights with the right of ingress and egress to mine and remove the same" on certain lands within the county. In 1990, the county gave an oil and gas lease to Florentine, giving Florentine the right to operate for and produce from the disputed property "oil and all gas including coal seam methane of whatsoever nature or kind". Carbon County filed a quiet title action against Reserve, asserting the county's claims to all of the mineral and mineral rights, excluding the coal and coal rights, on the disputed property. The District Court held that the coal seam methane gas was part of the coal estate and was included in the conveyance of coal and coal rights by the county to Reserve's predecessor in interest. The Supreme Court held that coal seam methane gas is not a constituent part of coal. Thus, it may be severed from the coal estate. As the lessee of Carbon County, the owner of the gas estate, Florentine has the right to drill for and to produce coal seam methane gas either in advance of or during coal mining operations. Reserve has a mutual, simultaneous right to extract and to capture the gas for safety purposes, incident to its coal operations. Carbon County v. Union Reserve Coal Co., Inc., 271 M 459, 898 P2d 680, 52 St. Rep. 529 (1995).

New Legislative Definitions — Not Unlawful Taking of Coal Seam Methane Gas From Owners of Coal or Coal Lands: In a dispute between the county, the gas lessee of the county, and the owner of coal rights, the latter claimed that 1993 legislative changes in the definitions of gas, oil, and coal either were regulatory in nature only and did not affect rights or, in the alternative, that if the amendments did remove coal seam methane gas ownership from coal owners, then the removal was without compensation and so constituted an unconstitutional taking. The Supreme Court held that the question of taking without compensation was moot because the legislation was prospective in nature and there was a severance of the gas estate from the coal estate under the plain language of the grant. Carbon County v. Union Reserve Coal Co., Inc., 271 M 459, 898 P2d 680, 52 St. Rep. 529 (1995).

Part 2
Cancellation and Forfeiture of Oil, Gas, or Mineral Leases

Part Case Notes

No Requirement for Further Development When Delay Rental Payments Made: When the clear language of an oil lease allowed lessee to make annual delay rental payments instead of engaging in drilling or production operations and when the payments were made and accepted by lessor, the covenant to develop was not breached and lessee was relieved of drilling obligations, except that of offset drilling. Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

Reasonable Notice Required Before Duty to Drill Offset Well Arises: Clarifying its opinion in U.V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979), the Supreme Court held that before

a lessee's duty to drill an offset well arises, the lessee must have reasonable notice of the necessity to protect the leasehold. Notice "can either be express, from the lessor, or constructive, gained from the surrounding circumstances". This rule is only applicable in cases when a lessor is seeking relief in the form of damages. If he is seeking other forms of relief, such as forfeiture of the lease, he must give written notice in order to give the lessor a chance to cure the breach. Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

Act of God or Similar Clause in Lease — Failure to Remedy Reasonably Correctable Situation: Oil and gas lease contained a provision that if production and operations were stopped the lessee had 90 days to resume them, and if lessee did not do so the lease was terminated. It also contained a clause stating that if production or operations were stopped because of circumstances beyond the lessee's reasonable control, the lease was not terminated. The state ordered production stopped because of saltwater seepage from a saltwater pit at the well site. The lessee could have corrected the leakage with a truckload of mud, which was available, and it was reasonable for lessee to do so. Therefore, the clause saving the lease from termination did not apply and the lease terminated after 90 days. Edington v. Creek Oil Co., 213 M 112, 690 P2d 970, 41 St. Rep. 1990 (1984).

Conditioning Termination of Lease on Judicial Ruling of Breach: Oil and gas lease contained a provision that if production and operations were stopped and the lessee did not resume them within 90 days, the lease was terminated. It also contained a provision that the lease was not forfeited for breach of an implied covenant until it was finally judicially determined that the breach existed and the breach was not remedied within a reasonable time after the determination. The first clause was an express condition, not an implied covenant, and where lessee did not follow it, the lease terminated by its own express language and could not be saved by the second clause. Edington v. Creek Oil Co., 213 M 112, 690 P2d 970, 41 St. Rep. 1990 (1984).

Reentry by Lessee Following Termination of Lease — Willful Trespass: Oil and gas lease contained a provision that if production and operations were stopped and lessee did not resume them within 90 days, the lease was terminated. Production and operations were stopped and not resumed until years later, at a time when the lease had terminated and lessor had granted a lease to someone else. Lessee was a willful trespasser in entering and recommencing drilling as lessee knew the lease had expired by its own terms. Lessee thus was not entitled to proceeds from the oil produced after the reentry or to cost of producing the oil. Edington v. Creek Oil Co., 213 M 112, 690 P2d 970, 41 St. Rep. 1990 (1984).

No Default for Failure to Furnish Accounting and Keep Open Records: Where the plaintiffs served the defendants notice of default of an operating agreement, the District Court did not err in granting summary judgment for the defendants on the issue of the defendants' failure to furnish an accounting to the plaintiffs of all minerals mined, processed, and sold and the defendants' failure to keep open for inspection complete records of the milling operation. The operating agreement required only that the defendants maintain accounts and keep them open for inspection during regular business hours. The defendants made clear to the plaintiffs that accounts were open for inspection, but the plaintiffs did not ask to inspect the documents nor did they ask to see those kept in out-of-state offices. Since defendants were willing to cooperate, there was no default in this respect. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

No Default for Failure to Pay Interest on Royalty Payment — Mineral Lease Not Requiring Payment of Interest: Where the plaintiff lessors of mineral rights gave the defendant lessees notice of default for failure to make a rental payment and the lessees tendered a check for that payment, the District Court did not err in granting summary judgment for the defendants in a later action for default brought by the plaintiffs. Even assuming that payment of interest in the royalty was due under 31-1-106, the agreement of the parties did not require payment of interest. Failure to remit interest was not in default of that agreement. Moreover, the default notice failed to notify the defendants that interest was due, contrary to the default clause of the parties' agreement. Failure to pay the interest was therefore immaterial. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

No Default for Failure to Provide Records and Data When Needed Information Not Specified: Where the plaintiffs served notice of default of an operating agreement upon the defendants for failure to provide maps, assay reports, drilling results, and other data but failed to specify the documents or information not provided, the District Court did not err in granting summary judgment for the defendants in a default action brought by the plaintiffs. Defendants informed plaintiffs they were unsure what documents or information was lacking and asked for a clarification, which plaintiffs failed to provide. Plaintiffs cannot claim default if they failed to specify the deficiency as required by the operating agreement. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

No Default in Payment by Personal Check: Where the defendants were given notice of default of an operating agreement for failure to make royalty payments but tendered a personal check for the royalties within the time allowed by the agreement for curing the default, the District Court did not err in granting summary judgment for the defendants in a default action subsequently brought by the plaintiffs. The operating agreement did not specify the form in which payment was to be made, and even though the plaintiffs had earlier requested payment in gold bullion, the defendants had never agreed to such payment. The evidence before the District Court was undisputed that prior payments had all been made by check and accepted, and the defendants had no reason to suspect dishonor. There was therefore no default in payment by check. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

No Default Where Lien Removed Within Period for Remedy of Default: Where the plaintiffs served notice of default of an operating agreement upon the defendants for allowing a lien to be placed against the plaintiffs' mine, the District Court did not err in granting summary judgment for the defendant in a default action brought by the plaintiffs. The notice of judicial sale applied only to an interest in the property held by a previous partner of a defendant and did not affect the plaintiffs' interest in the mine. Even if the sale was a "lien" within the meaning of the operating agreement, it was removed within the 60-day period for remedying a default. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

Operating Agreement Not Violation of Rule Against Perpetuities: Where the plaintiffs and defendants entered into an agreement for the operation of a mine that provided for two extensions of the 5-year primary term of the agreement only if the defendants were "engaged in commercial production of minerals" and only if "active mining operations" were in progress, the District Court did not err in granting summary judgment for the defendants and holding that the agreement did not violate the rule against perpetuities. Under the rationale of Consol. Mines Corp. v. O'Connell, 107 M 273, 85 P2d 345 (1938), the lease could be perpetually renewed but was limited by the required facts being found to exist at time of renewal. This is not a perpetuity. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

Forfeiture of Gas and Oil Lease — Common-Law Offset Drilling Rule: Where an oil and gas lease provided that no change in ownership of the land was to be binding upon the lessees until after lessee had been given a copy of any such transfer, lessor's grantees' right to damages for failure to drill an offset well under the common-law offset drilling rule could not be defeated by a failure to give the required notice, as the purpose of the notice is to prevent the lessee's forfeiture of the lease for failure to pay delay rentals to the proper party. Such required notice has nothing to do with implied covenants. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Construction of Lease in Favor of Lessor: An oil and gas lease should be construed strictly against the lessee and in favor of the lessor. Daley v. Torrey, 69 M 599, 223 P 498 (1924).

Part Law Review Articles

Remedies for Breach of Implied Covenants in Oil and Gas Leases in Montana, Gordon, 28 Mont. L. Rev. 187 (1967).

Effect of County and State Recordation of Options on Federal Oil and Gas Leases, 20 Mont. L. Rev. 101 (1958).

Oil and Gas Interests in a Decedent's Estate, Morris, 17 Mont. L. Rev. 85 (1955).

Assignments by the Landowner and the Lessee, Sullivan, 17 Mont. L. Rev. 64 (1955).

Elemental Principles of the Modern Oil and Gas Lease, Brown, 17 Mont. L. Rev. 39 (1955).

Nature of the Landowner's Interest in Oil and Gas, Walker, 17 Mont. L. Rev. 22 (1955).

A Survey of Oil and Gas Law in Montana as It Relates to the Oil and Gas Lease, Sullivan, 16 Mont. L. Rev. 1 (1955).

Oil and Gas Leases on Federal Land, Malone, 14 Mont. L. Rev. 20 (1953).

Oil and Gas Leasehold and Other Estates, Shepherd, 14 Mont. L. Rev. 1 (1953).

When an Oil and Gas Lease Terminates, Fambrough, 42 Oil & Gas Tax Q. 615 (1994).

Part Collateral References

Landlord and Tenant *key* 111, 112; Mines and Minerals *key* 59, 66 through 68, 72.

58 C.J.S. Mines and Minerals §§171, 210, 247, 271, 272, 274 through 281, 287, 288, 304, 322 through 330, 332.

38 Am. Jur. 2d Gas and Oil §§111, 231 through 233, 241, 242; 53A Am. Jur. 2d Mines and Minerals §§221, 227 through 229, 231, 232.

Extension of lease: production on one tract as extending term on other tract where one mineral lease conveys oil or gas rights in separate tracts for as long as oil or gas is produced. 35 ALR 4th 1167.

Validity and construction of statutes providing for reversion of mineral estates for abandonment or nonuse. 16 ALR 4th 1029.

Payment of stipulated minimum royalties or annual rental under solid mineral lease as precluding lessor's claim of forfeiture or abandonment. 87 ALR 2d 1076.

Estoppel of oil and gas lessee to deny lessor's title. 87 ALR 2d 602.

Termination: rights of lessee to minerals extracted during the lease but remaining on the premises after its termination. 51 ALR 2d 1121.

Relief against forfeiture of lease for nonpayment of rent. 31 ALR 2d 321.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental strictly on time. 5 ALR 2d 993.

82-1-201. Release of record upon forfeiture, cancellation, or expiration of lease — penalty.

Compiler's Comments

1997 Amendment: Chapter 228 inserted (2) regarding request for recordation of assignment or release of more than one lease; and made minor changes in style.

1985 Amendment: Near beginning of (1) before "forfeited", substituted "and recorded is" for "shall become" and after "forfeited", inserted "canceled, or expires"; near middle of (1) after "forfeiture", inserted "cancellation, or expiration"; and inserted (2) making violation of section a misdemeanor.

Case Notes

Automatic Termination Clause — Notice Not Required: In 1965, Larsons executed a 5-year oil and gas lease to Sun Oil. In 1968, Sun Oil assigned the lease to Miami Oil. In 1980, Larsons sent Miami a letter noting drilling activities had been discontinued for the 2 previous years and requesting a release of its lease or assignment. Miami did not respond. Three months later, Larsons commenced an action to quiet title and obtain a release of the lease. Miami Oil argued that since production had commenced during the primary term of the lease, the lease could not be terminated unless notice was given pursuant to the habendum clause of the lease. The court relied on an automatic termination clause based on a cessation of production without resumption for more than 90 days. No notice was required because termination of the lease was automatic. The court adopted the reasoning and rule of Lynch v. Southern Coast Drilling Co., 442 S.W.2d 804 (Tex. Civ. App. 1969), in quieting title for the Larsons. Miami Oil Producers, Inc. v. Larson, 203 M 225, 661 P2d 1260, 40 St. Rep. 407 (1983), followed in Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

Development: Lessor who intends to claim forfeiture, where development is an element, has the duty to demand that development proceed or commence. Braun v. Mon-O-Co Oil Corp., 133 M 101, 320 P2d 366 (1958).

Implied Covenant to Drill Offset Wells: Alleged failure to drill offset wells for protection of leased acreage in accordance with implied covenant to do so was not a breach of contract where there was no market for the gas that would be produced, and the drilling would thus have been a useless act. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

Implied Covenant to Find Market: Where the principal consideration for a lease on oil or gas lands is the payment of royalty, the lease, silent on the subject, carries an implied covenant to use reasonable diligence to market the product. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

Definition of "Forfeiture": "Forfeiture" means the deprivation of the right of the lessee to retain possession under the lease because of nonperformance of an obligation or condition imposed upon him by the lease. Steven v. Potlatch Oil & Ref. Co., 80 M 239, 260 P 119 (1927).

Time for Demanding Release: Lessor is not required to wait 60 days after forfeiture before making demand but may do so at any time, provided suit is not commenced before the expiration of the 60-day period during which it is the duty of the lessee to make release. Steven v. Potlatch Oil & Ref. Co., 80 M 239, 260 P 119 (1927).

Written Notice Not Required: The lessor of oil and gas rights is not required to give written notice of his intention to declare a forfeiture of the lease for failure of the lessee to commence drilling operations within the time stipulated in order for the lessor to prevail in an action brought under 82-1-201 through 82-1-204. Solberg v. Sunburst Oil & Gas Co., 76 M 254, 246 P 168 (1926).

Operations After Forfeiture: After forfeiture of an oil and gas lease has been declared and demand made for its return for nonperformance of the condition to commence drilling operations within a given time, it is immaterial that the lessee thereafter commenced drilling, and the lessee's

failure to release the lease of record within 60 days entitles the lessor to prosecute his action under 82-1-201 through 82-1-204. Solberg v. Sunburst Oil & Gas Co., 76 M 254, 246 P 168 (1926).

Construction of Lease in Favor of Lessor: An oil and gas lease should be construed strictly against the lessee and in favor of the lessor. Daley v. Torrey, 69 M 599, 223 P 498 (1924).

Written Portion of Lease Controlling: Written paragraph in lease providing that in the event a well was not commenced within the time limit mentioned in the lease the instrument should be null and void was controlling as against a printed one under which, if the operations were not commenced within that time, the lessor should pay $2 per acre for each additional year commencement of drilling was delayed. Daley v. Torrey, 69 M 599, 223 P 498 (1924).

Collateral References

Mines and Minerals *key* 70(4), 78(6).

58 C.J.S. Mines and Minerals §§225, 247, 272, 274 through 281, 287, 304.

53A Am. Jur. 2d Mines and Minerals §§226, 228.

Construction of oil and gas lease as to lessee's right and duty of geophysical or seismograph exploration or survey. 28 ALR 3d 1426.

"Dry hole" as "well" within undertaking to drill well. 15 ALR 3d 450.

Right and measure of recovery for breach of obligation to drill exploratory oil or gas wells. 4 ALR 3d 284.

Payment of stipulated minimum royalties or annual rental under solid mineral lease as precluding lessor's claim of forfeiture or abandonment. 87 ALR 2d 1076.

Right of lessor to cancel oil or gas lease for breach of implied obligation to explore and develop further after initial discovery of oil or gas, in absence of showing of reasonable expectation of profit to lessee from further drilling. 79 ALR 2d 792.

Duty of lessee or assignee of mineral lease other than lease for oil and gas, as regards marketing or delivery for marketing of mineral products. 77 ALR 2d 1058.

Implied obligation of lessee to conduct search for, or to develop or work premises for, minerals other than oil and gas. 76 ALR 2d 721.

Duty of lessee or assignee of oil or gas lease as regards marketing or delivery for marketing of oil and gas discovered. 71 ALR 2d 1219.

Relief against forfeiture of lease for nonpayment of rent. 31 ALR 2d 321.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental strictly on time. 5 ALR 2d 993.

82-1-202. Action to compel release — procedure without court action.

Case Notes

Automatic Termination Clause — Notice Not Required: In 1965, Larsons executed a 5-year oil and gas lease to Sun Oil. In 1968, Sun Oil assigned the lease to Miami Oil. In 1980, Larsons sent Miami a letter noting drilling activities had been discontinued for the 2 previous years and requesting a release of its lease or assignment. Miami did not respond. Three months later, Larsons commenced an action to quiet title and obtain a release of the lease. Miami Oil argued that since production had commenced during the primary term of the lease, the lease could not be terminated unless notice was given pursuant to the habendum clause of the lease. The court relied on an automatic termination clause based on a cessation of production without resumption for more than 90 days. No notice was required because termination of the lease was automatic. The court adopted the reasoning and rule of Lynch v. Southern Coast Drilling Co., 442 S.W.2d 804 (Tex. Civ. App. 1969), in quieting title for the Larsons. Miami Oil Producers, Inc. v. Larson, 203 M 225, 661 P2d 1260, 40 St. Rep. 407 (1983), followed in Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

Venue of Action: Although an action under this section combines three different causes of action, (1) an action for cancellation of the lease, (2) an action for the statutory penalty, and (3) an action for damages, the principal cause of action is for cancellation of the lease, which is a local nontransitory action in rem, and the defendant is not entitled to a change of venue as to any part of the action from the county where the real estate is located to the county of his residence. Beavers v. Rankin, 142 M 570, 385 P2d 640 (1963).

Attorney Fees:

Since this statute authorizes recovery of attorney fees, the Trial Court may act upon its own knowledge concerning value of attorneys' services and award fee without taking evidence. Stanolind Oil & Gas Co. v. Guertzgen, 100 F2d 299 (1938).

Where both lessor and lessee secured a portion of the relief they sought in action for cancellation of gas lease, neither party was required to pay the other's attorney fees. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

Nature of Action:

Action under these sections is one at law but embodies principle of equitable relief; Court should seek to do equity as between the parties. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

An action for the cancellation of an oil and gas lease and for recovery of damages and the statutory penalty for failure to release, brought under 82-1-201 through 82-1-204, is one at law, even through incidentally it calls for equitable relief. Stranahan v. Independent Natural Gas Co., 98 M 597, 41 P2d 39 (1935); Berthelote v. Loy Oil Co., 95 M 434, 28 P2d 187 (1933).

An action to compel the release of an oil and gas lease of record on the ground that the lessee had failed to commence drilling operations within the time fixed in the lease, by reason of which it became forfeited, and for the recovery of the statutory penalty, damages, and attorney's fees is one at law, entitling plaintiff to a jury trial. Solberg v. Sunburst Oil & Gas Co., 70 M 177, 225 P 612 (1924).

Burden to Prove Diligence to Find Market: In an action under 82-1-201 through 82-1-204 to cancel gas lease for failure to find market for gas produced, burden is upon lessee to establish fact that he used reasonable diligence in trying to find a market. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

Limitation of Action: A statute such as 82-1-202 that gives a right which existed before the statute and merely increases the damages by adding a penalty is not a penalty statute within the meaning of 27-2-211, the Statute of Limitations applicable to penalty statutes. Abell v. Bishop, 86 M 478, 284 P 525 (1930).

Grant by Lessor: When the lessor of oil and gas lands, after demanding a cancellation of the lease as required by 82-1-203, conveys title by warranty deed to another, both then have a remedial interest in the cause of action for cancellation of the lease when they join as plaintiffs in the action commenced after the passage of title. Failure of the grantee to make demand upon the lessee to clear the record of the instrument prior to commencement of the action does not destroy either plaintiff's right to maintain the suit since the lessor's demand was sufficient to meet the requirements of 82-1-203. Abell v. Bishop, 86 M 478, 284 P 525 (1930).

Abatement of Action: Although plaintiff's land was sold on foreclosure sale after his action for damages brought under 82-1-201 through 82-1-203 was commenced, the period of redemption having expired prior to retrial of the cause, it did not result in the abatement of the action under section 93-2824, R.C.M. 1947 (since repealed). Solberg v. Sunburst Oil & Gas Co., 76 M 254, 246 P 168 (1926).

Construction of Lease — Time When Drilling Required: In an action to have an oil and gas lease forfeited for failure of the lessee to "commence drilling operations for oil" within the time specified in the lease, the phrase "commence drilling operations for oil" in the lease means the commencement of actual drilling and not the commencement of preliminary work necessary to such drilling. Evidence that a well is not "spudded in" is sufficient to make out a prima facie case of forfeiture. Solberg v. Sunburst Oil & Gas Co., 73 M 94, 235 P 761 (1925).

Damages:

To warrant recovery of special damages, i.e., such damages as are the natural but not the necessary result of defendant's wrongful act, they must be pleaded. Solberg v. Sunburst Oil & Gas Co., 73 M 94, 235 P 761 (1925).

Proof that lessee's failure to make release prevented lessor from making a new lease was admissible to show nominal damages recoverable under this section but inadmissible to show special damages. Solberg v. Sunburst Oil & Gas Co., 73 M 94, 235 P 761 (1925).

Collateral References

Mines and Minerals *key* 70(6), 78.7.

58 C.J.S. Mines and Minerals §§227, 271, 284, 288.

82-1-203. Demand for release prior to action.

Compiler's Comments

1981 Amendment: Deleted "letterpress or carbon or written" before "copy" in the last sentence.

Case Notes

Lessee Unable to Rely on Lack of Notice to Successors in Interest: In 1965, Larsons executed a 5-year oil and gas lease to Sun Oil. In 1968, Sun Oil assigned the lease to Miami Oil. In 1980, Larsons sent Miami a letter noting drilling activities had been discontinued for the 2 previous years and requesting a release of its lease or assignment. Miami did not respond. Three months later, Larsons commenced an action to quiet title and obtain a release of the lease. Miami

contended Larsons were not entitled to relief as they had not prior to commencing the action for release served notice of demand for release on every holder of any type of interest in the leasehold. Larsons made demand only on Miami and not on any of the other parties. Miami not only refused to execute the release but refused to supply the names of its successors in interest. The court refused to reward Miami for recalcitrance. The court held the purpose of 82-1-203 is served when one or all of the owners in interest in a mineral fee demand(s) release of a lease after its date of forfeiture or termination. A lessor's claim for relief against a particular lessee will not be defeated by failure to make contemporaneous demands on every one of the lessee's successors in interest. Miami Oil Producers, Inc. v. Larson, 203 M 225, 661 P2d 1260, 40 St. Rep. 407 (1983).

Collateral References

Mines and Minerals *key* 70(4), 78(6).
58 C.J.S. Mines and Minerals §§225, 271, 288, 303.
38 Am. Jur. 2d Gas and Oil §§237, 243.

82-1-204. Joinder of plaintiffs in actions concerning oil and gas leases.

Collateral References

Cancellation of Instruments *key* 1, 25, 35(2), 37, 60; Quieting Title *key* 1, 15, 27, 30, 34, 52.
12A C.J.S. Cancellation of Instruments §§5, 16, et seq., 63, et seq., 71, 72, 74; 74 C.J.S. Quieting Title §§9, 10, 55, 58 through 67, 103.
38 Am. Jur. 2d Gas and Oil §§344 through 347; 53A Am. Jur. 2d Mines and Minerals §§402, 403.

Part 3
Trusts for Unlocatable Mineral Owners

Part Law Review Articles

How Do Taxpayers Establish Abandonment of Mineral Interests?, Desalvo & Dollinger, 76 J. Tax'n 92 (1992).

82-1-302. Creation of trust for unlocatable mineral, leasehold, or royalty interest owners.

Compiler's Comments

1997 Amendment: Chapter 126 in (3), after first "clerk of court", inserted "or, if the clerk of court declines to act as trustee, the department of revenue" and substituted "authorize the clerk of court or the department" for "authorize him"; inserted (4) relating to appointment of Department of Revenue as trustee; and made minor changes in style.

Case Notes

Definitions of "Related Documents" and "Tract of Land": Under 82-1-302, the term "related documents" refers to instruments which give a property interest holder the right to produce his property for such items as minerals. The interest holder's records of production and division proceeds also qualify as related documents. "Tract of land" includes all parcels described in a single lease, mineral deed, or other instrument giving a producer the right to produce property. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

Fees for Creation of a Trust: Petitions filed pursuant to 82-1-302 and 82-1-305 are "special proceedings" within the meaning of 27-1-102, and as such, a fee of $20 is proper to assess for each such proceeding filed. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045 (1980).

Section Relating to Unlocatable Mineral Interest Owners Not Unconstitutionally Vague: Under the rule of law established in Cramp v. Bd. of Public Instruction, 368 US 278 (1961), that the due process test for vagueness of a statute is whether the law is so vague and uncertain that men of common intelligence must guess at its meaning, 82-1-305 is not unconstitutionally vague. This section (before 1997 amendment) can be interpreted to mean the following:

"1. Any person holding funds payable to persons the holder cannot locate, produced from mineral interests or mineral production, including oil and gas, must turn the funds over to the clerk of the local District Court. A grace period of six months is allowed from the enactment of the statutes.

2. Subsequent to the enactment of the statutes, no holder of the type stated above may continue holding payments for the account of unlocatable persons for longer than six months. In turning over the monies to the clerk of the court as required by the statutes, the holder must petition for a trust as provided for in section 82-1-302, MCA.

3. Civil penalties are provided for failure to comply with the statutes." In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

82-1-303. No further liability for petitioner.

Compiler's Comments

1981 Amendment: Substituted "unlocatable owners" for "absent owners" after "income due to the".

82-1-304. Administration of trust.

Compiler's Comments

1997 Amendment: Chapter 126 in (4) substituted "must be kept in force" for "shall be in force"; in (5), in first sentence, substituted "invest funds in a prudent manner" for "invest funds under his management in the manner of a prudent man" and in second sentence, after "credited", inserted "to the department of revenue or, if the clerk of the court is the trustee"; and made minor changes in style.

1989 Amendment: At end of first sentence of (5) substituted "provided in 72-34-114" for "defined in 72-21-104".

82-1-305. Trust for unlocatable mineral, leasehold, and royalty interest owners — penalty.

Compiler's Comments

1997 Amendment: Chapter 126 deleted former (1) that read: "(1) Any bonuses, rental payments, royalties, and other income now held by any person or association for unlocatable owners or claimants of an interest in minerals underlying a tract of land must be deposited with the clerk of the district court in which the tract is located within 6 months after July 1, 1979. An accounting for the funds, any related documents, and any instrument creating a trust must be filed with the funds"; in (1), after "owners or claimants of", substituted "an interest in minerals underlying a tract of land. Within the 6-month period, the person shall petition" for "an interest in minerals, but in such case must petition"; in (2), after "subsection (1)", deleted "or (2)", substituted "on funds subject to subsection (1)" for "on such funds", and after "financial institutions" substituted "in any district in which the property or part of the property is located" for "in that district"; and made minor changes in style.

Case Notes

Fees for Creation of a Trust: Petitions filed pursuant to 82-1-302 and 82-1-305 are "special proceedings" within the meaning of 27-1-102, and as such, a fee of $20 is proper to assess for each such proceeding filed. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045 (1980).

No Violation of Equal Protection: Section 82-1-305 does not violate the equal protection clause of the federal and state constitutions. The state through its Legislature has a legitimate interest in establishing a classification for the protection of unlocated owners of interests in minerals or in mineral production and in providing a method for the protection of mineral producers, including oil and gas operators, as a defense against liability from future claims of such unlocated owners. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

Section Not Unconstitutionally Vague: Under the rule of law established in Cramp v. Bd. of Public Instruction, 368 US 278 (1961), that the due process test for vagueness of a statute is whether the law is so vague and uncertain that men of common intelligence must guess at its meaning, 82-1-305 is not unconstitutionally vague. This section (before 1997 amendment) can be interpreted to mean the following:

"1. Any person holding funds payable to persons the holder cannot locate, produced from mineral interests or mineral production, including oil and gas, must turn the funds over to the clerk of the local District Court. A grace period of six months is allowed from the enactment of the statutes.

2. Subsequent to the enactment of the statutes, no holder of the type stated above may continue holding payments for the account of unlocatable persons for longer than six months. In turning over the monies to the clerk of the court as required by the statutes, the holder must petition for a trust as provided for in section 82-1-302, MCA.

3. Civil penalties are provided for failure to comply with the statutes." In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

82-1-306. Filing of addresses.

Compiler's Comments

1997 Amendment: Chapter 126 in (1), after "county", substituted "in which the land is located a notice containing the person's address and a description of the person's interest in the minerals.

Filing the notice creates a rebuttable presumption" for "wherein the mineral interests lie a notice of his address and the legal description of his interest and thereby establish a rebuttable presumption"; inserted (2) requiring Clerk and Recorder to forward copy of notice to trustee; and made minor changes in style.

CHAPTER 2
MINING GENERALLY

Chapter Law Review Articles

Eminent Domain: Exploitation of Montana's Natural Resources, Kaze, 35 Mont. L. Rev. 279 (1974).

Taxation of Mineral Interests Under Article XII, Section 3, of the [1889] Montana State Constitution, Dye, 32 Mont. L. Rev. 47 (1971).

The Pelton Decision: A Symbol—A Guaranty That the Development and Conservation of Our Nation's Resources Will Keep Pace With Our National Demands, Veeder, 27 Mont. L. Rev. 27 (1965).

The New Multiple Use Mining Law, 20 Mont. L. Rev. 92 (1958).

Uranium and Its Legal Implications in Montana, 18 Mont. L. Rev. 180 (1957).

Reforming the Mining Law: Problems and Prospects, Leshy, 9 Pub. Land L. Rev. 1 (1988).

The Dawning of a New Era: Tribal Self-Determination in Indian Mineral Production, Carroll, 9 Pub. Land L. Rev. 81 (1988).

Drumming Out the Intent of the Indian Mineral Leasing Act of 1938, Carroll, 7 Pub. Land L. Rev. 135 (1986).

The Regulation of Private Mining Activities on Federal Public Lands, Schmidt, 7 Pub. Land L. Rev. 79 (1986).

Claiming the Cabinets: The Right to Mine in Wilderness Areas, Loop, 7 Pub. Land L. Rev. 45 (1986).

State Control of Mining on Federal Land: Environmental or Land Use Regulation?, Black, 28 Nat. Resources J. 873 (1988).

The Impact of the Water Quality Act of 1987 on Mining Operations, Janke, 9 E. Min. L. Found., 7-1 (1988).

Chapter Collateral References

Mines and Minerals *key* 47, 48, 96 through 100.

Mine tailings as real or personal property. 75 ALR 4th 965.

Mining exemption to sales or use tax. 47 ALR 4th 1229.

Grant, reservation, or lease of minerals and mining rights as including, without expressly so providing, the right to remove the minerals by surface mining. 70 ALR 3d 383.

Grant, lease, exception, or reservation of "oil, gas, and other minerals", as including coal or metallic ores. 59 ALR 3d 1146.

Clay, sand, or gravel as "minerals" within deed, lease, or license. 95 ALR 2d 843.

"Mine" as used in written instrument. 92 ALR 2d 868.

Nuisance — oil refinery. 86 ALR 2d 1322.

Strip or other surface mine or quarry operator: liability to person, other than employee, injured or killed during mining operations. 84 ALR 2d 733.

Vibrations: liability for property damage caused by vibrations attributable to quarry and stone cutting operations. 79 ALR 2d 982.

Duty of lessee or assignee of mineral lease other than lease for oil and gas, as regards marketing or delivery for marketing of mineral products. 77 ALR 2d 1058.

Solid mineral royalty as real or personal property. 68 ALR 2d 728.

Nuisance — quarries, gravel pits, etc. 47 ALR 2d 490.

Shaft: liability of landowner for injury or death of adult falling down unhoused mine shaft or the like. 46 ALR 2d 1069.

Oil and gas as "minerals" within deed, lease, or license. 37 ALR 2d 1440.

Liability of mine operator for damage to surface structure by removal of support. 32 ALR 2d 1309.

Loss by nonuser of private easement as to mineral and quarry rights. 25 ALR 2d 1320.

Partnership: powers, duties, and accounting responsibilities of managing partner of mining partnership. 24 ALR 2d 1359.

Trespasser's right to credit for expenditures in producing, as against his liability for value of, oil or minerals. 21 ALR 2d 380.

Rights of tenant for life or for years or remaindermen inter se in royalties or rents under oil, gas, coal, or other mineral lease. 18 ALR 2d 98.

Valuation of mineral interests in federal condemnation proceedings. 40 ALR Fed. 656.

Mining of "common varieties" in 30 U.S.C.S. §611, providing that no deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall be deemed "valuable mineral deposit". 38 ALR Fed. 456.

Interior Department: judicial review of Interior Department decisions affecting claims of mineral interests in public lands. 5 ALR Fed. 566.

Part 1
Location and Record of Claims

Part Case Notes

Necessity for Substantial Compliance: The provisions of local statutes relative to the location and recording notice of the location of mining claims are not only valid, but they are mandatory, and must be substantially complied with in order that the locator may acquire any right under his location. Thompson v. Barton Gulch Min. Co., 63 M 190, 207 P 108 (1922); Wilson v. Freeman 29 M 470, 75 P 84 (1876).

Part Collateral References

Mines and Minerals *key* 17.

58 C.J.S. Mines and Minerals §§38, 39, 52 through 61.

82-2-101. Manner of locating claim.

Case Notes

Meaning of "Discovery": Whether or not a mineral claimant has made a discovery sufficient to make valid his location is a question for the trier of fact. It is not required for validity that the mineral deposits must be sufficiently extensive to pay the mine's operating expenses, nor is there a requirement that the ground must yield any specific quantity of a particular mineral. Rather, the rule is that to constitute a "discovery" under mining law, it is sufficient that a particular mineral be found in the ground in a quantity that justifies the locator's development of the claim with a reasonable expectation of finding the mineral in payment quantities. Boscarino v. Gibson, 207 M 112, 672 P2d 1119, 40 St. Rep. 1931 (1983).

Notice of Location — Posting at Point of Discovery: When the record revealed that the notice was not posted near any discovery point, but rather was posted in the center of the claim and that the individual posting the claim had not seen any mineralization at the point the notice was posted, there was insufficient evidence to support the jury's verdict that the attempted claim was valid. The Anaconda Co. v. Whittaker, 188 M 66, 610 P2d 1177, 37 St. Rep. 902 (1980).

Actual Discovery of Minerals Required: When the record revealed that no one had actually found minerals in place on the claim but that the attempted discovery was based on geological studies for potential discovery of mineralization, there was insufficient evidence to support the jury's verdict that the attempted claim was valid. The Anaconda Co. v. Whittaker, 188 M 66, 610 P2d 1177, 37 St. Rep. 902 (1980).

Rights Against Subsequent Locator With Notice: Under 82-2-112, the failure to record a verified location of a mining claim does not operate to deprive the locator of his interest therein as against one who enters the property and makes a subsequent location with notice of the prior claim. Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959).

Location Notice to Accurately Describe Claim: In action to quiet title to mining claims, location notices of defendants were void where they were so indefinite and uncertain that it would be very difficult or perhaps impossible to locate the corners of the claims. Robinson v. Laffon, 131 M 446, 311 P2d 768 (1957).

Exclusive Right of Possession: One in rightful possession of a lawfully made placer mining location is guaranteed the exclusive right of possession, excluding anyone else from entering thereon during the life of the location for any purpose. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

Placer Rights Subject to Right to Mill Tailings: The locator of a placer mining claim does not have the right to mill tailings placed thereon by the operator of a quartz mine that have not been abandoned, the owner of the tailings having had a right to deposit them upon the public domain or

upon lands of which he had possession. A mineral location thereafter made upon such lands is subject to the right of the prior deposit. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

Area of Claim: The area bounded by a mining location must be within the limits granted by the statute—1,500 feet in length by 600 in width—and boundaries beyond such limits do not impart notice to subsequent locators, they not being required to look for stakes or boundaries beyond such limits. Thompson v. Barton Gulch Min. Co., 63 M 190, 207 P 108 (1922).

Boundaries:

The boundaries of a mining location must be so definite and certain that, taking the discovery as the initial point, they may be readily traced. The declaratory statement must furnish such information that a person of reasonable intelligence may therefrom find the claim and run its lines. Thompson v. Barton Gulch Min. Co., 63 M 190, 207 P 108 (1922).

The right of the Legislature to provide rules for the marking of the boundaries of mining claims and to provide for a record of such a claim and for what the recorded paper must contain is fully settled in this state. Baker v. Butte City Water Co., 28 M 222, 72 P 617 (1903), affirmed in Butte City Water Co. v. Baker, 196 US 119, 49 L Ed 409, 25 S Ct 211 (1905).

Substantial Compliance Necessary:

The provisions of this section, calling for the posting of a notice of location of a quartz lode mining claim containing a statement of the number of feet claimed along the course of the vein from the point of discovery, and of the next section, requiring the recordation of a certificate of location in the office of the County Clerk showing the direction and distance claimed along the course of the vein, etc., must be substantially complied with. Thompson v. Barton Gulch Min. Co., 63 M 190, 207 P 108 (1922).

Evidence that the locator of a mining claim substantially complied with the requirements of the federal statutes is not alone sufficient to a valid location, a substantial compliance with the state statutes also being required. Ringling v. Mahurin, 59 M 38, 197 P 829 (1921).

There can be no valid location of a mining claim without a discovery and a compliance with the requirements of the state statute. Ferris v. McNally, 45 M 20, 121 P 889 (1912); Baker v. Butte City Water Co., 28 M 222, 72 P 617 (1903); Sanders v. Noble, 22 M 110, 55 P 1037 (1899); Upton v. Larkin, 7 M 449, 17 P 728 (1888).

Where the locator had posted his notice a considerable distance away from the point of discovery but about a month thereafter, in accordance with the statute, sank his discovery shaft at the point where he posted his notice, and in the meantime another had made discovery and posted his notice, the location of the former must be postponed to the date when he posted his notice at the point of discovery because of the intervening rights of the latter. Butte N. Copper Co. v. Radmilovich, 39 M 157, 101 P 1078 (1909).

Where the locator of a lode mining claim failed to comply with the requirements of the statute relative to completing his location after the posting of his declaratory statement and another made a location conflicting with the claim of the prior discoverer, the area in conflict did not revert to the public domain but inured to the benefit of the junior locator who, by performing the necessary work required by the statute, became entitled to the possession of it. Helena Gold & Iron Co. v. Baggaley, 34 M 464, 87 P 455 (1906). See Street v. Delta Min. Co., 42 M 371, 112 P 701 (1910); Ferris v. McNally, 45 M 20, 121 P 889 (1912).

Failure to Complete Claim: Sections 82-2-101 through 82-2-104, modifying to some extent the requirements of the law with relation to the location of mining claims, go no further than to direct the Courts to disregard defects or irregularities in the posted and recorded notice and the failure to do any of the other acts made necessary to complete a location when it appears that such acts have in fact been done before a location of the same ground has been made by another. However, these sections do not excuse the performance of any act, even though the subsequent locator has notice of a prior location, which is required to perfect the location. Ringling v. Mahurin, 59 M 38, 197 P 829 (1921).

Prior Right by Discovery and Notice: By discovery and the posting of notice of claim, the discoverer acquires a right to make a location to the exclusion of one who thereafter enters and makes a location pending the time allowed by this section to complete the marking of the boundaries and the required excavation work. Ferris v. McNally, 45 M 20, 121 P 889 (1912).

Development Work: In addition to the acts required by the federal statutes, the state might rightfully exact of the locator of a quartz lode mining claim the doing of development work and the filing for record of a declaratory statement. Orton v. Bender, 43 M 263, 115 P 406 (1911); Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907); Mares v. Dillon, 30 M 117, 75 P 963 (1904).

Independent Acts to Be Done: The law contemplates that the location of a mining claim shall consist of a number of distinct acts which are independent of each other. The last that may be done

does not relate back to the first, and all must be performed before a legal location exists. Thornton v. Kaufman, 40 M 282, 106 P 361 (1910); McKay v. McDougall, 25 M 258, 64 P 669 (1901); Gonu v. Russell, 3 M 358 (1879).

Manifestation of Intention to Claim Quartz Lode: Under the Political Code of 1895 the only way the locator of a quartz lode mining claim could manifest his intention to claim the ground embraced within his boundaries, in good faith under the mining laws, was by means either of a discovery shaft or a crosscut sunk or made from an opening upon the claim sought to be located and not upon grounds over which he had not complete control as a matter of right or from which he might be excluded at any time at the option of another. Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907).

Constitutionality: State statutes providing additional requirements for valid location of mining claims to those imposed by acts of Congress are not in violation of the United States Constitution and acts of Congress. While the validity of a law of the Territory requiring a location notice to be verified was doubted in Wenner v. McNulty, 7 M 30, 14 P 643 (1887), the power of a state legislature to impose additional burdens upon the locator of a mining claim is now definitely settled. Purdum v. Laddin, 23 M 387, 59 P 153 (1899); Berg v. Koegel, 16 M 266, 40 P 605 (1895); McCowan v. Maclay, 16 M 234, 40 P 602 (1895); Metcalf v. Prescott, 10 M 283, 25 P 1037 (1891); O'Donnell v. Glenn, 8 M 248, 19 P 302 (1888).

Possession Alone Insufficient: A location of a mining claim is not made by taking possession alone but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. Purdum v. Laddin, 23 M 387, 59 P 153 (1899); Garfield M. & M. Co. v. Hammer, 6 M 53, 8 P 153 (1886); Upton v. Larkin 5 M 600, 6 P 66 (1885).

Power to Swing Claim: Though a locator has posted a notice under state and federal statutes stating the general course of the vein, he may, within 90 days, swing his claim in any direction required to include the vein, where no bad faith is shown. Sanders v. Noble, 22 M 110, 55 P 1037 (1899).

Procedure for Quartz Lode Claim Generally: Relative to the successive steps for making a valid location of a quartz lode mining claim, see Orton v. Bender, 43 M 263, 115 P 406 (1911); Thornton v. Kaufman, 40 M 282, 106 P 361 (1910); Butte N. Copper Co. v. Radmilovich, 39 M 157, 101 P 1078 (1909); Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907).

Notice Generally: For decisions as to the requisites of a valid location of a mining claim and the sufficiency or insufficiency of notice of location and declaratory statement under former statutes, see, generally, Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910); Giberson v. Tuolumne Copper Min. Co., 41 M 396, 109 P 974 (1910); Tiggeman v. Mrzlak, 40 M 19, 105 P 77 (1909); Butte N. Copper Co. v. Radmilovich, 39 M 157, 101 P 1078 (1909); Hickey v. Anaconda Copper Min. Co., 33 M 46, 81 P 806 (1905); Mares v. Dillon, 30 M 117, 75 P 963 (1904); Wilson v. Freeman, 29 M 470, 75 P 84 (1904); Brownfield v. Bier, 15 M 403, 39 P 461 (1895); Freezer v. Sweeney, 8 M 508, 21 P 20 (1888); Gamer v. Glenn, 8 M 371, 20 P 654 (1888); Flick v. Gold Hill & Lee Mtn. Min. Co., 8 M 298, 20 P 807 (1888); McBurney v. Berry, 5 M 300, 5 P 867 (1885).

Law Review Articles

Primer on the Theory and Proof of Discovery of Valuable Mineral Deposits Under the 1872 Mining Law, Frizzell & Kunz, 6 Pub. Land L. Rev. 103 (1985).

Hardrock Mining on Public Lands, Shanahan, 2 Pub. Land L. Rev. 57 (1981).

A Regulatory Minefield: Can the Department of Interior Say "No" to a Hardrock Mine?, Knight, 73 U. Colo. L. Rev. 619 (2002).

Location of Lode Claims Over Placer Claims, Harris, 34 Rocky Mtn. Min. L. Inst. Proc. 12-1 (1988).

Collateral References

Mines and Minerals *key* 13, 14, 17 through 20.

58 C.J.S. Mines and Minerals §52.

53A Am. Jur. 2d Mines and Minerals §44.

Mining grubstake contracts. 70 ALR 2d 904.

"Discovery", under mining laws, of radioactive minerals such as uranium. 66 ALR 2d 560.

Mineral Lands and Mining, Title 30, U.S.C.

Mining Regulations — Location — Recordation, 30 U.S.C. §28.

82-2-102. Record of certificate of location.

Compiler's Comments

1991 Amendment: In (1), at end of first sentence, deleted "and within 20 days thereafter, the county clerk shall provide a copy thereof to the department of state lands, Helena, Montana".

Section Not Codified: Section 50-703, R.C.M. 1947, a statute giving effect to mining locations that were recorded before the statute was enacted, was not codified in the MCA. This statute has not been repealed and is still valid law. Citation may be made to Sec. 3613, Pol. C. 1895.

Case Notes

Valid Location of Mine — Test: A condition precedent to a valid mining location is the actual discovery of a vein, lode, or ledge of rock in place bearing a valuable mineral deposit. If a subsequent locator questions the existence of such a discovery, it is incumbent on the original locator to prove he discovered sufficient minerals to meet the prudent man test. That test is whether minerals have been found and the evidence is such that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The ore need not be in sufficient quantity to support a profitable mining operation, nor must any specific amount of ore be found. In the present case, a certificate of location filed by the original locator was, under this section, sufficient prima facie evidence of a valid discovery. Silver Jet Mines, Inc. v. Schwark, 210 M 81, 682 P2d 708, 41 St. Rep. 933 (1984).

Reference to Natural or Permanent Monument: The fact that location certificate did not refer to a natural or permanent monument was of no significance when the contestant found a copy of the certificate at the entrance to the mine. McCarthy v. Morris, 159 M 227, 497 P2d 97 (1972).

Rights Against Subsequent Locator With Notice: Under 82-2-112, the failure to record a verified location of a mining claim does not operate to deprive the locator of his interest therein as against one who enters the property and makes a subsequent location with notice of the prior claim. Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959).

Invalid Certificates as Cloud on Title: Recorded certificates of location may cloud the title when apparently valid but actually, under the mining law, invalid. Hopkins v. Walker, 244 US 486, 61 L Ed 1270, 37 S Ct 711 (1917).

Statement to Be Self-Evident: The declaratory statement of a mining location required to be filed for record cannot be supplemented by proof of what was actually done in the premises. Dolan v. Passmore, 34 M 277, 85 P 1034 (1906); Hahn v. James, 29 M 1, 73 P 965 (1903).

Statement to Be Verified:

A declaratory statement of location of quartz mining claim, required to be recorded, must be under oath. McCowan v. Maclay, 16 M 234, 40 P 602 (1895); Brownfield v. Bier, 15 M 403, 39 P 461 (1895); Mattingly v. Lewisohn, 13 M 508, 25 P 111 (1893); Russell v. Hoyt, 4 M 412, 2 P 25 (1882). In O'Donnell v. Glenn, 8 M 248, 19 P 302 (1888), the Supreme Court held that a declaratory statement which does not contain the required affidavit is void and that decision has since then been followed uniformly. Washoe Copper Co. v. Junila, 43 M 178, 115 P 916 (1911). See Hickey v. Anaconda Copper Min. Co., 33 M 46, 81 P 806 (1905).

An affidavit to a declaratory statement of a quartz mining claim, made on information, has been held sufficient under a statute in Wenner v. McNulty, 7 M 30, 14 P 643 (1887), and the fact that the locator verified the statement on information only, instead of on his personal knowledge, did not render the statement void under a statute requiring such statement to be verified by the "oath of the locator". In the absence of proof tending to impeach the truth of the facts stated in a declaratory statement for a mining claim, it is immaterial to an adverse locator that the declaration was verified on information only. Mares v. Dillon, 30 M 117, 75 P 963 (1904).

A location notice, the affidavit to which did not contain notarial evidence that the party making it took an oath or was ever present before the officer, was held to be sufficient. Metcalf v. Prescott, 10 M 283, 25 P 1037 (1891). So, too, an affidavit to the declaratory statement of a quartz location, which disclosed that the statement was sworn to 1 year before the location of the lode, was considered fatal to the validity of the location in the absence of proof that the affidavit was wrongly dated by mistake of the notary. Berg v. Koegel, 16 M 266, 40 P 605 (1895). But where it appeared that the declaratory statement was sworn and subscribed to before an officer having power to administer an oath, it was valid although affiant's name did not appear in the body of the instrument. Davidson v. Bordeaux, 15 M 245, 38 P 1075 (1895).

Collateral References

Mines and Minerals *key* 21.

58 C.J.S. Mines and Minerals §§50, 51, 55, 57, 59.

53A Am. Jur. 2d Mines and Minerals §§41, 45, 47.

82-2-103. Affidavit of performance of annual work.

Case Notes

Failure to File Affidavit — Effect on Possessory Interests: Section 82-2-103 was enacted to supplement federal statutory law relating to annual improvements. That law simply requires work to be done annually. If the work is done, the claim is not open for relocation. Thus, in this quiet title action plaintiffs did not forfeit their interest in four mining claims upon which they faithfully performed the annual labor although they failed to file affidavits of performance of annual assessment work for one year. Defendants were not entitled to relocate the mining claims upon discovery of plaintiffs' omission to file affidavits. Section 82-2-103 does not mandate forfeiture of possessory interests in a claim if an affidavit is not filed. The only penalty is that the claimant must use other proof of the assessment work to avoid opening the claim for relocation. O'Connor v. Wilke, 217 M 422, 705 P2d 572, 42 St. Rep. 1298 (1985).

Sufficiency of Annual Assessment Work — Attribution to Another Claim: Where second locator of unpatented mining claim challenged the sufficiency of the required annual assessment work of successor to original locator, the court need scrutinize only the assessment work of 1980, since second locator did not locate his claim until that year. If the 1980 work was sufficient, the successor had a valid claim. If it was insufficient, even sufficient work during prior years could not save successor's claim, presuming a valid location by second locator. Generally, assessment work must tend to develop the claim and facilitate the extraction of ore. The work was sufficient where it consisted of securing the tunnel entrance on an adjoining patented claim to prevent unauthorized entry, clearing growth on the path to the tunnel, and clearing about 6,000 square yards of ground. The work on the adjoining patented claim could be attributed to the unpatented claim since evidence showed the clearing would be used as the needed base of operations for mining the unpatented claim and that the claim could be mined from the tunnel. Silver Jet Mines, Inc. v. Schwark, 210 M 81, 682 P2d 708, 41 St. Rep. 933 (1984).

Filing of Annual Assessment Affidavit Mandatory: Under former law, the filing of an annual affidavit could be used as proof that the assessment work had been done, but filing the affidavit was not required. It is now mandatory to file such an affidavit, and failure to file it is prima facie evidence that the assessment work has not been done. Sawyer-Adecor Int'l, Inc. v. Anglin, 198 M 440, 646 P2d 1194, 39 St. Rep. 1118 (1982).

Amount of Work Required: Recorded affidavit was prima facie evidence that annual assessment work was done, and it was not important how much work was done. McCarthy v. Morris, 159 M 227, 497 P2d 97 (1972).

Preservation of Evidence: Such statutes as this relate not to the effect of doing the work or making the improvements, as required by law but to the method of preserving prima facie evidence of the fact that such requirement has been fulfilled. Davidson v. Bordeaux, 15 M 245, 38 P 1075 (1895); Coleman v. Curtis, 12 M 301, 30 P 266 (1892).

Oral Evidence: The affidavit of annual representation is prima facie evidence of the facts recited, but oral evidence may be given to prove that the work was done, and it will not be regarded as error to admit the affidavit. Davidson v. Bordeaux, 15 M 245, 38 P 1075 (1895).

Payment for Work Done: Where labor performed as annual representation upon a mining claim is done by other than the owner, it is not necessary that such work be actually paid for by the owner in order to be effectual for that purpose. Coleman v. Curtis, 12 M 301, 30 P 266 (1892).

Collateral References

Mines and Minerals *key* 23(4).

58 C.J.S. Mines and Minerals §§46, 84 through 95.

53A Am. Jur. 2d Mines and Minerals §§48, 50.

Validity and construction of statutes providing for reversion of mineral estates for abandonment or nonuse. 16 ALR 4th 1029.

Mineral Lands and Mining, Title 30, U.S.C.

Mining Regulations — Location — Recordation, 30 U.S.C. §28.

82-2-104. Millsites.

Collateral References

58 C.J.S. Mines and Minerals §40.

53A Am. Jur. 2d Mines and Minerals §59.

82-2-105. Relocation of abandoned claim.

Case Notes

Intent to Abandon: In determining what constitutes abandonment of personal property (in the instant case mill tailings), the paramount object of inquiry is the intention of the owner to abandon, gathered from his acts or statements. Hence, where the owner of a mill tailing dump took measures to preserve it at considerable expense for future treatment, there was no abandonment. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939), followed in Hawkins v. Mahoney, 1999 MT 296, 297 M 98, 990 P2d 776, 56 St. Rep. 1185 (1999).

Collateral References

Mines and Minerals *key* 26.
58 C.J.S. Mines and Minerals §§101 through 107.
53A Am. Jur. 2d Mines and Minerals §§47, 49, 51, 90.

82-2-106. Rights of relocator.

Case Notes

Sufficiency of Annual Assessment Work — Attribution to Another Claim: Where second locator of unpatented mining claim challenged the sufficiency of the required annual assessment work of successor to original locator, the court need scrutinize only the assessment work of 1980, since second locator did not locate his claim until that year. If the 1980 work was sufficient, the successor had a valid claim. If it was insufficient, even sufficient work during prior years could not save successor's claim, presuming a valid location by second locator. Generally, assessment work must tend to develop the claim and facilitate the extraction of ore. The work was sufficient where it consisted of securing the tunnel entrance on an adjoining patented claim to prevent unauthorized entry, clearing growth on the path to the tunnel, and clearing about 6,000 square yards of ground. The work on the adjoining patented claim could be attributed to the unpatented claim since evidence showed the clearing would be used as the needed base of operations for mining the unpatented claim and that the claim could be mined from the tunnel. Silver Jet Mines, Inc. v. Schwark, 210 M 81, 682 P2d 708, 41 St. Rep. 933 (1984).

Relocation Under Former Statutes: For a general discussion of relocation of mining claims under former statutes, see McKay v. McDougall, 25 M 258, 64 P 669 (1901).

Collateral References

Mines and Minerals *key* 26, 28, 29.
58 C.J.S. Mines and Minerals §§101 through 107.
53A Am. Jur. 2d Mines and Minerals §§47, 49, 51, 90.

82-2-107. Amended location.

Collateral References

Mines and Minerals *key* 14(1), 21(3), 26.
58 C.J.S. Mines and Minerals §§34, 60, 63, 101.
53A Am. Jur. 2d Mines and Minerals §45.

82-2-108. Relocation by owner.

Case Notes

Relocation of Claim Held Not to Require Abandonment of Former Overlapping Claim: Noranda Minerals Corporation's predecessor in interest, the United States Borax and Chemical Corporation (Borax), located several mining claims that partially overlapped previously existing Borax mining claims. The Wilderness Society (TWS) challenged the validity of Borax's later claim, asserting that the later claim could not be approved by the U.S. Forest Service unless the earlier claim had been replaced, abandoned, or automatically extinguished and therefore constituted unappropriated ground. The Ninth Circuit Court of Appeals, distinguishing Tiggeman v. Mrzlak, 40 M 19, 105 P 77 (1909), and Lehman v. Sutter, 60 M 97, 198 P 1100 (1921), and relying upon Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959), affirmed the judgment of the U.S. District Court and held that there was nothing in the language of 82-2-109 or this section requiring the interpretation of those statutes in the manner asserted by TWS. Wilderness Society v. Dombeck, 168 F3d 367 (9th Cir. 1999).

Failure to Excavate: Where relocators of their own claims did not do the excavation work required to be done under this section before another had located the same ground, their attempted relocations were nugatory. Lehman v. Sutter, 60 M 97, 198 P 1100 (1921).

Collateral References
Mines and Minerals *key* 26 through 28.
58 C.J.S. Mines and Minerals §104.
53A Am. Jur. 2d Mines and Minerals §49.

82-2-109. Amendment or relocation not a waiver of acquired rights.

Case Notes
Relocation of Claim Held Not to Require Abandonment of Former Overlapping Claim: Noranda Minerals Corporation's predecessor in interest, the United States Borax and Chemical Corporation (Borax), located several mining claims that partially overlapped previously existing Borax mining claims. The Wilderness Society (TWS) challenged the validity of the later claim, asserting that the later claim could not be approved by the U.S. Forest Service unless the earlier claim had been replaced, abandoned, or automatically extinguished and therefore constituted unappropriated ground. The Ninth Circuit Court of Appeals, distinguishing Tiggeman v. Mrzlak, 40 M 19, 105 P 77 (1909), and Lehman v. Sutter, 60 M 97, 198 P 1100 (1921), and relying upon Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959), affirmed the judgment of the U.S. District Court and held that there was nothing in the language of 82-2-108 or this section requiring the interpretation of those statutes in the manner asserted by TWS. Wilderness Society v. Dombeck, 168 F3d 367 (9th Cir. 1999).

Collateral References
Mines and Minerals *key* 28.

82-2-110. Rights of third persons not affected.

Case Notes
Actual Knowledge: Where subsequent locators had actual knowledge of prior locations and the only defects on which they relied in attempting to prove that the claim of the prior locators was of no force and effect were defects in a recorded certificate which, under 82-2-112, did not deprive the locators of their rights, they could not rely on this section to avoid the force and effect of 82-2-107 through 82-2-109. Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959).

Collateral References
Mines and Minerals *key* 27.
58 C.J.S. Mines and Minerals §63.

82-2-111. Validating locations already made.

Case Notes
Retroactive Effect: This section has a retroactive effect, and a failure to comply with the statutes as to recordation of locations is cured by subsequent issuance of a patent. Butte & Superior Copper Co. v. Clark-Mont. Realty Co., 248 F 609 (1918).

Collateral References
Mines and Minerals *key* 29(3).

82-2-112. Defective locations good against persons with notice.

Case Notes
Rights Against Subsequent Locator With Notice: Under 82-2-112, the failure to record a verified location of a mining claim does not operate to deprive the locator of his interest therein as against one who enters the property and makes a subsequent location with notice of the prior claim. Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959).

Notice to Subsequent Locators:
In action to quiet title, it appeared that defendants were aware of the claims of plaintiffs and were watching to ascertain whether plaintiffs performed their assessment work. Plaintiffs had been interested in their claims for 21 years, and they were originally located in 1930. One of the defendants had been familiar with the area of the claims since 1932. Defendants in such circumstances could not maintain that they located their claims without notice of the prior claims of plaintiffs. Robinson v. Laffon, 131 M 446, 311 P2d 768 (1957).

In view of the provision of this section that defects in a recorded certificate of location of a mining claim are not material where the person relying on the defects made his location with notice thereof, allegations in his complaint, in an action to determine an adverse claim, relating to such defects are immaterial. Lehman v. Sutter, 60 M 97, 198 P 1100 (1921); Heilman v. Loughrin, 57 M 380, 188 P 370 (1920).

Title Required to Take Advantage of Defects: In an action in ejectment to recover possession of a mining claim, where defendants did not attempt to show title in themselves to the portion of the claim in dispute, either by location or any other method provided for by the federal statutes, they were in no position to take advantage of alleged defects in the original and amended declaratory statements of location. Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910).

Collateral References

Mines and Minerals *key* 29(4), (5).
58 C.J.S. Mines and Minerals §§63, 127.

82-2-113. Effect of patent.

Case Notes

Rejection by Federal Land Department: Where the federal Land Department did not merely reject an application for patent to placer mining location but declared that the ground covered thereby was nonmineral in character and that the location was null and void, the force and effect of the location was destroyed, the land within its boundaries reverted to the public domain, and only the federal government could question the right of another to enter thereon and reclaim mill tailings deposited on it. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

Retroactive Effect: In an action to quiet title and for an accounting of ore alleged to have been unlawfully taken, the Court properly held this section to have retroactive effect, notwithstanding a statutory prohibition against retroactive effects without a specific declaration of retroactivity, as the language of the statute itself evidenced an intent that it should apply to claims made before the enactment of the law. Butte & Superior Copper Co. v. Clark-Mont. Realty Co., 248 F 609 (1918).

Amendment of Description: A locator who had misdescribed his claim as running easterly and westerly was entitled under this section to file an amended declaratory statement that the claim ran in a northerly and southerly direction to correspond to the staking of the claim on the ground. Wilson v. Freeman, 29 M 470, 75 P 84 (1904).

Collateral References

Mines and Minerals *key* 39, 44.
58 C.J.S. Mines and Minerals §§92, 114 through 128.
53A Am. Jur. 2d Mines and Minerals §§22, 52 through 57, 61, 62, 69, 71 through 76.
U.S. Patents — Procurement Procedure, 30 U.S.C. §29.
Placer Claim Patents, 30 U.S.C. §35.

82-2-114. Amended locations.

Compiler's Comments

Section Not Codified: Section 50-716, R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to Sec. 2, p. 57, L. 1901.

Case Notes

Amendment Relates Back:

An amended declaratory statement confers no rights which did not exist prior to the filing of the amended statement but relates back to the first location. Milwaukee Gold Extraction Co. v. Gordon, 37 M 209, 95 P 995 (1908). See Giberson v. Tuolumne Copper Min. Co., 41 M 396, 109 P 974 (1910).

An amended declaratory statement relates back to the date of the original location, by virtue of the locator's discovery, his prior possession, the posting of the notice, the marking of the boundaries, the doing of the necessary development work, and the attempted compliance with the law relating to the filing of the declaratory statement for record. Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907). See Giberson v. Tuolumne Copper Min. Co., 41 M 396, 109 P 974 (1910).

Change of Name of Claim: The addition of a word to the name of a mining claim in an amended declaratory statement was insufficient to invalidate the statement, where such statement declares on its face that it is an amended declaratory statement, and the ground embraced therein is the same as in the original. Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907).

Collateral References

Mines and Minerals *key* 21(3).
58 C.J.S. Mines and Minerals §60.
53A Am. Jur. 2d Mines and Minerals §45.

82-2-115. Filing of false mining claims.

Collateral References

58 C.J.S. Mines and Minerals §§35, 64.

53A Am. Jur. 2d Mines and Minerals §§44, 45.

Part 2
Rights-of-Way and Eminent Domain

Part Law Review Articles

Inflation and the Valuation of Future Economic Losses, Formuzis & O'Donnell, 38 Mont. L. Rev. 297 (1977).

The Montana Law of Valuation in Eminent Domain, Sullivan, 34 Mont. L. Rev. 90 (1973).

Montana's Condemnation Procedure — The Inadequacy of the "Commission System" of Determining Compensation, Beiswanger, 25 Mont. L. Rev. 105 (1963).

Recent Decisions — Land Valuation — Testimony of Nonprofessional: St. v. Peterson, 134 M 52, 328 P2d 617 (1958), held that in a proceeding in which the state sought to condemn certain business property, it was error to exclude testimony concerning the value of the defendant's property even though the witness was not a professional in the field of land evaluation, as he was familiar with the property in question and his testimony would have been relevant to the issue of value, and it was not error to admit evidence as to the revenue produced from the condemned property. Fredricks, 22 Mont. L. Rev. 80 (1960).

Easements and Market Value, Cromwell, 17 Mont. L. Rev. 143 (1956).

The Doctrine of Public Use in Eminent Domain in Montana, White, 9 Mont. L. Rev. 53 (1948).

The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests, Wenzel, 42 Am. U.L. Rev. 607 (1993).

Inverse Condemnation Issues in Revising the Mining Law, McBride, 38 Rocky Mtn. Min. L. Inst. Proc. 7-1 (1992).

This Land is Your Land; This Land is Mineland, St. Antoine, 6 Envtl. F. 33(3) (1989).

Part Collateral References

Eminent Domain *key* 131, 134, 318, 319; Mines and Minerals *key* 73.1(6), 88.

29A C.J.S. Eminent Domain §§56, 105(2), 174; 58 C.J.S. Mines and Minerals §§159, 176.

Locating easement of way created by necessity. 36 ALR 4th 769.

Crops: construction and effect of provision for payment of damages to "crops" or "growing crops" in mineral deed or lease or in conveyance of pipeline or other underground easement. 87 ALR 2d 235.

Right of owner of title to or interest in minerals under one tract to use surface in connection with mining another tract. 83 ALR 2d 665.

Effect, as between lessor and lessee, of provision in mineral lease purporting to except or reserve a previously granted right-of-way or other easement through, over, or upon the premises. 49 ALR 2d 1191.

Eminent domain: elements and measure of compensation for oil or gas pipeline through private property. 38 ALR 2d 788, superseded in part by 34 ALR 3d 804.

Condemnor's acquisition of, or right to, minerals under land taken in eminent domain. 36 ALR 2d 1424.

Supreme Court's views as to what constitutes "taking," within meaning of Fifth Amendment's command that private property not be taken for public use without just compensation. 57 L Ed 2d 1254, §§7, 12, superseded by 89 L Ed 2d 977.

82-2-201. Right-of-way of owners of mines.

Collateral References

29A C.J.S. Eminent Domain §§24, 56.

26 Am. Jur. 2d Eminent Domain §§24, 81.

Effect, as between lessor and lessee, of provision in mineral lease purporting to except or reserve a previously granted right-of-way or other easement through, over, or upon the premises. 49 ALR 2d 1191.

U.S. Patents — Procurement Procedure, 30 U.S.C. §29.

Placer Claim Patents, 30 U.S.C. §35.

82-2-202. Road or ditch right-of-way.

Collateral References

Eminent Domain *key* 33; Mines and Minerals *key* 29, 88.

29A C.J.S. Eminent Domain §56; 58 C.J.S. Mines and Minerals §§60, 181 through 184, 335, 362 through 370, 381, 383.

26 Am. Jur. 2d Eminent Domain §§67, 69, 81; 53A Am. Jur. 2d Mines and Minerals §§341, 347, 348.

What constitutes reasonable necessary use of the surface of the leasehold by a mineral owner, lessee, or driller under an oil and gas lease or drilling contract. 53 ALR 3d 16.

Right of mineral lessee to deposit topsoil, waste materials, and the like upon lessor's additional land not being mined. 26 ALR 2d 1453.

Surface owner's right of access through solid mineral seam or vein conveyed to another or through the space left by its removal to reach underlying strata, water, oil and gas, etc. 25 ALR 2d 1250.

82-2-203. Proceedings to obtain right-of-way.

Case Notes

Right to Use Common Road Established by Express Grant in Deed — Prescriptive Easement Inapplicable: Appellants contended that they were entitled to an injunction because the presence of a gate across a common road changed the nature of their easement from prescriptive to permissive. However, because their right to use the common road was obtained by express grant in their deed pursuant to an agreement under this section that allows owners of certain mining claims to obtain a right-of-way by agreement, there was no prescriptive use and no basis for appellants' argument that the presence of the gate diminished their right to use the common road. The fact that appellants did not use the easement to any significant extent, coupled with the trial court's setting of standards regarding the gate, affirmed that the court did not abuse its discretion in denying appellants' request for an injunction to prevent maintenance of a locked gate across the common road. Gabriel v. Wood, 261 M 170, 862 P2d 42, 50 St. Rep. 1246 (1993), distinguishing Finley v. Rutherford, 151 M 488, 444 P2d 306 (1968), Cope v. Cope, 158 M 388, 493 P2d 336 (1971), and Larson v. Burnett, 158 M 421, 492 P2d 921 (1972), and followed in Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000), and Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000).

Water Rights Condemnation: The proceedings prescribed by this section are not applicable to a city seeking to condemn water rights for the purpose of establishing a water supply system. Helena v. Rogan, 27 M 135, 69 P 709 (1902).

Attempt to Agree Required: Where a mine owner desires to acquire a right-of-way across the lands of another, jurisdiction to consider the petition is not conferred unless it affirmatively appears therefrom that the petitioners have endeavored in good faith to come to an agreement with the owners of the lands to purchase the required right-of-way. Glass v. Basin Min. & Concentrating Co., 22 M 151, 55 P 1047 (1899).

Collateral References

Eminent Domain *key* 168(1), 191.

29A C.J.S. Eminent Domain §§218, 224(1), 251.

27 Am. Jur. 2d Eminent Domain §§474, 475, 497 through 499, 519 through 523.

82-2-204. Proceedings before the court.

Administrative Rules

ARM 17.24.1206 through 17.24.1211 Notices, orders of abatement, and cessation orders — penalties.

Collateral References

Eminent Domain *key* 180.

29A C.J.S. Eminent Domain §242.

27 Am. Jur. 2d Eminent Domain §§527 through 530.

82-2-205. Court order and appointment of commissioners.

Collateral References

Eminent Domain *key* 228.

29A C.J.S. Eminent Domain §316.

27 Am. Jur. 2d Eminent Domain §§637, 638, 641.

82-2-206. Commissioners to assess damages.

Collateral References
Eminent Domain *key* 210, 231, 234.
29A C.J.S. Eminent Domain §§312 through 314; 323 through 327.
27 Am. Jur. 2d Eminent Domain §§637, 638, 641.

82-2-207. Power to set aside commissioners' report.

Collateral References
Eminent Domain *key* 237.
29A C.J.S. Eminent Domain §329.
27 Am. Jur. 2d Eminent Domain §§704, 705.

82-2-208. Right-of-way to commence upon payment of assessed damages.

Collateral References
Loss by nonuser of private easement as to mineral and quarry rights. 25 ALR 2d 1320.

82-2-209. Appeal from assessment of damages.

Collateral References
Eminent Domain *key* 238.
29A C.J.S. Eminent Domain §391.
27 Am. Jur. 2d Eminent Domain §§606, 607, 614, 615.

82-2-210. Trial on appeal and costs.

Collateral References
Eminent Domain *key* 238, 239, 265(4).
29A C.J.S. Eminent Domain §§408 through 413.
27 Am. Jur. 2d Eminent Domain §§606, 607, 609 through 611, 614, 615, 617 through 619.

82-2-211. Payment of costs.

Collateral References
Eminent Domain *key* 265(2), (3).
29A C.J.S. Eminent Domain §413.
27 Am. Jur. 2d Eminent Domain §§743 through 755.

82-2-212. Appeal to supreme court.

Collateral References
Eminent Domain *key* 250, 252.
27 Am. Jur. 2d Eminent Domain §§715 through 721, 724, 726, 728, 730.

82-2-221. Eminent domain for open-pit mining — purchase of property required.

Compiler's Comments
2001 Amendment: Chapter 125 throughout section substituted references to condemnor for references to plaintiff; in (1) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.
Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Law Review Articles
Montana's Statutory Protection of Surface Owners From Strip Mining and Resultant Problems of Mineral Deed Construction, Karell, 37 Mont. L. Rev. 347 (1976).

Collateral References
Eminent Domain *key* 33, 170; Mines and Minerals *key* 88.
29A C.J.S. Eminent Domain §§56, 224; 58 C.J.S. Mines and Minerals §427.
26 Am. Jur. 2d Eminent Domain §§81, 338; 27 Am. Jur. 2d Eminent Domain §§497 through 499.
Restrictions on right to remove minerals underneath street, alley, or park. 62 ALR 2d 1319.

82-2-222. Construction of alternate facilities.

Compiler's Comments

2001 Amendment: Chapter 125 in two places substituted "condemnor" for "plaintiff"; in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Collateral References

29A C.J.S. Eminent Domain §81.

26 Am. Jur. 2d Eminent Domain §127.

Statutory or contractual obligation to restore surface after strip or other surface mining. 1 ALR 2d 575.

82-2-223. Compensation for property.

Collateral References

Eminent Domain *key* 126.

29A C.J.S. Eminent Domain §§136, 273.

26 Am. Jur. 2d Eminent Domain §§294, 295, 298 through 300, 304, 305.

82-2-224. Notice of condemnation — filing of plat.

Compiler's Comments

2001 Amendment: Chapter 125 in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1983 Amendment: After "all owners" inserted "and purchasers under contracts for deed".

Law Review Articles

Montana's Statutory Protection of Surface Owners From Strip Mining and Resultant Problems of Mineral Deed Construction, Karell, 37 Mont. L. Rev. 347 (1976).

Collateral References

Eminent Domain *key* 179, 186.

29A C.J.S. Eminent Domain §§226, 242.

27 Am. Jur. 2d Eminent Domain §§536 through 545.

Part 3
Landowner Notification of Surface Operations

Part Collateral References

53A Am. Jur. 2d Mines and Minerals §§330 through 334.

82-2-303. Written notice and approval required before commencement of operations.

Case Notes

Open-Pit Excavation Necessary for Backslope as Authorized Public Use — Landowner Notification Act Ineffectual to Prevent Condemnation: An open-pit excavation necessary to backslope the mining of an ore body is an authorized public use for which condemnation may be had. The Landowner Notification Act appears to preclude this kind of condemnation because under 82-2-303, an open-pit mine operator must obtain from the surface owner of private lands specific written approval of proposed work before commencing operations. However, the Supreme Court noted that the Act was aimed at the protection of private persons, while eminent domain law, constitutionally grounded and deriving from the power of sovereignty, was enacted to protect the public good. The court found it inconceivable that the Legislature intended provisions enacted for the benefit of private persons to overcome and supersede provisions preserving the public good. Therefore, the Landowner Notification Act was found not to adversely affect the right to use eminent domain against a nonconsenting landowner. Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444, 44 St. Rep. 2161 (1987).

82-2-306. Violation — immunity of landowner.

Collateral References
58 C.J.S. Mines and Minerals §§340 through 342.

Part 4
Assaying of Ore and Payment for Consignments

Part Collateral References
Mines and Minerals *key* 93 ½.
58 C.J.S. Mines and Minerals §§371, 372.

82-2-406. Violation — penalty.

Collateral References
58 C.J.S. Mines and Minerals §§340 through 342.

82-2-421. Time for payment for ores.

Compiler's Comments
Portion of Section Not Codified: A portion of section 50-301, R.C.M. 1947, concerning payment for minerals shipped but not paid for upon the effective date of the former law, was not codified in the MCA. Such portion of the section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 37, L. 1911, as amended by sec. 1, Ch. 5, L. 1953.

Collateral References
Mines and Minerals *key* 93 ½, 94.
58 C.J.S. Mines and Minerals §§340 through 342, 371, 372.

CHAPTER 4
RECLAMATION

Chapter Administrative Rules
Title 17, chapter 24, ARM Reclamation.

Chapter Case Notes
No Constitutional Limitation on Appropriation of Resource Indemnity Trust Funds Beyond Principal: Nothing in the Montana Constitution as a whole or in the plain language of Art. IX, sec. 2, Mont. Const., places a limitation on the appropriation of resource indemnity trust funds beyond the $100 million principal, which must remain inviolate. Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989).

Trust Funds Not Limited to Reclamation of Land Disturbed by Taking of Natural Resources: The appropriation or allocation of resource indemnity trust funds is not limited to the reclamation of lands disturbed by the taking of natural resources. Therefore, the use of funds for programs related to improving the total environment does not violate the fiduciary duty of the state toward the trust in allocating trust funds. Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989).

Right to Explore for Minerals as Including Right to Conduct Resource Inventory Operations: A mineral reservation executed in the 1940s, allowing the grantor to use the surface to explore for minerals, includes the right to conduct resource inventory operations and other activities necessary to compile the environmental information that must be obtained before the state will allow mining operations to commence. W. Energy Co. v. Genie Land Co., 195 M 202, 635 P2d 1297, 38 St. Rep. 1791 (1981).

Chapter Law Review Articles
Constitutional Challenges to the Surface Mining Control and Reclamation Act, Habein, 43 Mont. L. Rev. 235 (1982).

Recent Developments in Montana Natural Resources Law, Roberts & Stone, 38 Mont. L. Rev. 169 (1977).

Montana's Statutory Protection of Surface Owners From Strip Mining and Resultant Problems of Mineral Deed Construction, Karell, 37 Mont. L. Rev. 347 (1976).

Strip Mining on Reservation Lands—Protecting the Environment and the Rights of Indian Allotment Owners, Anderson, 35 Mont. L. Rev. 209 (1974).

Strip Mining Reclamation Requirements in Montana—A Critique, Muckelston, 32 Mont. L. Rev. 66 (1971).

A Constitutional Challenge to the Surface Mining Control and Reclamation Act, Meissner, 2 Pub. Land L. Rev. 138 (1981).

Abandonment and Reclamation of Energy Sites and Facilities: The United States, Zillman & Smith, 10 J. Energy & Nat. Resources L. 46 (1992).

Mining Waste and the Resource Conservation and Recovery Act: An Overview, Van Bever, 7 J. Min. L. & Pol'y 249 (1991).

Soil Cleanup Standards for Mining and Petroleum Sites—A Status Review, Brown & Logsdon, 37 Rocky Mtn. Min. L. Inst. Proc. 5-1 (1991).

Coal Resource Development and Land Use Planning: The Demands of SMCRA, Quinn, 3 Nat. Resources & Env't 24(7) (1989).

Keystone Bituminous Coal Association v. DeBenedictis [107 S. Ct. 1232]: A "Regulatory Taking"?, 89 W. Va. L. Rev. 803 (1987).

Regulatory Enforcement of the Surface Mine Control and Reclamation Act of 1977, P L 95-87: A Comparison of State and Federal Compliance in Three Midwestern States, Lowe, 27 Nat. Resources J. 201 (1987).

Chapter Collateral References

Mines and Minerals *key* 120 through 125.

58 C.J.S. Mines and Minerals §§335, 362 through 370, 381, 383.

53A Am. Jur. 2d Mines and Minerals §260.

Validity, construction, and application of state hazardous waste regulations. 86 ALR 4th 401.

Measure and elements of damages for pollution of well or spring. 76 ALR 4th 629.

Standing to sue for violation of state environmental regulatory statute. 66 ALR 4th 685.

Validity and construction of statutes regulating strip mining. 86 ALR 3d 27.

Statutory or contractual obligation to restore surface after strip or other surface mining. 1 ALR 2d 575.

Part 1
Strip and Underground Mine Siting

Part Administrative Rules

Title 17, chapter 24, subchapter 18, ARM Rules governing Montana strip- and underground-mine siting law.

Part Collateral References

Validity and construction of statutes regulating strip mining. 86 ALR 3d 27.

82-4-102. Policy and purpose.

Compiler's Comments

1995 Amendment: Chapter 418 in (2)(b), after "rules", deleted "to suspend and revoke permits, and to conduct hearings". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Collateral References

53A Am. Jur. 2d Mines and Minerals §§255 through 258.

82-4-103. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of land commissioners as provided for in Article X, section 4, of the constitution of this state"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of state lands provided for in Title 2, chapter 15, part 32"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1981 Amendment: Substituted "82-4-203" for "82-4-203(12)" in (3).

82-4-111. Rules of board — hearings.

Compiler's Comments

1995 Amendment: Chapter 418 deleted (1) and (2) that read: "(1) issue, after an opportunity for a hearing, orders requiring an operator to adopt the remedial measures necessary to comply with this part and rules adopted under this part;

(2) issue, after an opportunity for a hearing, a final order directing the department to revoke a permit when the requirements set forth by the notice of noncompliance, order of suspension, or an order of the board requiring remedial measures have not been complied with according to the terms herein"; after "part" inserted "and rules regarding filing of reports, issuance of permits, and other matters of procedure and administration"; and deleted (4) that read: "(4) conduct hearings under provisions of this part or rules adopted by the board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 17, chapter 24, subchapter 18, ARM Rules governing Montana strip- and underground-mine siting law.

Collateral References

53A Am. Jur. 2d Mines and Minerals §257.

82-4-112. Administration.

Compiler's Comments

2001 Amendment: Chapter 79 in (1)(b) after "issue" deleted "after an opportunity for hearing"; in (1)(d) substituted "issue an order" for "issue, after opportunity for hearing, a final order" and after "notice of" substituted "violation" for "noncompliance"; deleted former (6) that read: "(6) conduct hearings under provisions of this part or rules adopted by the board"; inserted (2) requiring the board to conduct hearings under this part; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1995 Amendment: Chapter 418 inserted (2) concerning remedial measures to comply with rules; inserted (4) concerning final order revoking permit; inserted (6) concerning hearings; and deleted former (6) that read: "(6) adopt rules with respect to the filing of reports, the issuance of permits, and other matters of procedure and administration". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 17, chapter 24, subchapter 18, ARM Rules governing Montana strip- and underground-mine siting law.

82-4-113. Receipts paid into general fund.

Compiler's Comments

1981 Amendment: Substituted "general fund" for language dealing with a special agency account, the mining and reclamation fund, and its administration; substituted "penalties" for "forfeit funds".

82-4-122. Application and approval of permit.

Compiler's Comments

2001 Amendment: Chapter 299 in (2) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

Administrative Rules

ARM 17.24.1803 through 17.24.1810 Permit application — contents.

ARM 17.24.1816 Reclamation plan — additional specific requirements.

82-4-123. Permit fee and surety bond.

Compiler's Comments

1995 Amendment: Chapter 418 in second sentence, after "determined by the", substituted "department" for "board on the recommendation of the commissioner"; and in third sentence, after "limits, the", substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

82-4-124. Permit — authority under and renewal.

Collateral References

53A Am. Jur. 2d Mines and Minerals §259.

82-4-125. Refusal of permit.

Administrative Rules

ARM 17.24.1815 Performance standards.

82-4-129. Noncompliance — suspension of permits.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), in first sentence in two places after "department", deleted reference to Board and near end substituted "director of the department" for "commissioner" and in second sentence, after "certified", deleted "or registered"; near end of second sentence of (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

82-4-130. Procedure for hearings.

Compiler's Comments

2001 Amendment: Chapter 79 inserted (1) allowing an aggrieved person to request a hearing; in (2) substituted language applying the contested case provisions of the Montana Administrative Procedure Act to the hearing for former sentence that read: "All hearing and appeal procedures shall be in accordance with the Montana Administrative Procedure Act"; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

82-4-141. Violation — penalty.

Compiler's Comments

1995 Amendment: Chapter 418 in (2) substituted "director" for "commissioner". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Collateral References

Mines and Minerals *key* 92.11.

58 C.J.S. Mines and Minerals §§340 through 342.

82-4-142. Mandamus to compel enforcement.

Collateral References

53A Am. Jur. 2d Mines and Minerals §§377, 386.

Part 2
Coal and Uranium Mine Reclamation

Part Compiler's Comments

Sections Amended and Created — Effective Date: Chapter 550, L. 1979, amended 16 sections of this part and created one section for the purpose of bringing state law into compliance with federal law requiring reclamation of strip-mined lands. The effective date of Chapter 550 was delayed pending approval by the Secretary of the Interior of the state plan implementing the federal requirements. Section 19(1), Ch. 550, L. 1979, provided: "(1) This act does not become effective until the secretary of interior has conditionally or finally approved the state's permanent regulatory program under Public Law 95-87; however, rules pursuant to this act may be adopted pursuant to Title 2, chapter 4, prior to the effective date of this act and shall become effective only on the effective date of this act." Conditional approval of the state implementation plan was granted effective April 1, 1980. Sections amended were 82-4-202 through 82-4-205, 82-4-221 through 82-4-223, 82-4-225, 82-4-227, 82-4-231, 82-4-232, 82-4-235, 82-4-239, 82-4-251, 82-4-252, and 82-4-254. Section 82-4-228 was created.

Temporary Provisions: Section 19(2), Ch. 550, L. 1979, provided: "(2) Within 2 months of the secretary of interior's approval of the state's permanent regulatory program pursuant to section 503 of Public Law 95-87, as amended, each operator shall submit to the department a permit revision application to bring its permit into compliance with this act. The burden shall be on the applicant to demonstrate that the application complies with all the requirements of this act. The department shall make a written finding granting or denying the application within 5 months of its submittal. Eight months after the secretary of interior's approval of the state's permanent regulatory program, no operator may conduct strip- or underground-mining operations unless the operator's permit has been revised to conform to the requirements of this act and approved by the department. Eight months after the secretary of interior's approval of the state's regulatory program, all strip- or underground-mining operations must be conducted in accordance with Title 82, chapter 2, part 4, as amended by this act." Conditional approval of the state implementation plan was granted effective April 1, 1980.

Section 27, Ch. 325, L. 1973, read: "Every operator shall within ninety (90) days after the effective date of this act file with the department an application for a permit."

Section 28, Ch. 325, L. 1973, read: "Ninety (90) days after the effective date of this act, the state shall proceed to cancel, according to their terms, all existing contracts entered into pursuant to chapter 245, Laws of Montana, 1967. If the contract does not provide according to its terms, for the cancellation, it shall be terminated and void within two hundred seventy (270) days from the effective date of this act."

Severability Clauses: Section 20, Ch. 550, L. 1979, and sec. 25, Ch. 325, L. 1973, were severability clauses.

Part Administrative Rules

Title 17, chapter 24, subchapters 3 through 13, ARM Rules governing The Montana Strip and Underground Mine Reclamation Act.

Title 24, chapter 30, subchapter 13, ARM Mine safety and health.

Part Law Review Articles

Constitutional Challenges to the Surface Mining Control and Reclamation Act, Habein, 43 Mont. L. Rev. 235 (1982).

Part Collateral References

Mines and Minerals *key* 35, 92.9.

58 C.J.S. Mines and Minerals §§3, 4, 6 through 17, 108.

Validity and construction of statutes providing for reversion of mineral estates for abandonment or nonuse. 16 ALR 4th 1029.

Grant, lease, exception, or reservation of "oil, gas, and other minerals", as including coal or metallic ores. 59 ALR 3d 1146.

Smoke or other air pollution by coal mine — regulation. 78 ALR 2d 1353.

Penalties under 30 USCS §1268 for violating Surface Mining Control and Reclamation Act. 82 ALR Fed. 218.

Coal: what constitutes "imminent danger", within provisions of Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. §801, et seq.) requiring Secretary of the Interior, upon finding that imminent danger exists in coal mine, to order all persons withdrawn therefrom until danger no longer exists. 25 ALR Fed. 646.

82-4-201. Short title.

Attorney General's Opinions

Application of Act to Indian Reservations: The Montana Strip and Underground Mine Reclamation Act is not applicable to the prospecting for, mining by strip-mining methods, or removal of coal on lands within the Northern Cheyenne Indian Reservation covered by a coal lease from the Northern Cheyenne Tribe without the State of Montana acting under 25 U.S.C. §1322 to obtain jurisdiction for enforcement of the Act upon Indian lands and the Northern Cheyenne Tribe granting the State of Montana jurisdiction to enforce the Act. 35 A.G. Op. 54 (1973).

82-4-202. Policy — findings.

Case Notes

Mining Held to Be Precondition for Permit Renewal — Two-Year Extension Provision Applicable to Three-Year Term for Mining — Construction and Purpose of Statute: In 1984, the Department of State Lands (now Department of Natural Resources and Conservation) issued Montco a 5-year mining permit. Montco performed no site preparation or other work during the first 3 years after the permit was issued, but Montco applied for and was granted a 2-year extension of the mining deadline. During the first 4 years of the permit, the permit was under challenge in administrative and judicial proceedings. As the 5-year term came to an end, Montco applied for a 5-year renewal, and renewal was granted by the Department. When 3 years of that 5-year period came to an end with Montco having accomplished no work at the site, Montco applied for and was granted another 2-year extension, although throughout this second 5-year period, there were no formal administrative or judicial proceedings challenging the permit. After Montco asked for another 5-year extension of the permit, it was denied by the Department, but the District Court granted summary judgment for Montco and against intervenors, requiring that another 5-year extension be granted. The Supreme Court followed the rules of statutory construction preventing part of a statute from having no effect, prohibiting a court from inserting omitted language, and prohibiting absurd results and held that: (1) the period for a 2-year renewal applies only to the first 3-year period for commencement of mining; (2) the 3-year period for commencement of mining must be renewed for 2 years if the permittee proves that mining was not commenced because the permit was being litigated; (3) renewal of the 5-year permit term may be accomplished only by an "operator", who is defined in 82-4-203 as a person "engaged in mining"; and (4) once a permit has expired after the initial 3-year period (if no extension of the time for commencement of mining is granted) or after the 2-year extension for the permittee to commence mining, the permit may not again be renewed because, in the words of 82-4-221(1), the permittee is no longer in compliance with the requirements of "this part" and the permit has therefore expired. The Supreme Court also held that an administrative rule adopted by the Department could not be construed to require a result contrary to the Supreme Court's interpretation of the statutes and that the District Court's interpretation, automatically granting a 3-year extension of the permit itself, not only made the "must expire" language of the statute meaningless but was also contrary to the purpose of the Montana Strip and Underground Mine Reclamation Act, which seeks an orderly development of coal resources while protecting a wide range of other interests and values. The Supreme Court reversed the District Court and ordered that summary judgment be granted

against Montco and denied renewal of the permit. Montco v. Simonich, 285 M 280, 947 P2d 1047, 54 St. Rep. 1150 (1997).

Collateral References

53A Am. Jur. 2d Mines and Minerals §§255 through 257, 260.

82-4-203. Definitions.

Compiler's Comments

1997 Amendment: Chapter 196 in definition of operator inserted (d) concerning a person who is engaged in uranium mining using in situ methods; in definition of prospecting, in (a)(ii) before "mineral", deleted "natural"; and made minor changes in style. Amendment effective April 3, 1997.

Severability: Section 7, Ch. 196, L. 1997, was a severability clause.

Retroactive Applicability: Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

1995 Amendments — Composite Section: Chapter 159 in definition of prospecting, after "means", deleted "the removal of overburden, core drilling, construction of roads, or any other disturbance of the surface for the purpose of determining the location, quantity, or quality of a natural mineral deposit" and inserted (a)(ii) concerning the location, quantity, or quality of a natural mineral deposit; and made minor changes in style.

Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of land commissioners as provided for in Article X, section 4, of the constitution of this state"; deleted definition of Commissioner that read: ""Commissioner" means the commissioner of state lands provided for in 2-15-3202"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of state lands provided for in Title 2, chapter 15, part 32"; substituted definition of prime farmland for former definition that read: ""Prime farmland" means that land previously prescribed by the United States secretary of agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface-layer composition, susceptibility to flooding, and erosion characteristics and which historically has been used for intensive agricultural purposes and as defined in the Federal Register"; and made minor changes in style. Amendment effective July 1, 1995.

A style change in the chapters was slightly different. The codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 225 in definition of prospecting, after "deposit", deleted "and, on areas designated unsuitable for coal mining pursuant to 82-4-227 and 82-4-228" and after "overburden" deleted "and coal"; and made minor changes in style.

1991 Amendment: In definition of prospecting, near middle after "mineral deposit", inserted "and, on areas designated unsuitable for coal mining pursuant to 82-4-227 and 82-4-228, the gathering of surface or subsurface geologic, physical, or chemical data by mapping, trenching, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal in an area and the gathering of environmental data to establish the conditions of an area before beginning strip- or underground-coal-mining and reclamation operations under this part".

1987 Amendment: Inserted definitions of coal preparation and coal preparation plant; in definition of operation inserted "including coal preparation plants"; in definition of operator, at end, inserted "or a person engaged in operating a coal preparation plant"; inserted definition of remining; and in definition of strip mining, at end, inserted two sentences stating what the term includes and does not include.

1981 Amendment: Substituted "minable" for "strippable" in (12).

Administrative Rules

ARM 17.24.301 Definitions.

ARM 17.24.834 Remining — applicability.

Case Notes

Mining Held to Be Precondition for Permit Renewal — Two-Year Extension Provision Applicable to Three-Year Term for Mining — Construction and Purpose of Statute: In 1984, the Department of State Lands (now Department of Natural Resources and Conservation) issued Montco a 5-year mining permit. Montco performed no site preparation or other work during the

first 3 years after the permit was issued, but Montco applied for and was granted a 2-year extension of the mining deadline. During the first 4 years of the permit, the permit was under challenge in administrative and judicial proceedings. As the 5-year term came to an end, Montco applied for a 5-year renewal, and renewal was granted by the Department. When 3 years of that 5-year period came to an end with Montco having accomplished no work at the site, Montco applied for and was granted another 2-year extension, although throughout this second 5-year period, there were no formal administrative or judicial proceedings challenging the permit. After Montco asked for another 5-year extension of the permit, it was denied by the Department, but the District Court granted summary judgment for Montco and against intervenors, requiring that another 5-year extension be granted. The Supreme Court followed the rules of statutory construction preventing part of a statute from having no effect, prohibiting a court from inserting omitted language, and prohibiting absurd results and held that: (1) the period for a 2-year renewal applies only to the first 3-year period for commencement of mining; (2) the 3-year period for commencement of mining must be renewed for 2 years if the permittee proves that mining was not commenced because the permit was being litigated; (3) renewal of the 5-year permit term may be accomplished only by an "operator", who is defined in this section as a person "engaged in mining"; and (4) once a permit has expired after the initial 3-year period (if no extension of the time for commencement of mining is granted) or after the 2-year extension for the permittee to commence mining, the permit may not again be renewed because, in the words of 82-4-221(1), the permittee is no longer in compliance with the requirements of "this part" and the permit has therefore expired. The Supreme Court also held that an administrative rule adopted by the Department could not be construed to require a result contrary to the Supreme Court's interpretation of the statutes and that the District Court's interpretation, automatically granting a 3-year extension of the permit itself, not only made the "must expire" language of the statute meaningless but was also contrary to the purpose of the Montana Strip and Underground Mine Reclamation Act, which seeks an orderly development of coal resources while protecting a wide range of other interests and values. The Supreme Court reversed the District Court and ordered that summary judgment be granted against Montco and denied renewal of the permit. Montco v. Simonich, 285 M 280, 947 P2d 1047, 54 St. Rep. 1150 (1997).

82-4-204. Board rules.

Compiler's Comments

1995 Amendment: Chapter 418 deleted former (1) and (2) that read: "(1) issue orders requiring an operator to adopt the remedial measures necessary to comply with this part and rules adopted under this part;

(2) issue, after an opportunity for a hearing, a final order directing the department to revoke a permit when the requirements set forth by the notice of noncompliance, order of suspension, or an order of the board requiring remedial measures have not been complied with according to the terms herein"; deleted (4) that read: "(4) conduct hearings under provisions of this part or rules adopted by the board"; and inserted (2) concerning the adoption of rules. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 17, chapter 24, subchapters 3 through 13, ARM Rules implementing The Montana Strip and Underground Mine Reclamation Act.

Collateral References

53A Am. Jur. 2d Mines and Minerals §257.

82-4-205. Administration by department and board.

Compiler's Comments

2001 Amendment: Chapter 79 at beginning of (1)(b) after "shall" substituted "review for approval or disapproval" for "examine and pass upon"; at beginning of (1)(e) substituted "issue an order" for "issue, after opportunity for hearing, a final order" and after "notice of" substituted "violation" for "noncompliance"; in (1)(g) after "conduct" inserted "public"; deleted former (10) that read: "(10) may conduct hearings under the provisions of this part"; inserted (2) requiring the board to conduct contested case hearings under this part; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1997 Amendment: Chapter 273 deleted former (10) that read: "(10) may adopt rules with respect to the filing of reports, the issuance of permits, monitoring, and other matters of procedure and administration"; and made minor changes in style. Amendment effective April 16, 1997.

Saving Clause: Section 6, Ch. 273, L. 1997, was a saving clause.

1995 Amendment: Chapter 418 inserted (3) concerning remedial measures; inserted (5) concerning final order revoking permit; inserted (7) concerning hearings; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 17, chapter 24, subchapters 3 through 13, ARM Rules implementing The Montana Strip and Underground Mine Reclamation Act.

82-4-206. Procedure for contested case hearings.

Compiler's Comments

2001 Amendment: Chapter 79 inserted (1) allowing an aggrieved person to request a hearing; in (2) substituted language applying the contested case provisions of the Montana Administrative Procedure Act to the hearing for former sentence that read: "All hearings and appeal procedures shall be in accordance with parts 6 and 7 of chapter 4, Title 2"; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

Administrative Rules

ARM 17.24.425 Administrative review.

82-4-221. Mining permit required.

Compiler's Comments

1995 Amendment: Chapter 159 in fourth sentence of (1) extended time for permit renewal from at least 120 but not more than 150 days prior to the renewal date to at least 240 but not more than 300 days prior to the renewal date; and made minor changes in style.

1981 Amendment: In (1) extended the time period for application for renewal of a permit from between 30 and 60 days prior to renewal date to between 120 and 150 days prior to renewal date.

Administrative Rules

ARM 17.24.412 Extension of time to commence mining.

ARM 17.24.415 Permit revisions.
ARM 17.24.416 Permit renewal.
ARM 17.24.425 Administrative review.
ARM 17.24.835 Remining — application and operating requirements.
ARM 17.24.1204 Inspections in response to citizen complaints.
ARM 17.24.1221 through 17.24.1228 Small operator assistance program.
ARM 17.24.1301 Modification of existing permits — issuance of revisions and permits.

Case Notes

Mining Held to Be Precondition for Permit Renewal — Two-Year Extension Provision Applicable to Three-Year Term for Mining — Construction and Purpose of Statute: In 1984, the Department of State Lands (now Department of Natural Resources and Conservation) issued Montco a 5-year mining permit. Montco performed no site preparation or other work during the first 3 years after the permit was issued, but Montco applied for and was granted a 2-year extension of the mining deadline. During the first 4 years of the permit, the permit was under challenge in administrative and judicial proceedings. As the 5-year term came to an end, Montco applied for a 5-year renewal, and renewal was granted by the Department. When 3 years of that 5-year period came to an end with Montco having accomplished no work at the site, Montco applied for and was granted another 2-year extension, although throughout this second 5-year period, there were no formal administrative or judicial proceedings challenging the permit. After Montco asked for another 5-year extension of the permit, it was denied by the Department, but the District Court granted summary judgment for Montco and against intervenors, requiring that another 5-year extension be granted. The Supreme Court followed the rules of statutory construction preventing part of a statute from having no effect, prohibiting a court from inserting omitted language, and prohibiting absurd results and held that: (1) the period for a 2-year renewal applies only to the first 3-year period for commencement of mining; (2) the 3-year period for commencement of mining must be renewed for 2 years if the permittee proves that mining was not commenced because the permit was being litigated; (3) renewal of the 5-year permit term may be accomplished only by an "operator", who is defined in 82-4-203 as a person "engaged in mining"; and (4) once a permit has expired after the initial 3-year period (if no extension of the time for commencement of mining is granted) or after the 2-year extension for the permittee to commence mining, the permit may not again be renewed because, in the words of subsection (1) of this section, the permittee is no longer in compliance with the requirements of "this part" and the permit has therefore expired. The Supreme Court also held that an administrative rule adopted by the Department could not be construed to require a result contrary to the Supreme Court's interpretation of the statutes and that the District Court's interpretation, automatically granting a 3-year extension of the permit itself, not only made the "must expire" language of the statute meaningless but was also contrary to the purpose of the Montana Strip and Underground Mine Reclamation Act, which seeks an orderly development of coal resources while protecting a wide range of other interests and values. The Supreme Court reversed the District Court and ordered that summary judgment be granted against Montco and denied renewal of the permit. Montco v. Simonich, 285 M 280, 947 P2d 1047, 54 St. Rep. 1150 (1997).

Collateral References

53A Am. Jur. 2d Mines and Minerals §259.

82-4-222. Permit application.

Compiler's Comments

1991 Amendment: In (1)(i), (3), and two places in (5), after "strip-", inserted "mining"; in (1)(m), after "surface", inserted "water"; and made minor changes in style.

1987 Amendment: Inserted (1)(h) referring to record of outstanding reclamation fees.

1983 Amendment: In (1)(b) twice and in (1)(c), after "owners of record" inserted "and any purchasers under contracts for deed".

1981 Amendment: Deleted "federal" after "has received" in the last sentence of (3).

Administrative Rules

Title 17, chapter 24, subchapter 3, ARM Definitions and strip mine permit application requirements.

Title 17, chapter 24, subchapter 4, ARM Mine permit and test pit prospecting permit procedures.

ARM 17.24.835 Remining — application and operating requirements.

ARM 17.24.901 and 17.24.902 Underground coal and uranium mining — application and review requirements.

ARM 17.24.920 Placement and disposal of underground development waste.

ARM 17.24.930 Placement and disposal of coal processing waste — special application requirements.

ARM 17.24.1301 Modification of existing permits — issuance of revisions and permits.

82-4-223. Permit fee and surety bond.

Compiler's Comments

1995 Amendment: Chapter 418 in two places in (2) and in (3) substituted "department" for "board"; and in (2), in first sentence after "determined by the", substituted "department" for "board, on the recommendation of the commissioner". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: In (1) increased fee from $50 to $100.

Administrative Rules

ARM 17.24.647 Transfer of wells.

ARM 17.24.837 Remining — bonding.

ARM 17.24.1016 Bond requirements for drilling operations.

ARM 17.24.1101 through 17.24.1121 Bonding.

82-4-225. Application for increase or reduction in permit area.

Administrative Rules

ARM 17.24.417 Permit amendment.

82-4-226. Prospecting permit.

Compiler's Comments

1997 Amendment: Chapter 196 in (8), in first sentence before "mineral", deleted "natural" and after "deposit" inserted "and that does not remove more than 250 tons of coal" and in second sentence, before "mineral", deleted "natural" and after "deposit" inserted "outside an area designated unsuitable, that does not remove more than 250 tons of coal"; and made minor changes in style. Amendment effective April 3, 1997.

Severability: Section 7, Ch. 196, L. 1997, was a severability clause.

Retroactive Applicability: Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

1995 Amendments: Chapter 159 in (8) inserted second sentence concerning exemption for prospecting that does not disturb natural land surface; and made minor changes in style.

Chapter 418 in (8), in fourth sentence, substituted "board's" for "department's". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 225 in (1), at beginning, substituted "Except as provided in subsection (8)" for "On and after March 16, 1973"; inserted (8) relating to prospecting that is not conducted in an area designated unsuitable for coal mining and not conducted to determine the location, quality, or quantity of a natural mineral deposit; and made minor changes in style.

Administrative Rules

Title 17, chapter 24, subchapter 4, ARM Mine permit and test pit prospecting permit procedures.

Title 17, chapter 24, subchapter 10, ARM Strip and Underground Mine Reclamation Act — prospecting.

82-4-227. Refusal of permit.

Compiler's Comments

1995 Amendment: Chapter 418 in (3)(b)(i) substituted "department" for "regulatory authority"; in (4), in second sentence, substituted "director of the department" for "commissioner"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 225 in (11), near beginning after "applicant", inserted "or by any person who owns or controls the applicant"; near end of (11) and near beginning of (12) substituted "amendment, other than an incidental boundary revision" for "major revision"; in (13), before "lands", deleted "private"; and made minor changes in style.

Federal Statute: Public Law 95-87 relating to surface mining control and reclamation is codified at 30 U.S.C. 1201, et seq.

Administrative Rules

ARM 17.24.413 Conditions of permit.

ARM 17.24.427 Change of contractor.

ARM 17.24.516 Adjacent strip and underground mining operations.

ARM 17.24.518 Buffer zones.

ARM 17.24.751 Protection and enhancement of fish, wildlife, and related environmental values.

Title 17, chapter 24, subchapter 8, ARM Alluvial valley floors, prime farm lands, alternate reclamation, and auger mining.

Title 17, chapter 24, subchapter 9, ARM Underground coal and uranium mining.

ARM 17.24.1131 through 17.24.1138 Areas upon which coal mining is prohibited.

ARM 17.24.1141 through 17.24.1148 Designation of lands unsuitable.

ARM 17.24.1303 Rules applicable to coal operations only.

82-4-228. Designation of land unsuitable for coal mining.

Administrative Rules

ARM 17.24.1138 Areas upon which coal mining is prohibited — designation process not affected.

ARM 17.24.1303 Rules applicable to coal operations only.

82-4-231. Submission of and action on reclamation plan.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 82 in (8)(c) at end substituted "at least 15 days prior to the date of issuance of the written findings pursuant to subsection (8)(f)" for "within 365 days of the date of notice provided pursuant to subsection (5)"; in (8)(f) at end of first sentence after "acceptable" deleted "or from the publication of the final environmental impact statement, whichever occurs later"; and made minor changes in style. Amendment effective March 20, 2001.

Chapter 299 in (8)(d) at beginning of first sentence and at beginning of fourth sentence and in (8)(f) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Preamble: The preamble attached to Ch. 82, L. 2001, provided: "WHEREAS, The Montana Strip and Underground Mine Reclamation Act now requires the Department of Environmental Quality to complete and publish a final environmental impact statement within 365 days of notifying the applicant that the application for a permit or a major permit amendment is administratively complete; and

WHEREAS, applications that are administratively complete may be revised significantly because of substantive deficiencies under The Montana Strip and Underground Mine Reclamation Act discovered by the Department in its subsequent acceptability review of the application; and

WHEREAS, the preparation of an environmental impact statement prior to the Department's acceptability review is inefficient; and

WHEREAS, completion of the environmental impact statement 15 days prior to the Department's written findings will allow efficient preparation of the environmental impact statement and will not delay the decision on the application."

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

1995 Amendment: Chapter 418 in (9), at end of first sentence, deleted "by the board" and in third and fourth sentences substituted "department" for "board"; in (10)(f), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: Renumbered former second sentence of (2) as (3); inserted (4) providing criteria for determining an application to be administratively complete; inserted (5) providing for notification of environmental impact statement, if required; inserted first sentence of (6) concerning publication and near end of (6), after "proposed operation", deleted "after adequate public notice" and inserted "within 30 days of receipt of the request. The department shall notify the applicant and all parties to the informal conference of its decision and the reasons therefor within 60 days of the informal conference"; in (7) substituted "The filing of written objections or a request for an informal conference shall not preclude the department from proceeding with its review of the application as specified in subsection (8)" for former text that read: "The department shall notify the applicant by certified or registered mail within 120 days after receipt of the complete application if it is or is not acceptable. The department may extend the 120 days an additional 120 days upon notification of the operator in writing. The department shall make written findings granting or denying the permit or revision application in whole or in part. If the application is not acceptable, the department shall set forth the reasons why it is not acceptable, and it may propose modifications, delete areas, or reject the entire application. A landowner, operator, or any person with an interest that is or may be adversely affected may by written notice request a hearing by the board. The hearing shall be held within 30 days of the request. No person who presided at the informal conference may either preside at the hearing or participate in the decision thereon. For purposes of the hearing, the board may order site inspections of the area pertinent to the application. The board shall notify the person by certified or registered mail and all other persons by regular mail within 20 days after the hearing of its decision. Every reclamation plan shall be subject to annual review and modification"; inserted (8) referring to Department's review and determination of acceptability of applications; and inserted (9) referring to request for hearing and hearing by the Board.

Administrative Rules

Title 17, chapter 24, subchapters 3 through 13, ARM Rules implementing The Montana Strip and Underground Mine Reclamation Act.

82-4-232. Area mining required — bond — alternative plan.

Compiler's Comments

1997 Amendment: Chapter 42 in (7), at end, substituted "82-4-222(1)(l)" for "82-4-222(1)(k)"; and made minor changes in style. Amendment effective March 12, 1997.

1995 Amendment: Chapter 418 in (7), in three places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: At end of (6)(c)(ii)(A) changed "82-4-231(3)(k)" to "82-4-231(10)(k)".

1985 Amendment: In (6) substituted language establishing procedures for release of performance bond or deposit for former text that read: "When the backfilling, grading, subsidence stabilization, water controls, and topsoiling have been completed and approved by the department, the commissioner, after public notice and opportunity for hearing, may release so much of the bond which was filed for that portion of the operation as the commissioner may determine, provided that no less than $200 per acre shall be retained by the department until such time as the planting and revegetation is done according to law and approved by the department, at which time the commissioner shall release the bond in the remaining amount. No part of the bond or deposit may be released under this subsection so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by this part or until soil productivity for prime farmlands mined for coal has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to this part. Where a silt dam is to be retained as a permanent impoundment, the portion of bond pertaining thereto may be released under this subsection so long as provisions for sound future maintenance by the operator or the landowner have been made with the department. Any person with a valid legal interest that might be adversely affected by release of the bond or the responsible head of any federal, state, or local governmental agency that has jurisdiction by law or special expertise with respect to any environmental, social, or economic

impact involved in the operation or is authorized to develop and enforce environmental standards with respect to such operations shall have the right to file written objections to the proposed release with the department within 30 days of public notice. The hearing shall be held at the state capital or, if an objector so requests, in the locality of the proposed bond release. For purposes of the hearing, the board may order site inspections of the area for which bond release is sought and other strip- or underground-mining operations carried on by the applicant in the area. Without prejudice to the rights of the objectors or the applicant or to the responsibilities of the department, the department may establish an informal conference to resolve written objections."

Source: Chapter 288, L. 1985, is based on the bond release provisions of the Surface Mining Control and Reclamation Act of 1977, the applicable provisions of which are found at 30 U.S.C. §1269(c).

Administrative Rules

Title 17, chapter 24, subchapters 3 through 13, ARM Rules implementing The Montana Strip and Underground Mine Reclamation Act.

ARM 17.24.1122 Notice of action on collateral bond.

ARM 17.24.1303 Rules applicable to coal operations only.

82-4-233. Planting of vegetation following grading of disturbed area.

Compiler's Comments

1997 Amendment: Chapter 196 in (1), at beginning, inserted exception clause; inserted (4) considering introduced species as desirable and necessary to achieve postmining land use; and made minor changes in style. Amendment effective on occurrence of contingency.

Severability: Section 7, Ch. 196, L. 1997, was a severability clause.

Retroactive Applicability: Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

Contingent Effective Date: Section 9(2), Ch. 196, L. 1997, provided: "[Section 4] [amending 82-4-233] is effective on the date that it is approved by the secretary of the United States department of the interior pursuant to 30 U.S.C. 1253." A final rule approving the amendment was made by the secretary of the interior and is found at Volume 66 of the Federal Register, pages 31530 through 31533.

Administrative Rules

ARM 17.24.401 Filing of application and notice.

ARM 17.24.638 Sediment control measures.

Title 17, chapter 24, subchapter 7, ARM Topsoiling, revegetation, and protection of wildlife and air resources.

ARM 17.24.821 Submission of alternate reclamation plan.

ARM 17.24.823 through 17.24.825 Alternate reclamation.

ARM 17.24.831 through 17.24.833 Auger mining.

ARM 17.24.903, 17.24.904, and 17.24.907 General performance standards — in situ processing.

ARM 17.24.924 through 17.24.927 Disposal of underground development waste.

ARM 17.24.932 Disposal of coal processing waste.

ARM 17.24.1006 through 17.24.1013 Prospecting.

ARM 17.24.1303 Rules applicable to coal operations only.

82-4-234. Commencement of reclamation.

Administrative Rules

ARM 17.24.638 Sediment control measures.

ARM 17.24.713 Timing of seeding and planting.

82-4-235. Inspection of vegetation — final bond release.

Compiler's Comments

1997 Amendment: (Version effective on occurrence of contingency) Chapter 196 in (1) deleted former third sentence that read: "For land that was seeded using a seed mix that included a substantial component of introduced species approved by the department pursuant to 82-4-233(2) and on which reclaimed vegetation otherwise meets the requirements of 82-4-233(1), approval of reclaimed vegetation for release of bond may not be withheld on the basis that introduced species compose a major or dominant component" and at beginning of third sentence deleted "Except as

provided in subsection (2)(b)"; and made minor changes in style. Amendment effective April 3, 1997.

Severability: Section 7, Ch. 196, L. 1997, was a severability clause.

Retroactive Applicability: Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

1995 Amendment: (Version effective on occurrence of contingency) Chapter 193 in first sentence of (1), after "possible", inserted "following an application for final bond release", inserted third sentence prohibiting withholding of approval of reclaimed vegetation bond on reclaimed land meeting requirements and using introduced species approved by Department, and at beginning of fourth sentence inserted exception clause and substituted "May 2" for "February 2"; inserted (2)(a) providing criteria for approval to release a bond on land upon which coal was removed prior to May 2, 1978; inserted (2)(b) authorizing interseeding or supplemental planting without liability on land meeting criteria; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 193, L. 1995, provided: "This bill is intended to provide criteria for approving as successful reclamation reclaimed vegetation seeded in the 1970s and early 1980s using seed mixes that included grass species approved by the department of state lands [functions now transferred to department of environmental quality]. At that time, availability of native grass seed was very limited and introduced species in combination with native species were routinely approved. Because introduced grass species can be aggressive competitors, many of these lands are now dominated by introduced species. Current standards require dominance by native species as a condition for release of bond, and hence, mine operators might be required to plow and reseed, restarting the 10-year bond liability period. Reclaimed vegetation dominated by introduced species has demonstrated its ability to withstand climatic extremes, support grazing of livestock, provide habitat for wildlife, and control erosion. The date of May 3, 1978, is the date on which reclamation performance standards of the federal Surface Mining Control and Reclamation Act of 1977 became effective on existing coal mining operations in Montana."

Contingent Effective Date: Section 2, Ch. 193, L. 1995, provided: "[This act] is effective on the date that it is approved by the secretary of the United States department of the interior pursuant to 30 U.S.C. 1253. If the secretary disapproves any portion of [this act], those provisions that are approved become effective on the date of approval." A final rule approving the amendment was made by the secretary of the interior and is found at Volume 66 of the Federal Register, pages 31530 through 31533.

Administrative Rules

ARM 17.24.711 Establishment of vegetation.
ARM 17.24.713 Timing of seeding and planting.
ARM 17.24.714 Cover crops and mulching.
ARM 17.24.716 through 17.24.721 and 17.24.723 through 17.24.726 Revegetation methods.
ARM 17.24.728 Composition of vegetation.
ARM 17.24.730 through 17.24.733 Revegetation.
ARM 17.24.1017 Bond release procedures for drilling operations.
Title 17, chapter 24, subchapter 11, ARM Bonding.
ARM 17.24.1201 through 17.24.1203 and 17.24.1205 Inspections.
ARM 17.24.1303 Rules applicable to coal operations only.

82-4-237. Operator to file annual reports.

Compiler's Comments

1983 Amendment: In (1), inserted second sentence authorizing Department to allow annual report for each operation in lieu of annual report on each permit; in third sentence of (1), substituted "an annual" for "this"; and at end of (1)(a), inserted "or numbers".

Statement of Intent: The statement of intent attached to HB 214 (Ch. 68, L. 1983) provided: "This bill grants the department discretionary authority to allow mine operators under the Strip and Underground Mine Reclamation Act to file one report for each operation rather than a separate report for each permit. A statement of intent is necessary because the department will be required to amend its present rules concerning annual reports and provide a procedure for determining when the operator is required to file the report. It is the intent of the Legislature to facilitate department review of annual reports and ease the burden of filing reports on operators with more than one permit."

Administrative Rules
ARM 17.24.414 Review of existing permits.
ARM 17.24.1129 Annual report.
ARM 17.24.1201 through 17.24.1203 and 17.24.1205 Inspections.

82-4-238. Successor operator.

Administrative Rules
ARM 17.24.418 Transfer of permits.
ARM 17.24.427 Change of contractor.

82-4-239. Reclamation.

Compiler's Comments
1995 Amendment: Chapter 418 in (1), in two places in (2), and in (6) substituted "department" for "board"; in (3), in second sentence, substituted "director of the department" for "commissioner"; near beginning of (4)(a) inserted "shall take the actions described in subsection (4)(b)"; at beginning of (4)(c) substituted "Action taken under subsection (4)(b)" for "This act"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.
1983 Amendment: In second paragraph of (4)(c), after "if known" inserted "and any purchaser under contract for deed, if known"; and after "if" substituted "neither is" for "not".

Administrative Rules
ARM 17.24.836 Remining — eligibility for abandoned mine land status.

82-4-240. Reclamation of lands after bond forfeited.

Compiler's Comments
1995 Amendment: Chapter 418 substituted "department" for "board". Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.
1981 Amendment: Deleted "and use moneys appropriated from the mining and reclamation fund for such purposes" from end of section.

82-4-241. Receipts paid into general fund — disposition of bond forfeiture money.

Compiler's Comments
2001 Amendment: Chapter 338 inserted (2) concerning use of bond forfeiture money; inserted (3) concerning deposit of certain funds in environmental rehabilitation and response account; and made minor changes in style. Amendment effective July 1, 2001.
Severability: Section 8, Ch. 338, L. 2001, was a severability clause.
1981 Amendment: Substituted "general fund" for language dealing with a special agency account, the mining and reclamation fund, and its administration and substituted "penalties" for "forfeit funds".

82-4-242. Funds received by department.

Compiler's Comments
1995 Amendment: Chapter 418 substituted "department" for "board". Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules
ARM 17.24.836 Remining — eligibility for abandoned mine land status.

82-4-243. Subsidence.

Compiler's Comments
Severability: Section 7, Ch. 196, L. 1997, was a severability clause.

Retroactive Applicability: Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

Effective Date: Section 9(1), Ch. 196, L. 1997, provided: "Except as provided in subsection (2) [providing a separate effective date for the 1997 amendment to 82-4-233], [this act] is effective on passage and approval." Approved April 3, 1997.

82-4-250. Operating permit revocation — permit transfer.

Compiler's Comments

Effective Date: Section 3, Ch. 522, L. 2001, provided that this section is effective on passage and approval. Approved May 1, 2001.

Applicability: Section 4, Ch. 522, L. 2001, provided: "[Section 1] [82-4-250] applies to mine operating permits that are in effect as of [the effective date of this act] [effective May 1, 2001] and applies retroactively, within the meaning of 1-2-109, to permits that were revoked no more than 5 years before [the effective date of this act]."

82-4-251. Noncompliance — suspension of permits.

Compiler's Comments

1995 Amendment: Chapter 418 throughout section substituted "director of the department" or "director" for "commissioner"; in (3), in fourth sentence, and in (4), in second sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: Deleted last sentence of (4), which read: "The department may not issue any additional permits to an operator who has repeatedly been in noncompliance or violation of this part."

1981 Amendment: Substituted "the operation" for "strip- or underground-coal-mining and reclamation operations" in two places in (1); substituted "the operation" for "strip or underground mining and reclamation" in (2); substituted "the operation" for "strip or underground mining and reclamation" in (3); deleted "strip or underground mining or reclamation" in first sentence of (5); substituted "A person" for "An operator" at the beginning of (6); substituted "cessation" for "abatement" in the first sentence of (6).

Administrative Rules

ARM 17.24.427 Change of contractor.
ARM 17.24.1201 through 17.24.1203 Inspections.
ARM 17.24.1205 through 17.24.1210 Notices — orders of abatement and cessation.
ARM 17.24.1213 through 17.24.1216 Suspension and revocation of permits.
ARM 17.24.1307 through 17.24.1309 Litigation expenses.

82-4-252. Mandamus.

Compiler's Comments

1981 Amendment: Substituted "or" for "in" before "any rule" in (3)(b).

Collateral References

Mines and Minerals *key* 92.11.
53A Am. Jur. 2d Mines and Minerals §§377, 386.

82-4-253. Suit for damage to water supply.

Compiler's Comments

1997 Amendment: Chapter 42 in (2), in first sentence, substituted "section" for "subsection"; and made minor changes in style. Amendment effective March 12, 1997.

Administrative Rules

ARM 17.24.648 Water rights and replacement.

Collateral References

58 C.J.S. Mines and Minerals §428.
53A Am. Jur. 2d Mines and Minerals §§357 through 361.

82-4-254. Violation — penalty — waiver.

Compiler's Comments

2001 Amendment: Chapter 79 in (3) in second sentence after "violation" inserted "stating the reason for the request" and after "hearing" inserted "before the board under 82-4-206", in third sentence after "10 days after" inserted "issuing the", in fourth sentence after "hearing" substituted "the board" for "or after the time for requesting a hearing has expired, the department" and after "violation and" inserted "if the board finds that the violation has occurred", and inserted fifth sentence regarding department action if the time for requesting a hearing expires; in (4) near beginning after "director of" substituted "the department" for "environmental quality"; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1997 Amendment: Chapter 42 in (4), in introductory clause, substituted "director of environmental quality" for "commissioner"; and made minor changes in style. Amendment effective March 12, 1997.

1995 Amendment: Chapter 418 in (1), in second sentence after "board", deleted "or department" and after "order of the" substituted "department" for "commissioner"; in (2), in second sentence after "board", deleted "of land commissioners"; in (3), in fourth sentence after "expired, the", substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendments: Chapter 24 in (2) near end of first sentence, before "the administration", changed "or impairs" to "and does not impair".

Chapter 217 in (1) near middle of subsection, after "$750 for each day", inserted "up to 30 days" and inserted last sentence referring to actions Department may take in cases of continued failure to abate.

Source: Chapter 217, L. 1985, is based on language contained in 30 C.F.R. 845.15(b)(2), a rule adopted by the Office of Surface Mining in 1982. The language of subsection (1) imposing a $750 penalty per day is based on the penalty provisions of the Surface Mining Control and Reclamation Act of 1977, found at 30 U.S.C. 1268(h).

1983 Amendment: At beginning of (1), inserted exception clause; and inserted (2) referring to waiver of penalty.

Statement of Intent: The statement of intent attached to HB 615 (Ch. 499, L. 1983) provided: "A statement of intent is required for this bill because it grants rulemaking authority to the Board of Land Commissioners [functions now transferred to Board of Environmental Review] for the issuance of waivers of civil penalties for minor violations of the Strip and Underground Mine Reclamation Act.

Section 1 of the bill allows the Board to adopt rules concerning the issuance of waivers for civil penalties if the underlying violation does not pose potential harm to public health, public safety, or the environment or impair administration of the Act. It is the legislature's intent that the Board's rules prescribe specific criteria that will be used by the Department of State Lands [functions now transferred to Department of Environmental Quality] in determining whether or not a violation poses potential harm to the public health, public safety, or the environment or threatens to impair the administration of the Strip and Underground Mine Reclamation Act. The rules must also establish a procedure for the issuance of waivers, which must include a requirement that the Department of State Lands [functions now transferred to Department of Environmental Quality]

give notice of the violation and waiver to the permittee and place such notice in the permittee's file kept by the department."

1981 Amendment: Reworded the language of subsection (1) to clarify that "term or condition" refers to a permit.

Administrative Rules

ARM 17.24.1211 and 17.24.1212 Assessment and waiver of civil penalties — point system.
ARM 17.24.1217 through 17.24.1220 Individual civil penalties.
ARM 17.24.1246 through 17.24.1255 Restrictions on employee financial interests.

Collateral References

Mines and Minerals *key* 92.11.
58 C.J.S. Mines and Minerals §§340 through 342.

Part 3
Metal Mine Reclamation

Part Compiler's Comments

Severability Clause: Section 25, Ch. 252, L. 1971, read: "The provisions of this act are severable, and if any part or provision thereof shall be held void in decision of the court so holding shall not affect or impair any of the remaining parts of the provisions of this act that are severable from the invalid applications."

Part Administrative Rules

Title 17, chapter 24, subchapter 1, ARM Rules governing Montana hard-rock mining reclamation law.

Part Case Notes

Mining Permit Not Required Prior to Condemnation: Plaintiff contends that since 70-30-111 requires the use for condemned property to be "authorized by law" before condemnation is allowed, the obtaining of a valid mining permit is a condition precedent to condemnation. Section 70-30-102 declares mining to be a public use. It is unquestioned that the Anaconda Co. is engaged in mining operations. To find that a mining permit must be obtained prior to condemnation would be inconsistent with statutory authority and contrary to the public policy of providing expediency in eminent domain proceedings. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132, 37 St. Rep. 790 (1980).

Part Law Review Articles

Re-claiming Butte: The Doctrine of Subjacent Support, McCarthy, 49 Mont. L. Rev. 267 (1988).

Part Collateral References

Validity and construction of statutes providing for reversion of mineral estates for abandonment or nonuse. 16 ALR 4th 1029.

82-4-302. Purpose.

Compiler's Comments

2000 Amendment: Chapter 7 substituted (1)(a) through (1)(h) enumerating purposes of part for former text that read: "(a) that the usefulness, productivity, and scenic values of all lands and surface waters involved in mining and mining exploration within the boundaries and lawful jurisdiction of the state will receive the greatest reasonable degree of protection and reclamation to beneficial use;

(b) authority for cooperation between private and governmental entities in carrying this part into effect;

(c) for the recognition of the recreational and aesthetic values of land as a benefit to the state of Montana; and

(d) priorities and values to the aesthetics of our landscape, waters, and ground cover"; and made minor changes in style. Amendment effective May 18, 2000.

Applicability: Section 4, Ch. 7, Sp. L. May 2000, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies retroactively, within the meaning of 1-2-109, to permits and permit amendments approved by the department after September 30, 1995.

(2) Section 82-4-336(9)(b)(ii) and (9)(b)(iii) do not apply to any reclamation plan approved by the department for a mine at which mining operations have permanently ceased on [the effective date of this act] [effective May 18, 2000].

(3) Section 82-4-336(9)(c) does not alter or abrogate any backfilling requirement imposed or approved by the department prior to [the effective date of this act]." Effective May 18, 2000.

Administrative Rules

ARM 17.24.106 Exploration drill hole plugging.

82-4-303. Definitions.

Compiler's Comments

2001 Amendment: Chapter 488 in definition of disturbed land in second sentence near middle after "roads, conveyor systems" inserted "load-out facilities". Amendment effective May 1, 2001.

Saving Clause: Section 12, Ch. 488, L. 2001, was a saving clause.

Severability: Section 13, Ch. 488, L. 2001, was a severability clause.

Applicability: Section 15, Ch. 488, L. 2001, provided: "Sections 82-4-303(6) and 82-4-338(8) apply to licenses and permits issued after [the effective date of this act] [effective May 1, 2001] and to permits issued before [the effective date of this act] [effective May 1, 2001] that are in effect on [1 year after the effective date of this act] [effective May 1, 2002]."

1999 Amendment: Chapter 507 in definition of mineral after "gravel" substituted "peat, soil materials" for "phosphate rock"; in definition of placer deposit in (a) after "in" substituted "gravel, glacial, eolian, colluvial, or alluvial deposits" for "gravel or alluvium" and inserted (b) expanding definition to include all forms of deposit except veins of quartz and other rock in place; in definition of small miner after "engages in" inserted "mining activity that is not exempt from this part pursuant to 82-4-310, that engages in" and after "business of" deleted "mining or"; in definition of surface mining in (b) after "gravel" substituted "peat, soil materials" for "phosphate rock"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(1), Ch. 507, L. 1999, provided: "[Section 1(8)] [82-4-303(8)] and [section 9(6)] [82-4-403(6)] apply to operations conducted after July 31, 1999, except that the department of environmental quality may accept small miner exclusions and issue licenses and permits to implement these provisions at any time after [the effective date of this act] [effective April 28, 1999]. [Section 1(8)] [82-4-303(8)] and [section 9(6)] [82-4-403(6)] apply to those operations upon filing of the exclusion or issuance of the license or permit."

1997 Amendment: Chapter 272 in definition of small miner, in (a) near middle after "waste materials", substituted "or, except as provided in 82-4-310, that knowingly allows other persons to engage in mining activities on land owned or controlled by the person, firm, or corporation" for "that does not remove from the earth during any calendar year material in excess of 36,500 tons in the aggregate", after "82-4-335(2)" inserted "or a permit that meets the criteria of subsection (15)(c)", deleted (a)(i)(C) that read: "(C) not operated simultaneously except during seasonal transitional periods, not to exceed 30 days", inserted (b)(ii) requiring exclusion of access roads in computing mining area, and inserted (c) limiting area disturbance to 100 acres; inserted definition of soil materials; and made minor changes in style. Amendment effective April 16, 1997.

Applicability: Section 4(1), Ch. 272, L. 1997, provided: "[Section 1(15)] [amending the definition of small miner in 82-4-303] applies to operations conducted after [the effective date of this act]." Effective April 16, 1997.

1995 Amendment: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of land commissioners or a state employee or state agency as may succeed to its powers and duties under this part"; deleted definition of Commissioner that read: ""Commissioner" means the commissioner of state lands provided for in 2-15-3202"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 472 inserted definition of amendment; and made minor changes in style. Amendment effective April 21, 1993.

Saving Clause: Section 8, Ch. 472, L. 1993, was a saving clause.

Severability: Section 9, Ch. 472, L. 1993, was a severability clause.

1991 Amendments: Chapter 283 inserted definition of Commissioner. Amendment effective July 1, 1991.

Chapter 637 inserted definition of Commissioner. Amendment effective July 1, 1991.

1989 Amendments: Chapter 93 near end of definition of exploration deleted reference to 82-4-305; and in definition of small miner, in (a)(i), substituted "an operation" for "operations". Amendment effective October 1, 1989.

Chapter 346 inserted definitions of placer deposit and placer or dredge mining; and made minor changes in phraseology. Amendment effective July 1, 1989.

Chapter 347 inserted definition of cyanide ore-processing reagent; in definition of small miner, near end of (a) after "82-4-335", inserted "except for a permit issued under 82-4-335(2)"; and made minor changes in phraseology. Amendment effective July 1, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

1989 Statement of Intent: The statement of intent attached to Ch. 347, L. 1989, provided: "A statement of intent is provided for this bill to elaborate on the type and extent of review that the department of state lands [functions now transferred to department of environmental quality] shall give to a small-miner application for an operating permit for a cyanide ore-processing facility. Moreover, the legislature anticipates that implementation of this bill will require rulemaking by the board of land commissioners [functions now transferred to board of environmental review].

While an operating permit is required for these operations, the legislature intends that, because of the size and limited scope of the operation, the application requirements in general may be substantially less rigorous than the requirements for larger proposed mine operations not under the small-miner exclusion. The department of state lands [functions now transferred to department of environmental quality] shall also attempt to review these applications in a shorter timeframe than currently needed to review operating permit applications for larger mines.

To encourage expedited review, the department of state lands [functions now transferred to department of environmental quality] shall provide clear guidance to permit applicants concerning requirements for a complete application. In particular, the guidance must help applicants prepare adequate operating and reclamation plans. While the legislature recognizes plan requirements may vary with the site and characteristics of the proposed operation, the department shall attempt to guide the applicant in a manner that minimizes applicant costs while also meeting metal mine reclamation requirements.

Finally, [section 4 of this act] [see compiler's comment to 82-4-335] exempts an existing cyanide ore-processing facility if the operator registers the facility by January 1, 1990. In order to provide ample notice to existing operators, the legislature intends that the department shall prepare the form and notify affected small miners of the form's availability and purpose as soon as possible by mail or publication, or both."

Applicability Date: Section 4, Ch. 346, L. 1989, provided: "[This act] applies to any placer or dredge mining operation for which a small-miner exemption has not been obtained before July 1, 1989."

1985 Amendments: Chapter 386 in definition of small miner acreage computation near end, after "mining", deleted "or exploration".

Chapter 453 in definition of disturbed land after "overburden", inserted "tailings, waste materials"; inserted definition of ore processing; in definition of person after "exploration for", deleted "or development" and after "earth", inserted "reprocessing of tailings or waste materials, or operation of a hard-rock mill"; in definition of small miner after "business of mining", inserted "or reprocessing of tailings or waste materials".

Administrative Rules

ARM 17.24.102 Definitions.

Case Notes

Deficient Application for Permit — Effect: Because the application for permit was deficient under the hard-rock mining law, the present mining operations on the 500 acres covered by Permit 41A cannot be continued until an adequate application is made and a valid permit pursuant to the hard-rock mining law is issued. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

82-4-304. Exemption — works performed prior to promulgation of rules.

Compiler's Comments

1995 Amendment: Chapter 204 near end of third sentence, after "mill", inserted "that does not use cyanide ore-processing reagent and"; and made minor changes in style. Amendment effective March 23, 1995.

1985 Amendment: At end of first sentence, after "82-4-321", inserted "relating to exploration and mining"; inserted second sentence referring to reprocessing of tailings or waste rock; and inserted third sentence referring to mills not located at a mine site.

Administrative Rules

ARM 17.24.166 Applicability of rules to mills.

ARM 17.24.171 Reprocessing of waste rock and tailings.

82-4-305. Exemption — small miners — written agreement.

Compiler's Comments

1999 Amendment: Chapter 507 in (7) in first sentence in two places after "reagent" inserted "or other metal leaching solvents or reagents" and in second sentence after "by the" inserted "operation using" and after "cyanide" substituted "ore-processing reagents or other metal leaching solvents or reagents" for "ore-processing operation"; inserted (10) prohibiting use of mercury by small miner except in contained facility; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(2), Ch. 507, L. 1999, provided: "[Section 2(7)] [82-4-305(7)] applies to operations for which a valid small miner exclusion had not been filed before May 1, 1999."

1997 Amendment: Chapter 272 in (1)(d), after "small miner", inserted "shall salvage and protect all soil materials for use in reclamation of that site and";in (3), in first sentence after "state's", substituted "documented cost estimate" for "actual cost" and after "exceed" substituted "$10,000" for "$5,000"; in (7) inserted last sentence excluding disturbed acreage from the statutory 5-acre limit; and made minor changes in style. Amendment effective April 16, 1997.

Applicability: Section 4(2), Ch. 272, L. 1997, provided: "[Section 2(1)(d)] [amending 82-4-305(1)(d)] applies to lands initially disturbed after May 15, 1997." Section 4(3), Ch. 272, L. 1997, provided: "[Section 2(3)] [amending 82-4-305(3)] applies to operations for which a bond was not posted prior to May 15, 1997."

1995 Amendment: Chapter 329 in (2)(a) substituted "an individual" for "a natural person"; inserted (9)(c) relating to area subject to remediation of contamination or pollution by a public agency; and made minor changes in style. Amendment effective April 5, 1995.

1993 Amendment: Chapter 598 inserted (8)(b) through (8)(d) adding additional exceptions to the small miner exemption for persons who have not paid a penalty, posted a reclamation bond, or complied with an abatement order; and made minor changes in style.

1991 Amendment: In (1) extended subsection references; and inserted (9) providing that the exemption pertaining to small miner with annual written agreement does not apply to area under permit pursuant to 82-4-335 or to area permitted pursuant to 82-4-335 and reclaimed by permittee, Department, or other state or federal agency. Amendment effective July 1, 1991.

1989 Amendments: Chapter 93 inserted (8) disallowing the exemption of certain persons unless the provisions of 82-4-360 are met; and made minor changes in phraseology and form. Amendment effective October 1, 1989.

Chapter 346 at beginning of (1) inserted exception clause; inserted (1)(d) relating to reclamation of placer or dredge mining operations; inserted (3) requiring posting of a performance bond; inserted (4) establishing liability for failure to reclaim placer or dredge operations; inserted (5) regarding notification of Department reclamation; inserted (6) relating to collection of additional reclamation costs; and made minor changes in phraseology. Amendment effective July 1, 1989.

Chapter 347 at beginning of (1) inserted exception clause; inserted (7) requiring an operating permit for cyanide ore-processing reagent operations; and made minor changes in phraseology. Amendment effective July 1, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of

environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

1989 Statement of Intent: The statement of intent attached to Ch. 347, L. 1989, provided: "A statement of intent is provided for this bill to elaborate on the type and extent of review that the department of state lands [functions now transferred to department of environmental quality] shall give to a small-miner application for an operating permit for a cyanide ore-processing facility. Moreover, the legislature anticipates that implementation of this bill will require rulemaking by the board of land commissioners [functions now transferred to board of environmental review].

While an operating permit is required for these operations, the legislature intends that, because of the size and limited scope of the operation, the application requirements in general may be substantially less rigorous than the requirements for larger proposed mine operations not under the small-miner exclusion. The department of state lands [functions now transferred to department of environmental quality] shall also attempt to review these applications in a shorter timeframe than currently needed to review operating permit applications for larger mines.

To encourage expedited review, the department of state lands [functions now transferred to department of environmental quality] shall provide clear guidance to permit applicants concerning requirements for a complete application. In particular, the guidance must help applicants prepare adequate operating and reclamation plans. While the legislature recognizes plan requirements may vary with the site and characteristics of the proposed operation, the department shall attempt to guide the applicant in a manner that minimizes applicant costs while also meeting metal mine reclamation requirements.

Finally, [section 4 of this act] [see compiler's comment to 82-4-335] exempts an existing cyanide ore-processing facility if the operator registers the facility by January 1, 1990. In order to provide ample notice to existing operators, the legislature intends that the department shall prepare the form and notify affected small miners of the form's availability and purpose as soon as possible by mail or publication, or both."

Applicability Date: Section 4, Ch. 346, L. 1989, provided: "[This act] applies to any placer or dredge mining operation for which a small-miner exemption has not been obtained before July 1, 1989."

1985 Amendment: In (2) substituted language providing requirements to obtain or continue an exemption for small-miner exemptions obtained after September 30, 1985, for former text that read: "Failure to comply with the regulations stipulated in this section will constitute a misdemeanor, and this offense will subject the owners or operators of said project to a fine of not less than $10 or more than $100, payable to the department of revenue of the state of Montana or any board, commission, or person authorized to collect said fine."

Administrative Rules

ARM 17.24.101 General provisions.

ARM 17.24.102 Definitions.

ARM 17.24.180 through 17.24.189 Small miner operating requirements.

82-4-306. Confidentiality of application information.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), in first sentence near beginning, substituted "the department from" for "the board or by the director or his staff by virtue of" and after "between the" substituted "department" for "board"; in (2) substituted "department" for "director, the board, appeals board"; in (3), after "obtained by", substituted "department" for "board, the commissioner, or department staff", after "small miners" substituted "and that is related to" for "for", and after "federal lands" substituted "when the information" for "that"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: At beginning of (1) inserted exception clause; at beginning of (2) deleted "It is further provided that", after "information" substituted "referenced in subsection (1)" for "obtained by the board or by the director or his staff by virtue of such applications", and near end, after "rules", inserted "adopted under this part"; inserted (3) authorizing Department to disclose information obtained from license applications and for exploration or mining on state and federal

lands that identifies exploration and mining activities locations and describes surface disturbance but prohibiting disclosure of proprietary geological information; and made minor changes in style. Amendment effective July 1, 1991.

1981 Amendment: Substituted "an operating permit" for "a development or an operating permit" at the end of the first sentence.

Attorney General's Opinions

Confidential Information Versus Right to Know: Confidential information contained in an application to the Department for a hard-rock mining permit cannot be made public through an environmental impact statement because the merits of public disclosure are outweighed by the need for privacy. 35 A.G. Op. 19 (1973).

82-4-308. Release by waiver.

Compiler's Comments

1995 Amendment: Chapter 418 before "department" deleted "board and". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

82-4-309. Exemption — operations on federal lands.

Administrative Rules

ARM 17.24.101 General provisions.

ARM 17.24.102 Definitions.

82-4-310. Exemption — scale and type of activity.

Compiler's Comments

1999 Amendment: Chapter 507 inserted (1)(e) regarding use of mercury in operations except in contained facility; inserted (1)(f) regarding use of cyanide ore-processing reagent or other metal leaching solvents or reagents; substituted (2) outlining when person is exempt from part when engaging in mining activity using a suction dredge for former (1)(e) and (1)(f) that read: "(e) use a suction dredge with an intake of more than 4 inches in diameter; or

(f) operate a suction dredge beyond the area of the stream bed that is naturally under water at the time of operation"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

1997 Amendment: Chapter 272 substituted (1) and (2) concerning activities to which part does not apply for former section that read: "This part shall not be applicable to any person or persons collecting rock samples as a hobby or when the collection of rocks and minerals is offered for sale in any amount not exceeding $100 per year." Amendment effective April 16, 1997.

Administrative Rules

ARM 17.24.102 Definitions.

82-4-311. Disposition of fees, fines, penalties, and other uncleared money.

Compiler's Comments

2001 Amendment: Chapter 338 at end of first sentence substituted "in the environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110" for "in the state special revenue fund in the state treasury and credited to a special account that is designated as the hard-rock mining and reclamation account", inserted second sentence concerning funds held as bond or as a result of bond forfeiture being deposited in the environmental rehabilitation and response account, and deleted former second and third sentences relating to the hard-rock mining and reclamation account that read: "This account is available to the department by appropriation and may be expended for the research, reclamation, and revegetation of land and the rehabilitation of water affected by any mining operations. Any unencumbered and any unexpended balance of this account remaining at the end of a fiscal year does not lapse but must be carried forward for the purposes of this section until expended or until appropriated by subsequent legislative action." Amendment effective July 1, 2001.

The amendment to this section made by Ch. 488, L. 2001, was rendered void by sec. 11, Ch. 488, L. 2001, a coordination instruction.

Severability: Section 8, Ch. 338, L. 2001, was a severability clause.

1995 Amendment: Chapter 418 in first sentence, after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

82-4-312. Hard-rock mining reclamation debt service fund.

Compiler's Comments

Effective Date: Section 9, Ch. 460, L. 2001, provided: "[This act] is effective July 1, 2002."

82-4-313. Hard-rock mining reclamation bonds.

Compiler's Comments

Effective Date: Section 9, Ch. 460, L. 2001, provided: "[This act] is effective July 1, 2002."

82-4-314. Authorization for sale of hard-rock mining reclamation bonds.

Compiler's Comments

Effective Date: Section 9, Ch. 460, L. 2001, provided: "[This act] is effective July 1, 2002."

82-4-315. Hard-rock mining reclamation special revenue account.

Compiler's Comments

Effective Date: Section 9, Ch. 460, L. 2001, provided: "[This act] is effective July 1, 2002."

82-4-321. Administration.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning of first and second sentences substituted "department" for "board"; and deleted former second sentence that read: "The board may delegate such powers, duties, and functions to the department as it deems necessary for the performance of its duties as administrator of this part." Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Statement of Intent: The statement of intent attached to Ch. 453, L. 1985, provided: "The purpose of the extension of the rulemaking authority of the department of state lands [functions now transferred to department of environmental quality] and board of land commissioners [functions now transferred to board of environmental review] is to allow the existing rules to be amended to include ore processing and reprocessing and extraction of old tailings and waste rock. In addition, the board and department may provide special rules eliminating application and performance standards irrelevant to reprocessing operations or milling operations."

Administrative Rules

Title 17, chapter 24, subchapter 1, ARM Rules governing Montana hard-rock mining reclamation law.

Collateral References

58 C.J.S. Mines and Minerals §382.

53A Am. Jur. 2d Mines and Minerals §257.

82-4-322. Investigations, research, and experiments.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

82-4-323. Interagency cooperation — receipt and expenditure of funds.

Compiler's Comments

1995 Amendment: Chapter 418 in three places substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

82-4-331. Exploration license required — employees included — limitation.

Compiler's Comments

2001 Amendment: Chapter 488 in third sentence at end after "accompanied by payment of a" substituted "$25 renewal fee" for "fee as required for a new license"; in (3)(a) near beginning after "that person's failure" inserted "or the failure of any firm or business association of which that person was a principal or controlling member" and near middle after "this part has resulted in" substituted "either the receipt of bond proceeds by the department or the completion of reclamation by the person's surety or by the department" for "the forfeiture of a bond"; in (3)(c) after "required by 82-4-305" deleted "unless the department has certified that the area for which the bond should have been posted has been reclaimed by that person or reclaimed by the department and the person has reimbursed the department for the cost of the reclamation"; and made minor changes in style. Amendment effective May 1, 2001.

Saving Clause: Section 12, Ch. 488, L. 2001, was a saving clause.

Severability: Section 13, Ch. 488, L. 2001, was a severability clause.

1995 Amendment: Chapter 418 in (1), in first sentence, substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 598 inserted (3)(b) through (3)(d) adding additional exceptions to the exploration licensing provision for persons who have not paid a penalty, posted a reclamation bond, or complied with an abatement order.

1989 Amendment: At beginning of fourth sentence of (1) inserted "A license may not be renewed if", after "renewal is" deleted "not then held by the board to be", and at end of sentence substituted "part" for "law"; inserted (3) disallowing the issuance of an exploration license unless the provisions of 82-4-360 are met; and made minor changes in phraseology.

1989 Statement of Intent: The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

Administrative Rules

ARM 17.24.101 General provisions.

ARM 17.24.102 Definitions.

ARM 17.24.108 Exploration reclamation deferred.

Collateral References

53A Am. Jur. 2d Mines and Minerals §259.

82-4-332. Exploration license.

Compiler's Comments

2001 Amendment: Chapter 488 in (1)(a) increased license fee from $5 to $100; and made minor changes in style. Amendment effective May 1, 2001.

Saving Clause: Section 12, Ch. 488, L. 2001, was a saving clause.

Severability: Section 13, Ch. 488, L. 2001, was a severability clause.

1995 Amendment: Chapter 418 in (1)(a) and (1)(b) substituted "department" for "board"; and in (2), in third sentence, substituted "board" for "department". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: Deleted former (3) that read: "(3) Upon filing of any certificate of claim location as permitted by federal and state mining laws and regulations, the locator shall provide copies of the certificate to the board".

Administrative Rules

ARM 17.24.101 General provisions.
ARM 17.24.103 Exploration license — application and conditions.
ARM 17.24.104 Exploration (temporary) roads.
ARM 17.24.105 Conduct of exploration operations.
ARM 17.24.107 Revegetation requirements.
ARM 17.24.108 Exploration reclamation deferred.

82-4-334. Exception — geological phenomena.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

82-4-335. Operating permit — limitation — fees.

Compiler's Comments

2001 Amendment: Chapter 488 in (3) at end of first sentence increased basic permit fee from $25 to $500; in (8)(a) near beginning after "that persons's failure" inserted "or the failure of any firm or business association of which that person was a principal or controlling member" and at end after "this part has resulted in" substituted "either the receipt of bond proceeds by the department or the completion of reclamation by the person's surety or by the department" for "the forfeiture of a bond"; in (8)(c) at end after "bond required by 82-4-305" deleted "unless the department has certified that the area for which the bond should have been posted has been reclaimed by that person or reclaimed by the department and the person has reimbursed the department for the cost of the reclamation"; and made minor changes in style. Amendment effective May 1, 2001.

Saving Clause: Section 12, Ch. 488, L. 2001, was a saving clause.

Severability: Section 13, Ch. 488, L. 2001, was a severability clause.

1999 Amendment: Chapter 507 in middle of first sentence in (1) and in two places in (2) after "reagent" or "reagents" inserted "or other metal leaching solvent or reagents"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

1995 Amendment: Chapter 418 in (1), two places in (3), (4), (5), and three places in (6) substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 598 inserted (8)(b) through (8)(d) adding additional exceptions to the operating permit provisions for persons who have not paid a penalty, posted a reclamation bond, or complied with an abatement order; and made minor changes in style.

1991 Amendments: Chapter 227 in (6) changed subsection reference to 90-6-302. Amendment effective March 29, 1991.

Chapter 403 in (3)(f), after "addresses of the", substituted remainder of subsection relating to owners of record and purchasers under contract for deed of the surface of the land for "surface and mineral owners of all lands within the mining area, to the extent known to the applicant"; inserted (3)(g) concerning owners of record and purchasers under contract for deed of minerals; inserted (3)(h) concerning source of applicant's legal right to mine; and made minor changes in style.

Chapter 637 in (3) inserted last five sentences authorizing Department to charge additional fee for permit not to exceed normal departmental operating expenses, including environmental review, authorizing Department to define expenses by rule, requiring Department to notify applicant and provide itemized expense estimate if fee will exceed $5,000, allowing applicant opportunity to review estimated expenses, and authorizing applicant to indicate duplicative or excessive expenses; at beginning of (4) inserted "The person"; in (4)(a), after "its", deleted "principal" and after "officers" inserted "directors, owners of 10% or more of any class of voting stock"; in (5) changed subsection reference; inserted (9) prohibiting issuance of permit unless certain current information is provided; and made minor changes in style. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 637, L. 1991, provided: "A statement of intent is required for this bill to provide guidance to the department of state lands [functions now transferred to department of environmental quality] concerning the adoption of rules to define the types of department expenses that applicants for hard-rock mine operating permits will be required to pay through increased permit application fees. Section 82-4-335(3) of the bill allows the department to increase the permit application review fee to fund expenses that are beyond the department's normal operating expenses and that are reasonably necessary in order for the department to provide a timely and adequate review, including any environmental review that is conducted pursuant to the requirements of the Montana Environmental Policy Act. The department's rules should authorize the use of the money collected from increased permit application fees for expenses, such as the hiring of temporary employees and contracted consultants and data collection and analysis when, due to workload considerations and statutory deadlines, the department cannot otherwise perform an adequate review."

1989 Amendments: Chapter 93 inserted (7) disallowing issuance of an operating permit to certain persons unless the provisions of 82-4-360 are met; and made minor changes in phraseology. Amendment effective October 1, 1989.

Chapter 347 near middle of (1), after "hard-rock mill", inserted "use cyanide ore-processing reagents"; inserted (2) requiring an operating permit for cyanide ore-processing reagent operations; in (4) corrected internal reference; and made minor changes in phraseology. Amendment effective July 1, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review]. shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

1989 Statement of Intent: The statement of intent attached to Ch. 347, L. 1989, provided: "A statement of intent is provided for this bill to elaborate on the type and extent of review that the department of state lands [functions now transferred to department of environmental quality] shall give to a small-miner application for an operating permit for a cyanide ore-processing facility. Moreover, the legislature anticipates that implementation of this bill will require rulemaking by the board of land commissioners [functions now transferred to board of environmental review].

While an operating permit is required for these operations, the legislature intends that, because of the size and limited scope of the operation, the application requirements in general may be substantially less rigorous than the requirements for larger proposed mine operations not under the small-miner exclusion. The department of state lands [functions now transferred to department of environmental quality] shall also attempt to review these applications in a shorter timeframe than currently needed to review operating permit applications for larger mines.

To encourage expedited review, the department of state lands [functions now transferred to department of environmental quality] shall provide clear guidance to permit applicants concerning requirements for a complete application. In particular, the guidance must help applicants prepare adequate operating and reclamation plans. While the legislature recognizes plan requirements may vary with the site and characteristics of the proposed operation, the department shall attempt to guide the applicant in a manner that minimizes applicant costs while also meeting metal mine reclamation requirements.

Finally, [section 4 of this act] [see compiler's comment to 82-4-335] exempts an existing cyanide ore-processing facility if the operator registers the facility by January 1, 1990. In order to provide ample notice to existing operators, the legislature intends that the department shall prepare the form and notify affected small miners of the form's availability and purpose as soon as possible by mail or publication, or both."

Registration of Cyanide Ore-Processing Operations — Temporary Applicability: Section 4, Ch. 347, L. 1989, provided: "An existing facility that uses a cyanide ore-processing reagent and was not, prior to July 1, 1989, required to obtain an operating permit for the facility or to include the facility in an operating permit is not subject to [this act] if the facility is registered by January 1, 1990, by the owner or operator, on a form provided by the department." See statement of intent to Ch. 347, L. 1989.

1987 Amendment: In (2), in two places in first sentence, substituted reference to approval of impact plan under 90-6-307 for reference to approval by the Hard-Rock Mining Impact Board.

1985 Amendments: Chapter 345 inserted (1)(h) referring to ground and surface water hydrologic data; inserted (1)(i) referring to tailings impoundments and water reservoirs; inserted (1)(j) referring to control and mitigation of discharges to surface or ground water; and inserted (1)(k) referring to expected life and expansion of tailings impoundment or waste site.

Chapter 453 in (1) near beginning, after "engage in mining", inserted "ore processing, or reprocessing of tailings or waste material or construct or operate a hard-rock mill" and after "anticipation of", substituted "those activities" for "mining"; at end of second sentence of (1) substituted "complex" for "mine complex"; at end of (1)(d) substituted "operations" for "mining"; in (1)(g) after "plan" deleted "of mining" and after "completion of", substituted "the operation" for "mining and associated land disturbances".

Chapter 582 in (2) changed "subsection (3)" to "subsection (4)"; and inserted (3) referring to compliance with hard-rock mining impact review and implementation requirements by a permittee who becomes a large-scale mineral developer.

1983 Amendment: Near beginning of (2), substituted "activities under the permit" for "mining".

1981 Amendment: Inserted (2) referring to permit for large-scale mineral development; and inserted (3) exempting small samples from impact plan requirement.

Severability: Section 15, Ch. 617, L. 1981, was a severability section.

Administrative Rules

ARM 17.24.101 General provisions.
ARM 17.24.115 Reclamation plans.
ARM 17.24.117 Permit conditions.
ARM 17.24.118 Annual report.
ARM 17.24.122 Permit assignment.
ARM 17.24.123 Permit consolidation.
ARM 17.24.165 through 17.24.171 Mills and reprocessing operations.
ARM 17.24.180 Definitions.
ARM 17.24.185 through 17.24.189 Small miner cyanide operations.

Case Notes

Deficient Application for Permit — Effect: Because the application for permit was deficient under the hard-rock mining law, the present mining operations on the 500 acres covered by Permit 41A cannot be continued until an adequate application is made and a valid permit pursuant to the hard-rock mining law is issued. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Environmental Impact Statement Not Required: An environmental impact statement (EIS) was not required before granting a permit under the hard-rock mining law because the 60-day period was a woefully inadequate period for the preparation of a proper EIS, the same reason that an EIS was not required in Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 US 776 (1976). Furthermore, the statutory requirement of an EIS was not given constitutional status by the enactment of Art. II, sec. 3, and Art. IX, sec. 1, Mont. Const., subsequent to the Montana Environmental Policy Act and the hard-rock mining law. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

82-4-336. Reclamation plan and specific reclamation requirements.

Compiler's Comments

2000 Amendment: Chapter 7 inserted (1) concerning site-specific conditions and circumstances; at end of (5) substituted "development area to the extent that it serves as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life" for "mined area"; in (7)(a) after "covering" substituted "the faces" for "to a depth of 2 feet or more" and at end inserted "in order to mitigate the generation of objectionable effluents"; in (9)(a) at beginning inserted "With regard to disturbed land other than open pits and rock faces", after "disturbed land" deleted "Proposed reclamation must provide for the reclamation of disturbed land", and at end deleted "except for open pits and rock faces that may not be feasible to reclaim in the same fashion as other disturbed lands"; in (9)(b)(ii) after "affords" inserted "some" and at end substituted "or the environment" for "and the surrounding natural system to the extent feasible"; substituted (9)(b)(iii) concerning mitigation of visual contrasts for "blends with the appearance of the surrounding area to the extent feasible"; inserted (9)(c) concerning backfilling; at end of (11) substituted "requirements and standards set forth in this section" for "activities specified in this section"; and made minor changes in style. Amendment effective May 18, 2000.

Applicability: Section 4, Ch. 7, Sp. L. May 2000, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies retroactively, within the meaning of 1-2-109, to permits and permit amendments approved by the department after September 30, 1995.

(2) Section 82-4-336(9)(b)(ii) and (9)(b)(iii) do not apply to any reclamation plan approved by the department for a mine at which mining operations have permanently ceased on [the effective date of this act] [effective May 18, 2000].

(3) Section 82-4-336(9)(c) does not alter or abrogate any backfilling requirement imposed or approved by the department prior to [the effective date of this act]." Effective May 18, 2000.

1995 Amendments — Composite Section: Chapter 418 in (1), (4), (5)(b), (5)(c), (5)(e), (8), and (9) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995. The amendment in (8) was rendered void by Ch. 464.

Chapter 464 in (3), after "in the mined area", deleted "which may serve as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life"; in (7), at end of first sentence, inserted "in the same fashion as other disturbed lands" and substituted "In the case of open pits and rock faces, the reclamation plan must provide for reclamation to a condition" for "In such excepted cases"; inserted (7)(a) through (7)(c) regarding conditions for reclamation; in (8) substituted "The reclamation plan must provide" for "the board shall require"; and made minor changes in style.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1995 Statement of Intent: The statement of intent attached to Ch. 464, L. 1995, provided: "In this bill, the legislature is implementing, with regard to open pits and rock faces that are the result of metal mining, the duty imposed upon it by Article IX, section 2(1), of the Montana constitution, which provides that "All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed."

The drafters of this provision of the constitution expressly decided not to impose a constitutional requirement for a specified level of reclamation for all disturbed lands in all locations under all circumstances. Rather, they delegated to the legislature the duty to more specifically define reclamation in the public interest.

The legislature expects, and this bill requires, that miners will prepare and submit to the state reclamation plans for open pits and rock faces. This bill requires that these plans must, at a minimum, provide for return of these lands to structural stability and that the plans must be protective of air and water quality as provided elsewhere in the metal mine reclamation laws. These requirements and standards will prevent risks to public health and safety and the environment and will thereby adequately protect the environmental life support system from degradation.

In order to prevent unreasonable depletion and degradation of natural resources, the legislature finds that further reclamation of open pits and rock faces to provide functional uses and to blend with surrounding areas should be accomplished whenever feasible.

In determining feasibility of further reclamation, the legislature directs the department of state lands [functions now transferred to department of environmental quality] to consider and give effect to each of the following objectives:

(1) to encourage mining as an activity beneficial to the economy of our state;

(2) to encourage the production of minerals to meet the needs of society and the economic demands of the marketplace;

(3) to encourage reclamation to a condition that is aesthetically unobtrusive;

(4) to encourage reclamation to functional use;

(5) to discourage requirements that may foreclose future access to mineral resources not fully developed by current mining operations;

(6) to discourage requirements that will generate undesirable offsite environmental impacts.

The legislature finds that functional postreclamation uses include but are not limited to livestock grazing, agriculture, timber, recreation, wildlife habitat or other wildlife use, or other industrial use, including remining.

The legislature finds that when reclamation has been accomplished in accordance with an approved reclamation plan, the economic and social benefits of mining outweigh the scenic and other impacts associated with open-pit mining."

1985 Amendments: Chapter 345 in (6) inserted second sentence referring to noxious weed control standards; in (7) substituted "shall provide for the reclamation of disturbed land to comparable utility and stability as that of adjacent areas, except for open pits and rock faces which

may not be feasible to reclaim. In such excepted cases, the board shall require sufficient measures to insure public safety and to prevent the pollution of air or water and the degradation of adjacent lands" for "need not reclaim the areas to a better condition or different use than that which existed prior to development or mining"; and inserted (9) referring to landscaping and contouring and postmining ground water discharges.

Chapter 453 throughout (1) substituted "the operation" for "mining"; at end of first sentence of (1), after "disturbance", deleted "by the mining operation"; and in middle of first sentence and at end of (1), substituted "the complex" for "mine complex".

Administrative Rules

ARM 17.24.115 Reclamation plans.
ARM 17.24.116 Operating permit — application requirements.
ARM 17.24.117 Permit conditions.
ARM 17.24.118 Annual report.
ARM 17.24.150 Abandonment or completion of operation.
ARM 17.24.165 Mills and reprocessing operations — definitions.
ARM 17.24.169 Mills — reclamation plans.

82-4-337. Inspection — issuance of operating permit — modification, amendment, or revision.

Compiler's Comments

2001 Amendment: Chapter 299 in (1)(b), (1)(d)(ii), (1)(d)(iii) at beginning, and (7) at beginning of second sentence inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

1997 Amendment: Chapter 42 in (1)(c)(iii) substituted "82-4-341(7)" for "82-4-341(6)". Amendment effective March 12, 1997.

1995 Amendments: Chapter 204 inserted (1)(d)(ii) authorizing the Department to negotiate to extend analysis time by up to 75 days and authorizing applicant to extend time period by written waiver; in (1)(d)(iii) inserted last sentence authorizing written waiver; and made minor changes in style.

Chapter 418 in (1)(a), in two places, (1)(b), in two places, (1)(d)(v), (2), and (3) substituted "department" for "board"; in (3), before "after timely notice", deleted "department"; and in (6), in third sentence, substituted "board" for "department". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendments — Composite Section: Chapter 472 in (1)(a), in first sentence before "30 days", inserted "60 days of receipt of the initial application and within" and at end, after "receipt", inserted "of responses to notices of deficiencies", inserted second and third sentences relating to deficiency issues, and in last sentence, at end, substituted "the appropriate review period" for "30 days of receipt"; inserted (1)(d)(iii) concerning contract to prepare EIS; and made minor changes in style. Amendment effective April 21, 1993.

Chapter 598 in (1)(a), in first sentence before "30 days", inserted "60 days of receipt of the initial application and within" and at end, after "receipt", inserted "of responses to notices of deficiencies" and in last sentence, at end, substituted "the appropriate review period" for "30 days of receipt"; inserted (4) through (7) regarding amendment or revision of operating permits; and made minor changes in style.

A style change in (1)(b) was slightly different in the two chapters. The codifier chose the more appropriate of the two.

Saving Clause: Section 8, Ch. 472, L. 1993, was a saving clause.

Severability: Section 9, Ch. 472, L. 1993, was a severability clause.

1991 Amendment: In (1)(b), at end of second sentence after "82-4-338", inserted "and pursuant to the requirements of subsection (1)(c)"; inserted (1)(c)(ii) prohibiting issuance of permit until information and certification have been submitted pursuant to 82-4-335(9); inserted (1)(c)(iii) prohibiting issuance of permit until Department has found issuance not prohibited by 82-4-335(8) or 82-4-341(6); and made minor changes in style. Amendment effective July 1, 1991.

1985 Amendment: In (1)(b) in two places, substituted "plan of operation" for "plan of mining"; in (2) after "period required to", substituted "complete the operation" for "mine the land covered by the plan" and after "until the", substituted "operation" for "surface or underground mining".

Administrative Rules

ARM 17.24.118 Annual report.

ARM 17.24.119 through 17.24.121 Permit amendments.

ARM 17.24.128, 17.24.129, and 17.24.132 through 17.24.134 Inspections and enforcement.

ARM 17.24.165 Mills and reprocessing operations — definitions.

Case Notes

Mandate Proper Remedy: Writ of Mandate is a proper remedy for return of a mining application and voidance of permit because the Department of State Lands (functions now transferred to Department of Environmental Quality) had a clear legal duty to return the permit application as incomplete and inadequate. Because the application was not returned, Permit 41A was void, and the Anaconda Company may not continue mining activities on the Permit 41A area until a valid permit is granted by the Department. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Specific Statute to Control: The well-settled principle of statutory construction that a specific statute will control a general one requires that the 60-day period in 82-4-337 controls the general provisions of 75-1-201(2)(c). Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Collateral References

58 C.J.S. Mines and Minerals §382.

53A Am. Jur. 2d Mines and Minerals §§257, 274 through 289.

82-4-338. Performance bond.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 79 in (1) at beginning of first sentence after "applicant" inserted "for an exploration license or operating permit"; in (3)(b) in first sentence after "contested case hearing" inserted "before the board", after "Act" inserted "Title 2, chapter 4, part 6", and at end after "hearing" inserted "stating the reason for the request"; and made minor changes in style. Amendment effective March 20, 2001.

Chapter 488 in (1) in second sentence near end after "a certificate of deposit" inserted "an irrevocable letter of credit" and in third sentence near middle after "to ensure compliance with" inserted "Title 75, chapters 2 and 5"; inserted (2) regarding third-party contractors; in (3)(a) in fourth sentence after "department" substituted "shall" for "may", inserted fifth sentence regarding preliminary and proposed bond determinations, in sixth sentence near beginning after "The department shall" deleted "make written findings", after "a copy of the" substituted "bond calculations that form the basis for the proposed bond determination" for "findings", and after "publish notice of the" substituted "proposed bond determination" for "findings", and inserted seventh through ninth sentences regarding issuance of final bond determination and 30-day extension of time to post bond; in (3)(b) in first sentence near middle after "Montana Administrative Procedure Act on the" substituted "final bond determination" for "adjusted bond level" and near end after "within 30 days of the" substituted "issuance of the final bond determination" for "notice" and inserted remainder of (3)(b) regarding request for hearing, board's determination after hearing, and extension of time to post bond; inserted (3)(c) regarding failure to post bond; in (6) inserted last sentence regarding bond calculations; inserted (8) regarding violations of law, forfeiture of bond, and abatement of danger; inserted (9) regarding termination of bond and suspension of license or permit; and made minor changes in style. Amendment effective May 1, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

Section 12, Ch. 488, L. 2001, was a saving clause.

Severability: Section 13, Ch. 488, L. 2001, was a severability clause.

Applicability: Section 15, Ch. 488, L. 2001, provided: "Sections 82-4-303(6) and 82-4-338(8) apply to licenses and permits issued after [the effective date of this act] [effective May 1, 2001] and to permits issued before [the effective date of this act] [effective May 1, 2001] that are in effect on [1 year after the effective date of this act] [effective May 1, 2002]."

1999 Amendment: Chapter 507 in first sentence in (1) after "$200" deleted "or more than $2,500" and after "disturbed" substituted "land" for "area", in second sentence after "file" substituted "with the department" for "with the board", at beginning of third sentence deleted "Regardless of the limits in this subsection" and after "permit" inserted "including the potential cost of department management, operation, and maintenance of the site upon temporary or permanent operator insolvency or abandonment, until full bond liquidation can be effected", and at end of fifth sentence substituted "department" for "board"; in (2) in first sentence after "shall" substituted "conduct an overview of" for "review", after "bond" substituted "annually" for "at least every 5 years", and after second "shall" inserted "conduct a comprehensive bond review at least every 5 years" and inserted second sentence authorizing department to conduct additional comprehensive bond reviews after modification, overview, or inspection if department determines bond increase may be necessary; in first sentence in (4) after "released" inserted "or decreased" and after "hearing" inserted "and a hearing has been held if requested" and inserted second sentence requiring department to provide reasonable statewide and local notice of hearing opportunity; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

1995 Amendments: Chapter 395 inserted (5) concerning the types of activities for which bonds may be required; and inserted (6) concerning the posting of unobligated bonds.

Chapter 418 in (1), at end of second sentence, substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 598 at end of first sentence of (1), after "board", inserted "and the permit" and at end of third sentence substituted "ensure compliance with this part, the rules, and the permit" for "complete the reclamation of the disturbed land"; near middle of second sentence of (2), after "present costs of", substituted "compliance with this part, the rules, and the permit" for "reclamation"; near end of (3) substituted "the permit" for "this reclamation plan"; and made minor changes in style.

1991 Amendment: In (1), in first sentence before "sum", deleted "penal"; in (2) inserted first sentence requiring Department to review amount of bond every 5 years and consult with licensee or permittee if bond level needs adjustment and inserted third and fourth sentences requiring Department to make written findings, to provide copy of findings, and, for operating permits, to publish notice of findings in newspaper in county in which the operation is located and authorizing permittee or interested person adversely affected to obtain contested case hearing on adjusted bond level within 30 days of request; and made minor changes in style. Amendment effective July 1, 1991.

1985 Amendment: Inserted (3) requiring hearing before bond can be released.

Administrative Rules

ARM 17.24.108 Exploration reclamation deferred.

ARM 17.24.118 Annual report.

ARM 17.24.140 through 17.24.146 Bonding requirements.

82-4-339. Annual report of activities by permittee — fee — notice of large-scale mineral developer status.

Compiler's Comments

2001 Amendment: Chapter 488 in (1) in first sentence near end after "pay the annual fee of" increased annual fee from $25 to $100; and made minor changes in style. Amendment effective May 1, 2001.

Saving Clause: Section 12, Ch. 488, L. 2001, was a saving clause.

Severability: Section 13, Ch. 488, L. 2001, was a severability clause.

1995 Amendment: Chapter 418 near end of (1) and in (1)(f) substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendments: Chapter 227 in (1)(d) changed subsection reference to 90-6-302. Amendment effective March 29, 1991.

Chapter 637 inserted (1)(e) requiring permittee to update information required in 82-4-335(4)(a); and made minor changes in style. Amendment effective July 1, 1991.

1985 Amendment: Inserted (1)(d) referring to number of persons on payroll; and inserted (2) referring to notice of large-scale mineral developer status.

Administrative Rules

ARM 17.24.118 Annual report.

ARM 17.24.128 Inspections — frequency, method, and reporting.

ARM 17.24.132 Enforcement — processing of violations and penalties.

82-4-340. Successor operator.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning and near end substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: Near beginning after "uncompleted", deleted "mining".

Section Not Codified: Section 50-1210(4), R.C.M. 1947, was not codified in the MCA because it was of temporary significance. This subsection has not been repealed and is still valid law. Citation may be made to sec. 10, Ch. 252, L. 1971, as amended by sec. 1, Ch. 427, L. 1977.

82-4-341. Compliance — reclamation by department.

Compiler's Comments

2001 Amendment: Chapter 488 in (5) in first sentence at end after "the permittee and the surety" substituted "by certified mail" for "by order"; in (6) in first sentence near middle after "reclamation of the disturbed lands" inserted remainder of sentence regarding reclamation plans and findings by department concerning prevention of substantial reclamation failure and in last sentence after "the department shall return" substituted remainder of sentence regarding amount not expended, including interest unless the surety agrees otherwise, for "any amount not expended"; and made minor changes in style. Amendment effective May 1, 2001.

Saving Clause: Section 12, Ch. 488, L. 2001, was a saving clause.

Severability: Section 13, Ch. 488, L. 2001, was a severability clause.

1999 Amendment: Chapter 507 at end of first sentence in (2) inserted "or as required pursuant to subsection (8)"; at end of first sentence in (3) inserted language requiring department notice and hearing and at beginning of second sentence inserted "As soon as practicable thereafter"; in (4) substituted "department" for "board"; and inserted (8) requiring department to determine whether further suspension of mine operation will cause violations or impair reclamation when no mineral extraction or ore processing has occurred for past 5 years, requiring department to notify permittee to abate conditions upon written determination of violations or reclamation impairment, authorizing department to grant reasonable time extensions for good cause, requiring department to order abatement of condition or reclamation if permittee does not abate conditions or reclamation within specified time, authorizing permittee to request hearing within 30 days of order, and providing that request for hearing stays order pending final decision unless department determines in writing that stay creates imminent threat of significant harm or impairs reclamation. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

1995 Amendments — Composite Section: Chapter 204 at beginning of (1) substituted language requiring inspection at least annually of permit area for former language that read: "Following receipt of the permittee's report and at any other reasonable time the board may elect" and at end substituted language requiring inspection to determine if permittee has complied with part, rules, or the permit for former language requiring inspection to determine if permittee has complied with reclamation plan and Department rules; inserted introductory clause in (4) regarding forfeiture of bond; in (4)(c), after "required", deleted former language authorizing Board, with staff, equipment, and material under its control or by contract, to take action to reclaim lands by competitive bidding and requiring record of expenses; in (5) deleted former second sentence requiring order to state expenses incurred by Board in reclaiming disturbed land and to include

notice of amount due; in (6) inserted first three sentences authorizing Board, with its staff, equipment, and material or by contract, to reclaim certain disturbed lands through competitive bidding and to keep expense records and inserted last sentence requiring Board to return unexpended amount following reclamation; and made minor changes in style.

Chapter 418 in (1), (2), in three places, (3), (4)(a), (4)(c), (5), in two places, (6), in three places, and (7), in three places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 transferred duties from the Board to the Department, the Code Commissioner has substituted "department" for "board" in the material enacted by Ch. 204 to reflect the intent of Ch. 418. Authority for the change is found in sec. 569, Ch. 546.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 17.24.136 Notices and orders — issuance and service.
ARM 17.24.144 Bonding — surety bonds.
ARM 17.24.146 Bonding — letters of credit.
ARM 17.24.170 Mills — cessation or completion of operation.

82-4-342. Amendment to operating permits.

Compiler's Comments

1995 Amendment: Chapter 418 in (2), in first and second sentences, substituted "board" for "department". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Saving Clause: Section 8, Ch. 472, L. 1993, was a saving clause.

Severability: Section 9, Ch. 472, L. 1993, was a severability clause.

Effective Date: Section 10, Ch. 472, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

Administrative Rules

ARM 17.24.119 Permit amendments.
ARM 17.24.120 Permit revisions.
ARM 17.24.141 Bonding — adjustment of amount of bond.

82-4-349. Limitations of actions.

Compiler's Comments

1999 Amendment: Chapter 507 inserted second sentence requiring issuance of summons and service of process on defendants within 60 days after action filed. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(3)(a), Ch. 507, L. 1999, provided: "For purposes of the amendment in [section 7] [82-4-349] relating to the time for issuance of summons and service of process in legal actions challenging department decisions granting or denying an exploration license or operating permit issued under Title 82, chapter 4, part 3, the 60-day time limit specified in [section 7] [82-4-349] applies to actions that are pending on [the effective date of this act] [effective April 28, 1999] and the 60-day period must begin on [the effective date of this act]." Effective April 28, 1999.

1995 Amendment: Chapter 418 substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Saving Clause: Section 8, Ch. 472, L. 1993, was a saving clause.

Severability: Section 9, Ch. 472, L. 1993, was a severability clause.

Effective Date: Section 10, Ch. 472, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

82-4-350. Award of costs and attorney fees.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 472, L. 1993, provided: "A statement of intent is required for this bill because [section 3] requires the department of state lands [functions now transferred to department of environmental quality] to adopt administrative rules. In adopting rules, the department shall establish application content requirements and amendment processing procedures that are consistent with the permitting requirements established in this bill."

Saving Clause: Section 8, Ch. 472, L. 1993, was a saving clause.

Severability: Section 9, Ch. 472, L. 1993, was a severability clause.

Effective Date: Section 10, Ch. 472, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

82-4-351. Reasons for denial of permit.

Compiler's Comments

1993 Amendment: Chapter 472 at beginning of (1) substituted "An application for a permit or an application for an amendment to a permit" for "A permit"; at end of (2) substituted "for denial, and be based on a preponderance of the evidence" for "therefor"; and made minor changes in style. Amendment effective April 21, 1993.

Saving Clause: Section 8, Ch. 472, L. 1993, was a saving clause.

Severability: Section 9, Ch. 472, L. 1993, was a severability clause.

1985 Amendment: In (1)(a) substituted "plan of operation or reclamation" for "plan of development, mining, or reclamation".

Administrative Rules

ARM 17.24.117 Permit conditions.

82-4-352. Reapplication with new reclamation plan.

Compiler's Comments

1995 Amendment: Chapter 418 in second sentence substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

82-4-353. Administrative remedies — notice — appeals — parties.

Compiler's Comments

2001 Amendment: Chapter 79 inserted (2) allowing an applicant to request a hearing concerning denial of the application; in (3) at beginning of first sentence after "hearings and" substituted "appeals under 82-4-337(3), 82-4-338(2), 82-4-341(7) and (8), 82-4-361, 82-4-362, and subsection (2) of this section must be conducted by the board" for "appeal procedures shall be"; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

82-4-354. Mandamus to compel enforcement.

Compiler's Comments

1997 Amendment: Chapter 535 inserted (4) relating to the district in which the action must be brought; and made minor changes in style.

Administrative Rules
ARM 17.24.129 Inspections — response to citizen complaints.

82-4-355. Action for damages to water supply — replacement.

Compiler's Comments
1991 Amendment: In (1), after "engaged in", deleted "a mining or exploration" and after "operation" inserted "for which a license is required pursuant to 82-4-332 or for which a permit is required pursuant to 82-4-335"; and made minor change in style. Amendment effective July 1, 1991.

Administrative Rules
ARM 17.24.106 Exploration drill hole plugging.

82-4-356. Action in response to complaints related to use of explosives.

Compiler's Comments
1989 Statement of Intent: The statement of intent attached to Ch. 443, L. 1989, provided: "A statement of intent is required for this bill in order to provide guidance to the department of state lands [functions now transferred to department of environmental quality] concerning the rulemaking authority that is provided in the bill. The department is authorized to adopt rules concerning the types and methods of investigations it may conduct to appropriately respond to complaints about the use of explosives associated with hard-rock mining and exploration activities. The rules may also specify the manner in which persons using explosives shall participate and cooperate in the department's investigation of a complaint and in carrying out any changes ordered by the department as a result of the investigation."

Administrative Rules
ARM 17.24.157 through 17.24.159 Blasting operations.

82-4-357. Abatement of environmental emergencies.

Compiler's Comments
1991 Statement of Intent: The statement of intent attached to Ch. 637, L. 1991, provided: "A statement of intent is required for this bill to provide guidance to the department of state lands [functions now transferred to department of environmental quality] concerning the adoption of rules to define the types of department expenses that applicants for hard-rock mine operating permits will be required to pay through increased permit application fees. Section 82-4-335(3) of the bill allows the department to increase the permit application review fee to fund expenses that are beyond the department's normal operating expenses and that are reasonably necessary in order for the department to provide a timely and adequate review, including any environmental review that is conducted pursuant to the requirements of the Montana Environmental Policy Act. The department's rules should authorize the use of the money collected from increased permit application fees for expenses, such as the hiring of temporary employees and contracted consultants and data collection and analysis when, due to workload considerations and statutory deadlines, the department cannot otherwise perform an adequate review."
Effective Date: Section 11, Ch. 637, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules
ARM 17.24.133 Enforcement — abatement of violations and permit suspension.
ARM 17.24.136 Notices and orders — issuance and service.

82-4-360. When activity prohibited — exception.

Compiler's Comments
2001 Amendment: Chapter 488 in (1) near middle after "bond forfeited under this part" inserted reference to department's receipt of bond proceeds and surety's completion of reclamation on the person's behalf; inserted (2)(b) regarding conditions leading to bond forfeiture; and made minor changes in style. Amendment effective May 1, 2001.
Saving Clause: Section 12, Ch. 488, L. 2001, was a saving clause.
Severability: Section 13, Ch. 488, L. 2001, was a severability clause.
1997 Amendment: Chapter 42 in (2)(a) substituted "82-4-341(6)" for "82-4-341(5)". Amendment effective March 12, 1997.
1995 Amendment: Chapter 418 in (2)(a) substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 17.24.144 and 17.24.146 Bonding.

82-4-361. Violation — penalties — waiver.

Compiler's Comments

2001 Amendment: Chapter 79 in (3) near end after "order" substituted "issued" for "adopted"; in (4) in second sentence after "after" inserted "issuing the", in third sentence after "request" inserted "stating the reason for the request" and after "hearing" inserted "before the board", in fourth sentence after "hearing" substituted "the board" for "or after the time for requesting a hearing has expired, the department" and after "violation and" inserted "if the board finds that the violation occurred", at beginning of fifth sentence substituted "board" for "department", inserted sixth sentence regarding department action if the time for requesting a hearing expires, and at end of ninth sentence after "department" inserted "in district court"; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1997 Amendments: Chapter 271 in (1)(a), at beginning, substituted "The department may assess an administrative" for "Except as provided in subsections (1)(b) and (2), a", after "additional" inserted "administrative", near end, after "continues and", inserted "may bring an action for", and after "violation" deleted "may be imposed"; inserted (2) setting out factors to be considered prior to instituting a civil penalty action; deleted (2)(b) that read: "(b) The civil penalties provided for in this section may be waived for a minor violation if it is determined that the violation does not represent potential harm to public health, public safety, or the environment and does not impair the administration of this part. The board shall adopt rules to implement and administer a procedure for waiver of a penalty under this subsection"; and made minor changes in style.

Chapter 273 in (4), in fourth and fifth sentences, substituted "department" for "board". Amendment effective April 16, 1997.

Chapter 535 inserted (5) relating to the district in which actions must be brought.

Applicability: Section 3, Ch. 271, L. 1997, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective April 16, 1997.

Saving Clause: Section 6, Ch. 273, L. 1997, was a saving clause.

1995 Amendment: Chapter 204 substituted (1)(a) and (1)(b) regarding civil penalties for each violation, for continuing violations, and for violations creating imminent danger to health or safety and authorizing injunctions for former language that read: "A person who violates any of the provisions of this part, the rules or orders adopted under this part (except 82-4-339), the provisions of any license or permit, or the conditions of a small minor exemption shall pay a civil penalty of not less that $100 or more than $1,000 for the violations and an additional civil penalty of not less than $100 or more than $1,000 for each day during which a violation continues and may be enjoined from continuing such violations as provided in this section. These penalties are recoverable in any action brought in the name of the state of Montana by the attorney general in the district court of the first judicial district of this state in and for the county of Lewis and Clark or in the district court having jurisdiction of the defendant"; at beginning of (2)(a) substituted language authorizing the Department to bring an action for restraining order for former language requiring the Attorney General, upon request of the Department, to initiate suit for recovery of

penalties; inserted (3) providing procedures for hearing and appeals; and made minor changes in style.

1991 Amendment: In (1), near beginning, inserted "the provisions of any license or permit". Amendment effective July 1, 1991.

1989 Amendment: Inserted (3) providing for waiver of civil penalties under certain circumstances and requiring adoption of rules; and made minor changes in phraseology.

1989 Statement of Intent: The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

1985 Amendments: Chapter 284 near beginning of (1) after "this part", inserted "except 82-4-339".

Chapter 386 in (1) near beginning, after "under this part", inserted "or conditions of a small-miner exemption".

Administrative Rules

ARM 17.24.101 General provisions.

ARM 17.24.133, 17.24.134, 17.24.136, and 17.24.137 Enforcement and notices and orders.

Collateral References

Mines and Minerals *key* 92.11.

58 C.J.S. Mines and Minerals §§340 through 342.

82-4-362. Suspension of permits — hearing.

Compiler's Comments

2001 Amendment: Chapter 79 in (1) near middle of first sentence after "notice of" substituted "violation" for "noncompliance" and at end before "permit" inserted "license or", at beginning of second sentence inserted "license or", in third sentence after "suspension of a" inserted "license or", in fourth sentence after "served" inserted "on the licensee or permittee", and in fifth sentence after "notice of" substituted "violation" for "noncompliance", after "specify" substituted "the provisions of" for "in what respects the operator has failed to comply with", before "permit" inserted "license or", and after "permit" inserted "violated and the facts alleged to constitute the violation"; in (2) in first sentence after "notice of" substituted "violation" for "noncompliance" and before "permit" inserted "license or", deleted former second sentence that read: "The licensee or permittee is entitled to a hearing before the department on the revocation of a permit or license or the forfeiture of a performance bond if a hearing is requested within 30 days after service of notice as provided in subsection (1)", at beginning of second sentence after "notice" inserted "of violation or order of suspension" and at end after "hearing" inserted "before the board", inserted third sentence regarding a request for a hearing within 30 days of receipt of the notice or order, and at end of fourth sentence substituted "board" for "department"; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1995 Amendments: Chapter 204 in first and last sentences in (1), after "permit", deleted "or reclamation plan", inserted second sentence authorizing suspension of permit for failure to

comply with order to pay civil penalty, and in third sentence, after "permit", deleted "including the reclamation plan"; and made minor changes in style.

Chapter 418 in (1), in three places, and in (3), in two places, substituted "director" for "commissioner"; and in (2) substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 598 near middle of first sentence of (1), after "complied with", deleted "within the time limits set by the department or board or by this part", near middle of third sentence, before "mail", deleted "or registered", and in fourth sentence, after "noncompliance", inserted "or order of suspension", before "or the reclamation plan" inserted "the permit", and after "or the reclamation plan" inserted "and must, if the violation has not been abated, order abatement within a specified time period"; and made minor changes in style.

1991 Amendment: In (1), near beginning of first sentence before "reclamation", inserted "a license, permit, or", inserted second sentence allowing Commissioner to suspend a permit when a violation creates a danger to persons outside the permit area, and at end of third sentence, before "permit", inserted "license or"; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: In (1), in two places after "rules", inserted "adopted under this part"; inserted second, third, and fourth sentences of (2) providing hearing and notice requirements for licensees or permittees; and made minor changes in phraseology.

1989 Statement of Intent: The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

1985 Amendment: Inserted (3) referring to suspension for failure to pay fee or file report required under 82-4-339.

Section Not Codified: Section 50-1226, R.C.M. 1947, concerning the validity of operating permits issued under prior law, was not codified in the MCA because it was of temporary significance. This statute has not been repealed and is still valid law. Citation may be made to sec. 13, Ch. 281, L. 1974.

Administrative Rules

ARM 17.24.101 General provisions.
ARM 17.24.118 Annual report.
ARM 17.24.133 Enforcement — abatement of violations and permit suspension.
ARM 17.24.136 and 17.24.137 Notices and orders.

82-4-371. Reclamation of abandoned mine sites.

Compiler's Comments

Effective Date: Section 5, Ch. 329, L. 1995, provided that this section is effective on passage and approval. Approved April 5, 1995.

82-4-372. Filing of lien for abandoned mine reclamation project.

Compiler's Comments

Effective Date: Section 5, Ch. 329, L. 1995, provided that this section is effective on passage and approval. Approved April 5, 1995.

82-4-390. Cyanide heap and vat leach open-pit gold and silver mining prohibited.

Compiler's Comments

1999 Amendment: Chapter 457 at end of (1) inserted exception clause; and at end of (2) substituted "or any amended permit that is necessary for the continued operation of the mine" for "but the permit may not be amended to allow its operations to be expanded". Amendment effective April 23, 1999.

Codification: Section 2, I.M. No. 137, a codification instruction, omitted the standard clause providing that the provisions of this part apply to section 1, I.M. No. 137.

Effective Date: Section 3, I.M. No. 137, provided that this section was effective upon approval by the electorate. Initiative approved November 3, 1998.

Law Review Articles

All That's Gold May Not Glitter (Montana Voter Initiative Prevents Cyanide Mining), Ingram, 18 UCLA J. Envtl. L. & Pol'y 371 (2001).

Part 4
Opencut Mining Reclamation

Part Compiler's Comments

Severability Clause: Section 16, Ch. 326, L. 1973, read: "The provisions of this act are severable, and if any part or provision thereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts of provisions of this act that are severable from the invalid applications."

Repealing Clause: Section 17, Ch. 326, L. 1973, read: "Sections 50-1018 through 50-1033, R.C.M. 1947, are repealed. However, contracts entered into under the provisions of sections 50-1018 through 50-1033, R.C.M. 1947, are not affected hereby, and shall remain in effect until terminated or completed."

Part Administrative Rules

Title 17, chapter 24, subchapter 2, ARM Rules implementing The Opencut Mining Act.

Part Attorney General's Opinions

Policy Provision of Act Relevant to Determination of Extent of Board's Contracting Authority: A policy section is relevant not only to the question of legislative intent concerning an act's overall purpose but also to the scope of administrative agency authority under the act. Thus, 82-4-402, the policy section of The Opencut Mining Act, is properly considered in determining the extent of the Board of Land Commissioners' (functions now transferred to Board of Environmental Review) authority under this Act to require reclamation contract commitments in addition to those mandated under 82-4-434. 40 A.G. Op. 47 (1984).

82-4-402. Policy.

Compiler's Comments

2001 Amendment: Chapter 325 at beginning inserted introductory phrase concerning economy of state; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 507 in two places substituted "opencut materials" for "opencut mineral"; near end of second sentence after "property" inserted "through reclamation"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

1987 Amendment: In two places substituted "mineral mining" for "bentonite, clay, scoria, phosphate rock, sand, or gravel mining".

Attorney General's Opinions

Section Properly Considered in Determining Extent of Board's Contracting Authority Under Act: A policy section is relevant not only to the question of legislative intent concerning an act's overall purpose but also to the scope of administrative agency authority under the act. Thus, this section is properly considered in determining the extent of the Board of Land Commissioners' (functions now transferred to Board of Environmental Review) authority under the Opencut Mining Act to require reclamation contract commitments in addition to those mandated under 82-4-434. 40 A.G. Op. 47 (1984).

Collateral References

53A Am. Jur. 2d Mines and Minerals §§255 through 257, 260.

82-4-403. Definitions.

Compiler's Comments

1999 Amendment: Chapter 507 in definitions of affected land, opencut mining, and overburden substituted "material" or "materials" for "mineral" or "minerals"; deleted former definition of contract that read: ""Contract" means a mined land reclamation contract prepared by the board to

meet the requirements of this part"; in definition of landowner substituted "subjected to" for "directly affected by"; substituted materials for minerals as defined term and in definition of materials substituted "peat" for "phosphate rock" and after "sand" inserted "soil materials"; in definition of opencut mining deleted former (c) that read: "(c) removing overburden for the purpose of determining the location, quality, or quantity of any natural deposit of minerals"; in definition of progress report after "report" substituted language regarding form and maps provided by department and outlining map requirements for former language that read: "showing the land that the operator has affected by opencut mining during the year. The report must show the number of acres of affected land and all reclamation accomplished"; deleted former definition of public notice that read: ""Public notice" means notice given by publication in a newspaper in the general area where the affected land is located. The notice must be given once a week for 3 successive weeks"; in definition of reclamation plan inserted "meets the requirements of 82-4-434"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(1), Ch. 507, L. 1999, provided: "[Section 1(8)] [82-4-303(8)] and [section 9(6)] [82-4-403(6)] apply to operations conducted after July 31, 1999, except that the department of environmental quality may accept small miner exclusions and issue licenses and permits to implement these provisions at any time after [the effective date of this act] [effective April 28, 1999]. [Section 1(8)] [82-4-303(8)] and [section 9(6)] [82-4-403(6)] apply to those operations upon filing of the exclusion or issuance of the license or permit."

Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 9], amending 82-4-403, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

1995 Amendment: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "state board of land commissioners"; inserted definition of Department; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: Substituted ""Affected land" means the area of land and land covered by water that is disturbed by opencut mining operations, including the area from which overburden or mineral is to be or has been removed and upon which the overburden is to be or has been deposited, roads constructed to gain access to the mineral, areas of processing facilities on or contiguous to the opencut mine, treatment and sedimentation ponds, and mineral stockpile areas on or contiguous to the opencut mine" for former definition that read: ""Affected land" means the area of land from which overburden is to be or has been removed and upon which the overburden is to be or has been deposited"; deleted former (5) that read: ""Highwall" means that side of the pit adjacent to unmined land"; inserted definition of minerals; in definition of opencut mining, in introductory clause, and in (7)(c) and definition of overburden substituted "minerals" for "bentonite, clay, scoria, phosphate rock, sand, or gravel"; in definition of opencut mining inserted language referring to mining directly from natural deposits of minerals; in (7)(c), at beginning, substituted "removing" for "including the removal of"; in definition of operator substituted "or" for "and"; and inserted definition of processing facilities.

Administrative Rules

ARM 17.24.202 Definitions.

82-4-405. Inapplicability to government.

Compiler's Comments

1999 Amendment: Chapter 507 in middle inserted reference to federal government or its agencies. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Attorney General's Opinions

Retroactive: After July 1, 1975, the State of Montana and its subdivisions need not comply with any fee or bonding requirements of The Opencut Mining Act. 36 A.G. Op. 31 (1975).

82-4-406. Exemption — operations on federal lands.

Attorney General's Opinions

Applicability of Opencut Mining Act: The Opencut Mining Act does not apply to federal agencies conducting opencut mining operations on private or federal land absent congressional authorization. But the Act does apply to private contractors mining on private land, and unless conflicting federal legislation applies, the Act also applies to private contractors mining on federal land. Any private contractor to whom the Act applies is required to enter into a contract pursuant to 82-4-431. 37 A.G. Op. 164 (1978).

82-4-421. Administration — delegation of functions.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board"; and deleted second sentence that read: "The board may delegate to the commissioner of state lands such powers, duties, and functions under this part as it considers necessary for the performance of its duties." Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Collateral References

53A Am. Jur. 2d Mines and Minerals §257.

82-4-422. Powers, duties, and functions.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 79 deleted former (1)(b) that read: "(b) conduct hearings and, for the purposes of conducting those hearings, administer oaths and affirmations, subpoena witnesses, compel attendance of witnesses, hear evidence, and require the production of any books, papers, correspondence, memoranda, agreements, documents, or other records relevant or material to the inquiry"; inserted (2)(c) requiring the board to conduct hearings; and made minor changes in style. Amendment effective March 20, 2001.

Chapter 325 near middle of (1)(a) substituted "requirements of this part and rules adopted to implement this part" for "requirements of the part or rules"; inserted (1)(b) allowing department to amend permits; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1999 Amendment: Chapter 507 at beginning of (1)(a) substituted "issue permits when" for "enter into contracts where"; in (2)(b) substituted "permits" for "contracts"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 11], amending 82-4-422, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

1995 Amendment: Chapter 418 in (1) and (1)(a) substituted "department" for "board"; deleted former (2) that read: "(2) prepare and adopt rules pertaining to opencut mining to accomplish the purposes of this part"; deleted (4) that read: "(4) adopt uniform procedures for the filing of necessary records, the issuance of contracts, and for any other matters of administration not

specifically enumerated in this part"; and inserted (2) authorizing the Board to adopt rules on the subjects of former subsections (2) and (4). Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 17, chapter 24, subchapter 2, ARM Rules governing The Opencut Mining Act.

82-4-423. Permits for reclamation.

Compiler's Comments

1999 Amendment: Chapter 507 in first sentence after "authorized" substituted "issue permits to" for "enter into contracts with" and in second sentence substituted "permit" for "contract" and at end substituted "a permit" for "such contracts"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 12], amending 82-4-423, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

1995 Amendment: Chapter 418 in three places substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: Near end of first sentence substituted "minerals" for "bentonite, clay, scoria, phosphate rock, sand, and gravel".

Administrative Rules

ARM 17.24.206 Landowner's consent to reclamation.

ARM 17.24.212 Approval or disapproval of application for a contract.

82-4-424. Receipt and expenditure of funds — disposition of fees, fines, penalties, and other money.

Compiler's Comments

2001 Amendment: Chapter 338 deleted former (2) that read: "(2) Any funds of any public works programs available to the department must be expended and used to reclaim and rehabilitate any lands that have been subject to opencut mining and that have not been reclaimed and rehabilitated in accordance with the standards of this part"; and substituted (2) concerning deposit of fees, fines, and penalties in the environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110 and concerning funds held as bond or as a result of bond forfeiture being deposited in the environmental rehabilitation and response account for former text that read: "There is an opencut mining and reclamation account within the state special revenue fund established in 17-2-102. There must be deposited in the account all fees, fines, penalties, and other money that have been or will be paid under the provisions of this part. The money in the account is available to the department through appropriation and must be spent by the department for the reclamation and revegetation of land, research pertaining to the reclamation and revegetation of land, and the rehabilitation of water affected by opencut mining operations and for administration of this part. Any unspent or unencumbered money in the account at the end of a fiscal year must remain in the account until spent or appropriated by the legislature." Amendment effective July 1, 2001.

The amendment to this section made by Ch. 488, L. 2001, was rendered void by sec. 11, Ch. 488, L. 2001, a coordination instruction.

Severability: Section 8, Ch. 338, L. 2001, was a severability clause.

1995 Amendment: Chapter 418 in (1), in two places, and in (2) substituted "department" for "board"; in (3), in third sentence after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: Inserted (3) establishing the opencut mining and reclamation account, providing the purposes for which it may be appropriated, and providing for its reversion.

82-4-425. Inspection of opencut mining.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Collateral References

58 C.J.S. Mines and Minerals §382.

53A Am. Jur. 2d Mines and Minerals §§257, 274 through 289.

82-4-426. Reclamation of land on which bond forfeited.

Compiler's Comments

2001 Amendment: Chapter 338 at end of second sentence substituted "environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110" for "state general fund". Amendment effective July 1, 2001.

Severability: Section 8, Ch. 338, L. 2001, was a severability clause.

1995 Amendments: Chapter 418 near middle of first sentence substituted "department" for "board". Amendment effective July 1, 1995.

Chapter 509 inserted second sentence concerning depositing excess amount of forfeited bonds in general fund. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

82-4-427. Hearing.

Compiler's Comments

2001 Amendment: Chapter 79 in (1) after "decision of the department" inserted "under this part" and after "hearing" inserted "before the board, if a written request is submitted to the board"; and in (2) at beginning after "The" inserted "contested case provisions of the", and after "Act" substituted "Title 2, chapter 4, part 6, apply to a hearing held under this section" for "governs hearings before the department and judicial review of those decisions". Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1999 Amendment: Chapter 507 at end of (1) inserted "within 30 days of the department's decision"; at end of (2) after "decisions" deleted "of the board under this part"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

1995 Amendment: Chapter 418 in (1) substituted "department" for "commissioner of state lands" and at end deleted "before the board"; and in (2) substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

82-4-431. Permit for reclamation required.

Compiler's Comments

1999 Amendment: Chapter 507 in (1) in first sentence after "removal of" inserted "a total of" and after "more of" substituted "materials and overburden until the department has issued a permit to the operator" for "product or overburden or that will result in the disturbance of land that was previously reclaimed pursuant to this part until the operator has entered into a contract with the department", inserted second sentence prohibiting person without a permit from removing materials from site where 10,000 cubic yards or more of materials and overburden have been removed, and in two places in third sentence substituted "materials and overburden" for "product or overburden"; in three places in first sentence in (2) and at end of (3) substituted "permit" for "contract"; in (2)(a) substituted "2,500 cubic yards" for "1,000 cubic yards"; in (3) inserted "approve an application for issuance of a permit under subsection (1) or" and after "under" inserted reference to subsection (1); and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 14], amending 82-4-431, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

1995 Amendment: Chapter 418 in (1), at beginning, deleted "After March 16, 1973" and near end of first sentence substituted "department" for "board"; in (2)(a)(ii), near beginning after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendments: Chapter 408 inserted (4) making sand and gravel opencut mines subject to local zoning regulations; and made minor change in style. Amendment effective April 9, 1991.

Chapter 431 in (1), in first sentence, inserted "or that will result in the disturbance of land that was previously reclaimed pursuant to this part"; and made minor change in style.

Applicability: Section 5, Ch. 408, L. 1991, provided: "(1) [This act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] does not apply to:

(a) an area for which a contract was issued prior to [the effective date of this act] [effective April 9, 1991] or for which an application for contract or contract amendment was filed with the department of state lands [functions now transferred to department of environmental quality] prior to February 23, 1991; or

(b) an area:

(i) that is contiguous to an area described in subsection (1)(a);

(ii) for which the holder of the contract has the legal right to mine on [the effective date of this act] [effective April 9, 1991]; and

(iii) for which the contract holder files with the department on or before January 1, 1992, on a form provided by the department, a legal description of the area, evidence of the legal right to mine, and certification that the contract holder holds the property for the purpose of future sand or gravel mining.

(2) Before June 1, 1991, the department shall mail notice of the provisions and passage of [this act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] and the form described in subsection (1)(b)(iii) to each person who holds a current contract on [the effective date of this act] [effective April 9, 1991] or who had, prior to February 23, 1991, submitted an application for contract or contract amendment that the department had not approved or denied as of February 23, 1991.

(3) The department shall maintain a list of areas for which certifications have been filed pursuant to subsection (1)(b) and shall provide a copy of the list to any person who requests the list."

1987 Amendment: In (1), at end, inserted exception clause; inserted (2) detailing criteria for exemption from reclamation contract requirement; and inserted (3) restricting location of opencut mines.

Administrative Rules

ARM 17.24.201 Applicability.

ARM 17.24.212 Approval or disapproval of application for a contract.

Attorney General's Opinions

Applicability of Opencut Mining Act: The Opencut Mining Act does not apply to federal agencies conducting opencut mining operations on private or federal land absent congressional authorization. But the Act does apply to private contractors mining on private land, and unless conflicting federal legislation applies, the Act also applies to private contractors mining on federal land. Any private contractor to whom the Act applies is required to enter into a contract pursuant to 82-4-431. 37 A.G. Op. 164 (1978).

82-4-432. Application for permit — contents — issuance — amendment.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 299 in (4) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 325 in (4) near beginning of first sentence substituted "an application" for "a complete application", near middle substituted "15 days" for "30 days" and at end after "person" inserted "whether or not the department believes that the application is complete", inserted second sentence requiring department to identify deficiencies in application if application not complete, at beginning of third sentence inserted "Within 30 days of receipt of a complete application, the department shall notify the applicant", inserted fourth sentence requiring department to identify deficiencies in application if application denied, and inserted sixth sentence requiring department to include reason for extension in notification of extension; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

1999 Amendment: Chapter 507 throughout section substituted "permit" for "contract"; in (2)(b) inserted "for an application to mine bentonite, clay, scoria, sand, or gravel"; in (2)(d) substituted "a complete reclamation plan" for "the method and manner of reclamation that will be used or followed"; in first sentence in (3) in two places substituted "a person" for "the operator" and substituted "an application" for "a plan" and inserted second and third sentences authorizing person to request meeting with department and requiring department to hold meeting if requested; at beginning of first sentence in (4) before "application" inserted "a complete" and after "application" substituted language requiring department to notify person within 30 days of approval or denial of application for former language that read: "bond or security, and fee due from the operator and upon agreement to the terms of the contract by the parties, the department may issue a contract to the applicant which entitles the applicant to continue in or engage in opencut mining on the land therein described"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 15], amending 82-4-432, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

1995 Amendment: Chapter 418 in (1), (3), in three places, (4), (5), in two places, and (6) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: Inserted (2)(c) requiring statement from local governing body to certify compliance with local zoning regulations; and made minor changes in style. Amendment effective April 9, 1991.

Applicability: Section 5, Ch. 408, L. 1991, provided: "(1) [This act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] does not apply to:

(a) an area for which a contract was issued prior to [the effective date of this act] [effective April 9, 1991] or for which an application for contract or contract amendment was filed with the department of state lands [functions now transferred to department of environmental quality] prior to February 23, 1991; or

(b) an area:

(i) that is contiguous to an area described in subsection (1)(a);

(ii) for which the holder of the contract has the legal right to mine on [the effective date of this act] [effective April 9, 1991]; and

(iii) for which the contract holder files with the department on or before January 1, 1992, on a form provided by the department, a legal description of the area, evidence of the legal right to mine, and certification that the contract holder holds the property for the purpose of future sand or gravel mining.

(2) Before June 1, 1991, the department shall mail notice of the provisions and passage of [this act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] and the form described in subsection (1)(b)(iii) to each person who holds a current contract on [the effective date of this act] [effective April 9, 1991] or who had, prior to February 23, 1991, submitted an application for contract or contract amendment that the department had not approved or denied as of February 23, 1991.

(3) The department shall maintain a list of areas for which certifications have been filed pursuant to subsection (1)(b) and shall provide a copy of the list to any person who requests the list."

Administrative Rules

ARM 17.24.203 Bond or other security.
ARM 17.24.204 Site information.
ARM 17.24.205 Mining and reclamation plan.
ARM 17.24.206 Landowner's consent to reclamation.
ARM 17.24.207 Additional requirements for bentonite mines.
ARM 17.24.213 Amendment and revision of contracts.

82-4-433. Bond.

Compiler's Comments

1999 Amendment: Chapter 507 throughout section substituted "permit" for "contract"; at end of first sentence in (1) inserted "and the permit"; in first, second, and fourth sentences in (2) and in first and second sentences in (3) substituted "department" for "board"; at end of second sentence in (2) after "required" inserted "but the department may require that the amount of the bond be adjusted to reimburse the department for foreclosure costs" and in fifth sentence substituted "may" for "shall"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 16], amending 82-4-433, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

1995 Amendment: Chapter 418 in (1), in three places, (3), (4), and (5) substituted "department" for "board"; in (2), in first sentence after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (2), in first sentence, inserted reference to letter of credit; and made minor changes in style.

1987 Amendment: In (2), in fourth and last sentences, substituted "affected land" for "mined acreages"; and made minor changes in phraseology.

1983 Amendment: In (1), in third sentence, deleted "penalty of the" before "bond", at beginning of fourth sentence, deleted "but" and inserted "The amount of the bond", at end of fourth sentence, inserted "unless" provision for determination of cost by the department, and inserted last sentence referring to Board's setting of bond amount where cost of restoration exceeds $1,000 per acre.

Administrative Rules

ARM 17.24.203 Bond or other security.
ARM 17.24.213 Amendment and revision of contracts.

82-4-434. Reclamation plan part of permit — requirements.

Compiler's Comments

2001 Amendment: Chapter 325 in (1) in two places in first sentence before "amendments" inserted "operator-proposed" and inserted last sentence requiring modifications by department to comply with 82-4-436; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 507 throughout section substituted "permit" for "contract"; in introductory clause substituted "reclamation plan" for "contract"; deleted former first, second, third, and fourth sentences in (1) that read: "The operator shall submit a reclamation plan to the department before commencing any opencut mining and may not commence mining before the plan receives approval from the department. The operator may request and receive a meeting with the department prior to submission of the plan. If the department does not notify the operator that it has approved or disapproved a plan within 30 days after the department has received the plan, the department is considered to have approved the plan. The department, however, for sufficient cause, may extend its period of consideration for an additional 30 days if it notifies the operator prior to the end of the original 30-day period"; in third sentence in (1) substituted "department" for "board" and after "immediately" substituted "to the state historic preservation office" for "to the director of the university of Montana-Missoula statewide archaeological survey" and in fourth sentence after "reclamation" deleted "procedures available"; in (2) after "plan" inserted "or a plan of operations"; inserted second sentence in (2)(d) requiring depth of soil materials placed on reclaimed land to be specified in plan; in (2)(k) substituted "those postmine land uses that do not require vegetation" for "rock faces, bench faces, and excavations used for water impoundments"; in (2)(l) after "permanent" deleted "suitable" and after "cover" substituted "that is suitable for the postmine land use" for "for wildlife, livestock"; inserted (2)(o) authorizing department to disapprove reclamation plan or plan of operations unless plans provide that noise and visual impacts on residential areas will be minimized to degree practicable; inserted (2)(p) authorizing department to disapprove reclamation plan or plan of operations unless plans provide implementation of any additional procedures necessary to prevent significant physical harm to land or adjacent land, structures, improvements, or life forms; in (3) after "cease" substituted "may issue an order to reclaim, a notice of violation, or an order of abatement or may institute an action" for "shall institute an action" and after "breach of" substituted "the conditions of the permit" for "contract"; in (4)(a) substituted "term of the permit" for "period of reclamation"; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 17], amending 82-4-434, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

1995 Amendment: Chapter 418 in (1), in 13 places, (2), (2)(h), (3), (4)(a), (4)(b), (5), (6), and (7), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Name Change — Direction to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (2)(n), after "surface", inserted "water"; and made minor changes in style.

1987 Amendment: Inserted (2)(n) requiring protection of surface and ground water.

Administrative Rules

ARM 17.24.204 Site information.
ARM 17.24.205 Mining and reclamation plan.
ARM 17.24.207 Additional requirements for bentonite mines.
ARM 17.24.212 Approval or disapproval of application for a contract.
ARM 17.24.213 Amendment and revision of contracts.
ARM 17.24.214 Annual progress report.
ARM 17.24.215 Penalties.

Attorney General's Opinions

Board Empowered to Require Contract Terms in Addition to Those in This Section: A policy section is relevant not only to the question of legislative intent concerning an act's overall purpose but also to the scope of administrative agency authority under the act. Thus, 82-4-402, the policy section of The Opencut Mining Act, is properly considered in determining the extent of the Board of Land Commissioners' [functions now transferred to Board of Environmental Review] authority under this Act to require reclamation contract commitments in addition to those mandated under this section. 40 A.G. Op. 47 (1984).

82-4-436. Plan amendments.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

82-4-441. Penalty — enforcement.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 79 in (3) deleted former second sentence that read: "The person or operator is entitled, by filing a written request within 20 days of receipt of the notice of violation, to a hearing on the issues of whether the alleged violation has occurred and whether the penalty proposed to be imposed is proper", in second sentence after "10 days after" inserted "issuing the", in third sentence after "hearing" substituted "provided for in 82-4-427, the board" for "or after the time for requesting a hearing has expired, the department" and after "violation and" inserted "if the board finds that the violation occurred", and inserted fourth sentence regarding department action if the time for requesting a hearing expires; in (4) near middle after "permit" inserted "issued"; and made minor changes in style. Amendment effective March 20, 2001.

Chapter 325 at end of (2)(b) inserted "within the past 3 years"; at end of (2)(e) inserted "to decrease the amount of penalty"; in (3) near middle of second sentence inserted "including the penalty calculation that identifies and describes the factors considered pursuant to subsection (2)"; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

1999 Amendment: Chapter 507 in (1) substituted "a reclamation permit" for "a contract for reclamation"; and in (4) substituted "a permit pursuant" for "a contract made pursuant". Amendment effective April 28, 1999.

Saving Clause: Section 20, Ch. 507, L. 1999, was a saving clause.

Severability: Section 21, Ch. 507, L. 1999, was a severability clause.

Applicability: Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 18], amending 82-4-441, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

1997 Amendments: Chapter 271 in (1), at beginning, inserted "The department may assess against"; in (1)(a) and (1)(b), at beginning, deleted "shall pay"; deleted (1)(c) that read: "(c) may be enjoined from continuing the violation as provided in this section"; substituted (2) setting out factors to be considered prior to instituting a civil penalty action for former (2) that read: "The civil penalties provided for in this section may be waived for a minor violation if it is determined that the violation does not represent potential harm to public health, public safety, or the environment and does not impair the administration of this part. The board shall adopt rules to implement and administer a procedure for waiver of a penalty under this subsection"; and made minor changes in style. Amendment effective April 16, 1997.

Chapter 273 in (3), near middle of fourth sentence, substituted "department" for "board". Amendment effective April 16, 1997.

Applicability: Section 3, Ch. 271, L. 1997, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective April 16, 1997.

Saving Clause: Section 6, Ch. 273, L. 1997, was a saving clause.

1995 Amendment: Chapter 418 at beginning of (3), after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (1), at end, deleted "These penalties are recoverable in an action brought in the name of the state of Montana by the attorney general in the district court having jurisdiction of the defendant or by mutual agreement of the parties involved, in the district court of the first judicial district. Penalty money shall be credited to the general fund"; deleted former (2) that read: "(2) The attorney general shall, upon the request of the department, sue for the recovery of the penalties provided for in this section and bring an action for a restraining order or a temporary or permanent injunction against an operator or other person violating or threatening to violate an order adopted under this part"; inserted (3) providing administrative procedures in case of a violation; and inserted (4) authorizing Department to bring an action to enjoin violations.

1987 Amendment: In (1), near beginning of first sentence after "rules adopted thereunder", inserted "or provisions of a contract for reclamation"; and inserted (3) providing for waiver of civil penalties in certain cases.

1987 Statement of Intent: The statement of intent attached to Ch. 280, L. 1987, provided: "A statement of intent is required for this bill to provide guidelines on rules that must be adopted by the board of land commissioners [functions now transferred to board of environmental review] under the provisions of section 7, which amends 82-4-441. Currently, 82-4-441 requires the imposition of a penalty regardless of the seriousness of a violation. A waiver of penalty provision would allow the department of state lands [functions now transferred to department of environmental quality] to serve a notice of noncompliance, informing the operator of violations of the act or contract, without imposing a fine for minor violation.

It is anticipated that the rules would set forth those instances where a violation would not result in a fine. Under the amendment to 82-4-441, a fine may be waived if the violation does not represent potential harm to public health, public safety, or the environment and does not impair the administration of the Opencut Mining Act. The adopted rules will set forth a mechanism through which the department may exercise its discretion in waiving a penalty. Also, the rules will set forth, within the guidelines of the statute, those violations that do not warrant the imposition of a fine. In establishing these rules, the department shall consider:

(1) whether the violation is inadvertent or unavoidable or results from an emergency situation;

(2) whether the violation will significantly alter or hinder reclamation or the approved reclaimed use;

(3) whether there has been a history of violations by the operator;

(4) whether the operator has shown good faith in rectifying the violation; and

(5) other pertinent factors relating to the seriousness of the violation."

1981 Title: The title to Ch. 113, L. 1981 (HB 277), read: "An act to provide for civil penalties for violation and enforcement by the attorney general of the Open Cut Mining Act; repealing section 82-4-435, MCA."

82-4-445. Reclamation of abandoned mine sites.

Compiler's Comments

Effective Date: Section 5, Ch. 329, L. 1995, provided that this section is effective on passage and approval. Approved April 5, 1995.

82-4-446. Filing of lien for abandoned mine reclamation project.

Compiler's Comments

Effective Date: Section 5, Ch. 329, L. 1995, provided that this section is effective on passage and approval. Approved April 5, 1995.

CHAPTER 10
OIL AND GAS — GENERAL PROVISIONS

Chapter Case Notes

Oil and Gas Leases in Deep Creek of Bob Marshall: Federal agencies violated the National Environmental Policy Act of 1969 by issuing oil and gas leases without preparation of an environmental impact statement and without adequate consideration of a no-action alternative. They violated the Endangered Species Act of 1973 by issuing leases without preparation of a comprehensive biological opinion assessing effects on threatened and endangered species in the area. Bob Marshall Alliance v. Hodel, 852 F2d 1223 (9th Cir. 1988).

Gas Pipeline on Tribal Land: A 50-year term for natural gas pipeline rights-of-way, consented to by the tribe, was valid. Blackfeet Indian Tribe v. Mont. Power Co., 838 F2d 1055 (9th Cir. 1988).

Oil and Gas Leases on National Forest Lands: Issuance of leases without "no surface occupancy" stipulations required filing of an environmental impact statement. Connor v. Burford, 836 F2d 1521 (9th Cir. 1988).

Ambiguity in Reservation — Summary Judgment Improper: In a 1944 deed, the grantor reserved "six percent of all royalties received for oil and gas removed from the above-described property". In 1968, the mineral owners leased the property subject to a one-eighth landowner's royalty (12 ½% of oil and gas produced). In a subsequent suit, the royalty owners claimed they were entitled to 6% of production and the mineral owners claimed that the royalty owners were entitled to 6% of the landowner's royalty of 12 ½% of production. The District Court granted summary judgment for the mineral owners. The Supreme Court reversed on the grounds that the reservation language is ambiguous and the true intent of the parties is discernible only with reference to extrinsic evidence, not from the deed alone; therefore, summary judgment was inappropriate. Proctor v. Werk, 220 M 246, 714 P2d 171, 43 St. Rep. 333 (1986).

Ambiguity in Reservation — Course of Conduct: Plaintiffs initiated an action to determine their rights under a reservation in an assignment of an oil and gas lease. The 1926 lease assigned reserved the right to take and use gas "for the purpose of extracting, making, or manufacturing casing-head gasoline or by-products or carbon black". The course of conduct and expert testimony both showed that the language was meant to be nonrestrictive. Souders v. Mont. Power Co., 203 M 483, 662 P2d 289, 40 St. Rep. 583 (1983).

Chapter Law Review Articles

Taxation of Oil and Gas Interests, Dye, 32 Mont. L. Rev. 57 (1971).

Remedies for Breach of Implied Covenants in Oil and Gas Leases in Montana, Gordon, 28 Mont. L. Rev. 187 (1967).

Effect of County and State Recordation of Options on Federal Oil and Gas Leases, Roth, 20 Mont. L. Rev. 101 (1958).

Reservoir Mechanics, Tarner, 17 Mont. L. Rev. 1 (1955).

The Origin, the Accumulation, and the Findings of Oil and Gas, Parker, 17 Mont. L. Rev. 10 (1955).

Elements of Reservoir Engineering, Wanner, 17 Mont. L. Rev. 15 (1955).

Abstracts and Oil Titles, Hanson, 17 Mont. L. Rev. 108 (1955).

A Survey of Oil and Gas Law in Montana as It Relates to the Oil and Gas Lease, Sullivan, 16 Mont. L. Rev. 1 (1955).

Minerals Management in the Western States: The New Federalism and Old Colonialism, Stevens, 6 Pub. Land L. Rev. 49 (1985).

State School Trust Lands and Oil and Gas Royalty Rates, Woodgerd & McCarthy, 3 Pub. Land L. Rev. 119 (1982).

Oil and Gas Leasing on Forest Service Lands: A Question of NEPA Compliance, Nelson, 3 Pub. Land L. Rev. 1 (1982).

The Deductibility of Postproduction Costs in Determining Royalty and Overriding Royalty Under Nonfederal Leases, Williams & Watson, 48 Sw. Legal Found. Inst. on Oil & Gas L. & Tax'n CH6 (1997).

The Interaction of the Division Order and the Lease Royalty Clause, Burney, 28 St. Mary's L.J. 353 (1997).

The New Frontier—Oil and Gas Exploration, Drilling, and Production Permits, Kaiser & Wurtzler, 1993 Min. L. Series, Rocky Mtn. Min. L. Found. 2-1 (1993).

The Greening of the Oil and Gas Industry: Current Trends in Environmental Reporting, Jones & Crain, 40 Oil & Gas Tax Q. 753 (1992).

The Clean Air Act Amendments: Impacts on the Western Mining and Oil and Gas Industries, Raffle, 37 Rocky Mtn. Min. L. Inst. Proc. 6-1 (1991).

Recent Developments—Oil and Gas, Hunter, 34 Loy. L. Rev. 1015 (1989).

Evaluating the Production Status of Oil and Gas Leases, Weaver, 23 Tulsa L.J. 667 (1988).

The Effect of the Tax Reform Acts of 1986 and 1987 on Oil and Gas Property Interests, Pauley & Thibadoux, 36 Oil & Gas Tax Q. 554 (1988).

Chapter Collateral References

Mines and Minerals *key* 36.

38 Am. Jur. 2d Gas and Oil §§1, 2 through 4.

Oil and gas farmout agreements. 65 ALR 5th 211.

Construction and application of "Mother Hubbard" or "cover-all" clause in gas and oil lease or deed. 80 ALR 4th 205.

Duty of oil or gas lessee to restore surface of leased premises upon termination of operations. 62 ALR 4th 1153.

Gas and oil lease force majeure provisions: construction and effect. 46 ALR 4th 976.

Production on one tract as extending term on other tract where one mineral lease conveys oil or gas rights in separate tracts for as long as oil or gas is produced. 35 ALR 4th 1167.

Production on one tract as extending term on other tract, where one mineral deed conveys oil or gas in separate tracts for as long as oil or gas is produced. 9 ALR 4th 1106.

Grant, lease, exception, or reservation of oil and/or gas rights as including oil shale. 61 ALR 3d 1109.

Liability of oil and gas lessee or operator for injuries to or death of livestock. 51 ALR 3d 304.

Meaning of "paying quantities" in oil and gas lease. 43 ALR 3d 8.

Distillate: rights, under oil and gas lease, deed, or sales contract, to "distillate", "condensate", or "natural gasoline". 38 ALR 3d 938.

Water: construction of oil and gas lease provision giving lessee free use of water from lessor's land. 23 ALR 3d 1434.

Development or operation for oil or gas within terms of habendum clause extending primary term while the premises are being "developed or operated". 96 ALR 2d 322.

Duty of lessee or assignee of oil or gas lease as regards marketing or delivery for marketing of oil and gas discovered. 71 ALR 2d 1219.

Employment in connection with oil or gas well drilling, as within federal Fair Labor Standards Act. 66 ALR 2d 1155.

Oil and gas as "minerals" within deed, lease, or license. 37 ALR 2d 1440.

Necessity that mortgage covering oil and gas lease be recorded as real-estate mortgage, and/or filed or recorded as chattel mortgage. 34 ALR 2d 902.

Grant, administration, and construction of leases to explore for oil and gas deposits under continental shelf. (Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §1331, et seq.) 31 ALR Fed. 615.

Part 1
Royalty Interests

Part Case Notes

No Adverse Possession of Royalty Interest by Color of Title Found — Estoppel Applied: Defendants in an action to quiet title to a royalty interest argued that they held color of title to the interest by virtue of an invalid tax deed and subsequent conveyances. However, defendants also argued that the reservation of a royalty interest by Rosebud County, their ultimate grantor, was invalid. Citing Russell v. Texas Co., 238 F2d 636 (1956), the Supreme Court held that the defendants could not attack a royalty reservation in a title under and through which defendants claimed adverse possession by color of title. The court held that defendants were estopped from attacking Rosebud County's royalty reservation and that because defendants' grant expressly subjects them to the county's reservation of a royalty interest, defendants had no color of title to their royalty. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

No Adverse Possession of Royalty Interest by Use and Occupancy Found — Burden of Proof Unmet: Defendants in an action to quiet title to certain royalty interests argued that they established adverse possession. Citing Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136 (1983), the Supreme Court noted that adverse possession must rely upon possession that is actual, visible, exclusive, hostile, and continuous for the required statutory period. Because the defendants failed to produce evidence that they possessed or had taken any of the proceeds from

the royalty, which was held by the clerk of court, the Supreme Court held that adverse possession did not apply. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

Royalty Interest Not Derived From Mineral Interest — Owner of Mineral and Surface Interests Not Entitled to Royalty Interest: Defendants in an action to quiet title to mineral interests in oil and gas argued that because a royalty interest can be derived only from a mineral interest of which they owned 75% and because they invested in and were in control of the mineral interest, they were entitled to all royalties except those burdened by the production lease. Citing McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981), the Supreme Court held that the distinction between a mineral interest and a royalty interest must be recognized. A mineral interest is a right to develop or lease for development and to keep the proceeds of the lease, whereas a royalty interest is the right to a share in production while remaining free from the costs of production. Defendants' argument that they can spend time and money on production yet have a royalty interest blurs this distinction and is contradictory to the definition of a royalty interest. The court refused to recognize such a basis for a royalty interest and awarded the royalty interest to plaintiffs. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

Unresolved Issues Regarding Royalty Interests — Summary Judgment Precluded: Prior to 1955, McDonald & Eide, Inc. (M&E) owned the entire working interest in a lease on a producing oil well. On July 12, 1955, M&E assigned 100% of its interest in the south half and 50% of its interest in the north half to H. W. McDonald, but this assignment was not recorded until 1963. After M&E's corporate charter was repealed for failure to pay taxes, corporate officers of M&E purported to assign M&E's total working interest to V. Eide and J. Von DeLinde in 1961, but this assignment conflicted with the one previously made to McDonald, who filed a quiet title action. Thereafter, all three entered an agreement with Continental Oil Company (Continental) assigning to the company an undivided one-half interest in the lease. While the quiet title action was pending, McDonald assigned undivided interests to G. Huntley, D. Iverson, and A. Larson with the intent to convey to each the respective share "held in suspense by Continental". In 1964, final judgment quieted title in McDonald subject to the agreement with Continental. In 1965, M&E stockholders appointed F. Gunnip as receiver, and he sued M&E corporate officers to recover the lease and other property. A 1970 judgment voided the 1961 agreement, and in 1976, final judgment provided that Gunnip owned one-half interest in the north half of the lease while Eide, Von DeLinde, and Continental were held to have no interest. Shell Oil Company, responsible for disbursing the lease proceeds, continued to pay Continental one-half of the proceeds under the agreement with McDonald, and although Gunnip was owner of a 50% interest, he received only a 25% share of proceeds. In 1981, Gunnip assigned a 3.75% interest in the north half to Huntley and a 2.5% interest in the north half to R. Schwinn. Huntley became aware that Gunnip was not receiving his full share, so Gunnip, Huntley, and Schwinn sued Continental, requesting an additional one-eighth of the proceeds. The District Court granted summary judgment to Continental in 1985, but the Supreme Court reversed on appeal, holding that: (1) unresolved issues of material fact remained regarding Continental's interest; (2) a trial must be had to assess Continental's interest considering potential application of adverse possession, waiver, and estoppel; and (3) Continental's asserted 50% interest in the north half of the lease must be tested against the interest of McDonald's assignees and successors in interest. The case was remanded for further proceedings. Gunnip v. Cont. Oil Co., 223 M 141, 727 P2d 1315, 43 St. Rep. 1605 (1986). On remand, the District Court neglected to assess Continental's interest as directed. On later appeal, the Supreme Court granted supervisory control and determined that: (1) plaintiffs failed to present substantial evidence to support a theory of adverse possession, waiver, or estoppel against Continental; (2) Continental owned an undivided one-half interest in the working interest in the north half of the lease; and (3) Gunnip and his assigns owned the remaining half of the working interest in the north half. Cont. Oil Co. v. Elks Nat'l Foundation, 235 M 438, 767 P2d 1324, 46 St. Rep. 121 (1989).

Assignment of Oil and Gas Lease Working Interest to Trust Valid Grant: In 1954, Fitzpatrick and three other parties entered into an operating agreement concerning the working interest in an oil and gas lease. The agreement included a clause giving each party a preferential right to purchase the working interest of any other party. In 1969, Fitzpatrick divided his interest into three parts. He assigned one-third to his wife, reserved one-third in himself, and assigned one-third in four equal parts to four trusts which he had created for his four children. In 1972, Fitzpatrick signed a quitclaim assignment of whatever working interest he had to Youngblood, successor in interest to one of the four parties to the 1954 agreement. Youngblood had acquired similar quitclaim assignments from the other two parties to the original agreement. Believing that he owned 100% of the working interest in the lease, Youngblood began development of oil and gas wells on the land. The land became productive in 1972. In 1975, Youngblood, concerned about

whether or not he had acquired all of Fitzpatrick's interest, had Fitzpatrick and his wife sign letters to ratify that Youngblood had acquired all their working interest in 1972. The Fitzpatrick children, as beneficiaries of the trusts, refused to sign similar letters. Youngblood then filed an action to quiet title to the working interest in him. The District Court found for Youngblood, ruling that the 1969 assignment was invalid for failure of delivery, failure of acceptance, and for retention of dominion and control over the working interest by Fitzpatrick. The Supreme Court reversed. The court ruled that Fitzpatrick's intent in making the 1969 assignment was to transfer income from oil and gas production to his wife and four children and that delivery was therefore complete. Acceptance of the assignment may be presumed because the net effect of the assignment was beneficial to the trusts. The court further ruled that there was not sufficient evidence that Fitzpatrick retained dominion and control over the working interests after the 1969 assignment. Finally, the court ruled that the parties did not intend the preferential purchase clause to apply to a transfer without consideration between family members, so Youngblood was not entitled to enforce that clause. Exeter Exploration Co. v. Fitzpatrick, 202 M 209, 661 P2d 1255, 40 St. Rep. 38 (1983).

Deed Reserving Mineral Interest to County — No Mutual Mistake: A 1944 deed reserved a mineral interest to the county. The deed did not on its face indicate mutual mistake, the parties agreed in 1977 that the 1944 deed reserved a royalty, and not one of the interested parties claimed mutual mistake. Plaintiff did not overcome the presumption that the 1944 deed contained the final agreement of the parties. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981).

Part Law Review Articles

Oil and Gas Leasehold and Other Estates, Shepherd, 14 Mont. L. Rev. 1 (1953).

Determining the Lessor's Royalty Share of Post-Production Costs: Is the Implied Covenant to Market the Appropriate Analytical Framework?, Williams, Paschal, Moore, Patten, & Williams, 41 Rocky Mtn. Min. L. Inst. Proc. CH 12 (1995).

Gas Royalty Issues: Who, What, How, and When? Valuation and Payment in Today's Market, Martin & Webre, 46 Sw. Legal Found. Inst. on Oil & Gas L. & Tax'n CH 2 (1995).

The "Perfect" Oil and Gas Lease (an Oxymoron), Lynch, 40 Rocky Mtn. Min. L. Inst. Proc. 3 (1994).

Royalty Calculation in a Restructured Gas Market, Pierce, 13 E. Min. L. Found. 18-1 (1992).

Oil and Gas Royalties—A Percentage of What?, Maxwell, 34 Rocky Mtn. Min. L. Inst. Proc. 15-1 (1988).

A Reexamination of the Definitional Elements of Production Payments, Hardie, 38 Inst. on Oil & Gas L. & Tax'n 14.1 (1987).

Lessor/Lessee Relations in a Turbulent Gas Market, Pierce, 38 Inst. on Oil & Gas L. & Tax'n 8.1 (1987).

Part Collateral References

Mines and Minerals *key* 70, 71, 79.

58 C.J.S. Mines and Minerals §§289 through 292, 294 through 296, 301 through 303, 305.

38 Am. Jur. 2d Gas and Oil §§209 through 218.

Oil and gas royalty as real or personal property. 56 ALR 4th 539.

Right to partition of overriding royalty interest in oil and gas leasehold. 58 ALR 3d 1052.

Expiration of term: rights of parties to oil and gas lease or royalty deed after expiration of fixed term where production temporarily ceases. 100 ALR 2d 885.

"Shut-in royalty" payment provisions in oil and gas leases. 96 ALR 2d 345.

Payment of stipulated minimum royalties or annual rental under solid mineral lease as precluding lessor's claim of forfeiture or abandonment. 87 ALR 2d 1076.

Expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return. 73 ALR 2d 1056.

Perpetual nonparticipating royalty interest in oil and gas as violating rule against perpetuities. 46 ALR 2d 1268.

Construction and effect of provision in mineral lease excusing payment of minimum rent or royalty. 28 ALR 2d 1013.

Rights of tenant for life or for years and remaindermen inter se in royalties or rents under oil, gas, coal, or other mineral lease. 18 ALR 2d 98.

What constitutes "royalty" on oil or gas production within language of conveyance, exception, or reservation. 4 ALR 2d 492.

82-10-101. Action for accounting for royalty.

Case Notes

Procedures for Determining Market Price of Gas: In an appeal from a declaratory judgment action, petitioner Montana Power Company requested the Supreme Court to determine whether the procedures adopted on remand from a previous case by the District Court for determining market price are consistent with the Supreme Court's instruction for remand. The Supreme Court held that the District Court's action on remand was proper, which action set the market price of gas at a certain level, and required the parties to attempt to renegotiate the market price if market conditions materially change, the court retaining jurisdiction if the parties cannot agree as to price. Mont. Power v. Kravik, 189 M 369, 616 P2d 321, 37 St. Rep. 1531 (1980).

Collateral References

Mines and Minerals *key* 70.

58 C.J.S. Mines and Minerals §227.

38 Am. Jur. 2d Gas and Oil §315.

Expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return. 73 ALR 2d 1056.

Construction and effect of provision in mineral lease excusing payment of minimum rent or royalty. 28 ALR 2d 1013.

Rights of tenants for years and remaindermen inter se in royalties or rents under oil or gas lease. 18 ALR 2d 98.

What constitutes oil or gas "royalty" within language of conveyance or assignment. 4 ALR 2d 492.

Rights and remedies of owner or lessee of oil or gas land or mineral or royalty interest therein, in respect of waste of oil or gas through operations on other lands. 4 ALR 2d 198.

82-10-102. Remedy not exclusive.

Compiler's Comments

1983 Amendments — Composite Section: Chapter 500, at beginning of section, changed "The remedy herein provided for" to "The remedy provided for in 82-10-101"; near end changed "provisions of this part" to "provisions of 82-10-101"; and at end changed "this part" to "that section".

Chapter 582, near beginning of section, changed "The remedy herein provided for" to "The remedy provided for in 82-10-101"; and after "the provisions of" and "provided for by" changed "this part" to "that section".

In preparing the composite of this section, the compiler has chosen the section designation "82-10-101" from Ch. 500 rather than the language "that section" from Ch. 582, for purposes of clarity.

82-10-103. Obligation to pay royalties as essence of contract — interest.

Compiler's Comments

1985 Amendment: In (2) near beginning, substituted "120 days after the initial oil or gas produced under the lease is marketed and within 60 days for all oil and 90 days for all gas produced and marketed thereafter" for "180 days after oil or gas produced under the lease is marketed" and at end, inserted "and annually whenever the aggregate amount is less than $10".

Source: This section was drawn from 47-16-39.1 of the North Dakota Century Code but was substantially amended in the legislative process.

82-10-110. Division order — definition — effect.

Compiler's Comments

Source: This section is based on Oklahoma Statutes Annotated, Title 52, section 570.11.

Part 2
Lease of Local Government Land

Part Case Notes

Deed Reserving Mineral Interest to County — No Mutual Mistake: A 1944 deed reserved a mineral interest to the county. The deed did not on its face indicate mutual mistake, the parties agreed in 1977 that the 1944 deed reserved a royalty, and not one of the interested parties claimed mutual mistake. Plaintiff did not overcome the presumption that the 1944 deed contained the

final agreement of the parties. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981).

Part Collateral References
Mines and Minerals *key* 5, 72, 86, 94.
38 Am. Jur. 2d Gas and Oil §308.

82-10-201. Authorization for lease and terms — land not subject to leasing.

Collateral References
38 Am. Jur. 2d Gas and Oil §308.

82-10-202. Acreage pooling.

Law Review Articles
Some Legal Aspects of the Unitization of Federal, State and Fee Lands, Hinkle, 14 Mont. L. Rev. 49 (1953).

Part 3
Underground Gas Storage Reservoirs

Part Collateral References
58 C.J.S. Mines and Minerals §§334, 336 through 339, 349 through 356.
38 Am. Jur. 2d Gas and Oil §§14, 15, 171, 249 through 258.
Rights and liabilities with respect to natural gas reduced to possession and subsequently stored in natural reservoir. 94 ALR 2d 543.

82-10-303. Use of eminent domain to acquire underground reservoirs.

Compiler's Comments
2001 Amendment: Chapter 125 in (1) in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.
Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Collateral References
Supreme Court's views as to what constitutes "taking," within meaning of Fifth Amendment's command that private property not be taken for public use without just compensation. 57 L Ed 2d 1254, §§7, 12, superseded by 89 L Ed 2d 977.

82-10-304. Certificate of board required prior to use of eminent domain.

Compiler's Comments
2001 Amendment: Chapter 125 in (1) in first sentence inserted references to Title 70, chapter 30, and this chapter; and made minor changes in style. Amendment effective October 1, 2001.
Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

82-10-305. Proceedings.

Compiler's Comments
2001 Amendment: Chapter 125 at end deleted reference to Title 70, chapter 31; and made minor changes in style. Amendment effective October 1, 2001.
Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Part 4
Abandoned Oil and Gas Wells — Reclamation

Part Collateral References
Mines and Minerals *key* 92.46, 122.
58 C.J.S. Mines and Minerals §§335, 362 through 370, 381, 383.
38 Am. Jur. 2d Gas and Oil §§176, 244, 245.

Common-law strict liability in tort of prior landowner or lessee to subsequent owner for contamination of land with hazardous waste resulting from prior owner's or lessee's abnormally dangerous or ultrahazardous activity. 13 ALR 5th 600.

Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants. 11 ALR 5th 438.

Abandoned well: duty and liability as to plugging oil or gas well abandoned or taken out of production. 50 ALR 3d 240.

Payment of stipulated minimum royalties or annual rental under solid mineral lease as precluding lessor's claim of forfeiture or abandonment. 87 ALR 2d 1076.

Duty of oil and gas lessee to restore surface of leased premises. 65 ALR 2d 1356, superseded by 62 ALR 4th 1153.

Abandonment of oil or gas lease by parol declaration. 13 ALR 2d 951.

82-10-401. Notice required before abandonment of well — owner's option.

Administrative Rules

ARM 36.22.1302 Notice of abandonment.

82-10-402. Inventory of abandoned wells and seismic operations — reclamation procedures.

Compiler's Comments

1989 Amendment: In (1), in two places, substituted "board of oil and gas conservation" for "department of natural resources and conservation" and "record" for "list"; in (2), near beginning of first sentence, substituted "record compiled" for "list supplied by the department" and near middle of first sentence, after "determine", inserted "and list"; in (3) substituted language that provides that when a person who abandoned well, sump, or hole cannot be identified or located or does not have resources to pay for complete reclamation, Board may reclaim land with funds from account consistent with 82-11-161 and 82-11-164 for "When the person who abandoned a well, sump, or hole cannot be identified or located under the preceding subsection, the board shall notify the department of natural resources and conservation. The department may then reclaim the disturbed land with funds available from the resource indemnity trust fund under 15-38-202, when available"; inserted (4) defining well for purposes of subsection (3); and made minor changes in phraseology. Amendment effective July 1, 1989.

Part 5
Surface Owner Damage and Disruption Compensation

Part Compiler's Comments

1981 Title: The title to Ch. 199, L. 1981 (SB 16), read: "An act to require oil and gas developers or operators to give written notice to surface owners of intent to begin drilling operations; to require oil and gas developers and operators to compensate surface owners for damages caused by drilling and production operations; and to allow such compensation to be made in annual installments under certain conditions; and providing an effective date."

Source: This part is based on Title 38, chapter 11.1, North Dakota Century Code.

Severability: Section 10, Ch. 199, L. 1981, was a severability section.

82-10-503. Notice of drilling operations.

Compiler's Comments

1985 Amendment: Inserted last sentence referring to time deadlines for giving notice of drilling operations.

1983 Amendment: Twice after "surface owner" inserted "and any purchaser under contract for deed" and after second insertion substituted "their addresses" for "his address".

82-10-504. Surface damage and disruption payments — penalty for late payment.

Compiler's Comments

1985 Amendment — Subsection Enactment: In (1)(c) substituted "receive annual damage payments" for "be paid damages in annual installments".

Subsection (2) concerning penalty for late payment by an oil and gas developer or operator was enacted as a separate section by Ch. 497, L. 1985, but is codified with this section for convenience.

CHAPTER 11
OIL AND GAS CONSERVATION

Chapter Administrative Rules

Title 36, chapter 22, ARM Board of Oil and Gas Conservation.

Chapter Case Notes

Reasonable Notice Required Before Duty to Drill Offset Well Arises: Clarifying its opinion in U.V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979), the Supreme Court held that before a lessee's duty to drill an offset well arises, the lessee must have reasonable notice of the necessity to protect the leasehold. Notice "can either be express, from the lessor, or constructive, gained from the surrounding circumstances". This rule is only applicable in cases when a lessor is seeking relief in the form of damages. If he is seeking other forms of relief, such as forfeiture of the lease, he must give written notice in order to give the lessor a chance to cure the breach. Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

Forfeiture of Gas and Oil Lease — Common-Law Offset Drilling Rule: Where an oil and gas lease provided that no change in ownership of the land was to be binding upon the lessees until after lessee had been given a copy of any such transfer, lessor's grantees' right to damages for failure to drill an offset well under the common-law offset drilling rule could not be defeated by a failure to give the required notice, as the purpose of the notice is to prevent the lessee's forfeiture of the lease for failure to pay delay rentals to the proper party. Such required notice has nothing to do with implied covenants. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Notice or Demand to Drill Under Common-Law Offset Drilling Rule: Where plaintiffs' well was being drained by an adjoining well in which defendants (plaintiffs' lessees under a gas and oil lease) also had an interest, there was no requirement that plaintiffs must serve written notice or demand to drill an offset well under the common-law offset drilling rule, as those defendants were presumed to know that plaintiffs' well was being drained. However, as to those defendants who did not own an interest in the well causing the plaintiffs' well to drain, the plaintiffs must give notice to drill. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes: Where the parties entered into a mineral lease for the production of oil underlying plaintiff's property, there was by common law implied in this and every oil and gas lease a covenant on the part of the lessee to protect the premises of his lessor from drainage by an adjacent producing well by drilling an offset well. The implied covenant was not per se eliminated by the enactment of the 1953 oil and gas conservation law, and an oil and gas lessee still has a duty under the implied covenant to protect his premises from drainage by drilling an offset well, if doing so would not be in violation of the statutes or of a valid rule or order of the Oil and Gas Conservation Board. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Chapter Law Review Articles

Application of the Doctrine of Correlative Rights by the State Conservation Agency in the Absence of Express Statutory Authorization, Strong, 28 Mont. L. Rev. 205 (1967).

Symposium on Rocky Mountain Oil and Gas Law, Vol. 17, No. 1, Mont. L. Rev. (1955).

Conservation in Montana, Marchi, 17 Mont. L. Rev. 100 (1955).

A Survey of Oil and Gas Law in Montana as It Relates to the Oil and Gas Lease, Sullivan, 16 Mont. L. Rev. 1 (1955).

Oil and Gas Leasehold and Other Estates, Shepherd, 14 Mont. L. Rev. 1 (1953).

Reconciling State Oil and Gas Conservation Regulation With the Natural Gas Act: New Statutory Revelations, Pierce, 1989 B.Y.U. L. Rev. 9 (1989).

Chapter Collateral References

Mines and Minerals *key* 86, 92.2.

38 Am. Jur. 2d Gas and Oil §157.

Production on one tract as extending term on other tract where one mineral lease conveys oil or gas rights in separate tracts for as long as oil or gas is produced. 35 ALR 4th 1167.

Secondary recovery of oil and gas. 19 ALR 4th 1182.

Remedy for breach of implied duty of oil and gas lessee to protect against drainage. 18 ALR 4th 147.

Implied duty of oil and gas lessee to protect against drainage. 18 ALR 4th 14.

Market value: meaning of, and proper method for determining, market value or market price in oil and gas lease requiring royalty to be paid on standard measured by such terms. 10 ALR 4th 732.

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits. 10 ALR 3d 1226.

Compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit. 37 ALR 2d 434.

Part 1
Regulation by Board of Oil and Gas Conservation

Part Administrative Rules

ARM 36.22.304 Inspection of records, properties, and wells.

Part Law Review Articles

Application of the Doctrine of Correlative Rights by the State Conservation Agency in the Absence of Express Statutory Authorization, 28 Mont. L. Rev. 205 (1967).

Impact of the Tax Reform Act of 1986 on the Oil and Gas Industry, Glickman, Coffin, & Pollan, 38 Inst. on Oil & Gas L. & Tax'n 12.1 (1987).

Significant Current Developments in Oil and Gas Taxation, Linden, 38 Inst. on Oil & Gas L. & Tax'n, 11.1 (1987).

State Regulation of Natural Gas Production: Is There Life After Transco [Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd. of Mississippi, 106 S. Ct. 709]?, Martin, 38 Inst. on Oil & Gas L. & Tax'n 10.1 (1987).

Recent Developments in Oil and Gas Bankruptcy Law, Gandy, 38 Inst. on Oil & Gas L. & Tax'n 2.1 (1987).

Part Collateral References

Mines and Minerals *key* 92.15.

58 C.J.S. Mines and Minerals §§334, 349, 357.

38 Am. Jur. 2d Gas and Oil §§157 through 162.

82-11-101. Definitions.

Compiler's Comments

1993 Amendment: Chapter 379 deleted definition of gas that read: ""Gas" means all natural gases and all other fluid hydrocarbons as produced at the wellhead and not defined as oil in subsection (10) of this section"; deleted definition of oil that read: ""Oil" means crude petroleum oil and other hydrocarbons regardless of gravity which are produced at the wellhead in liquid form by ordinary production methods and which are not the result of condensation of gas before or after it leaves the reservoir"; in definition of waste inserted (b) excluding from definition loss of gas to atmosphere during coal mining; and made minor changes in style.

Saving Clause: Section 6, Ch. 379, L. 1993, was a saving clause.

1991 Amendment: In definition of responsible person inserted "disposal well, water source well, drill site", after "hole" inserted "or other area where oil and gas drilling and production operations were conducted", and deleted former (a) and (b) requiring responsible person to be either a corporation, association, partnership, or other business organization with assets in excess of $250,000 or, if the business organization does not have assets in excess of $250,000, to be a natural person with primary ownership in the business organization; and made minor changes in style.

Saving Clause: Section 6, Ch. 734, L. 1991, was a saving clause.

1989 Amendment: Inserted definition of responsible person. Amendment effective July 1, 1989.

1987 Amendment: Inserted definitions of administrator, class II injection well, fluid, pollution, and state waters; and in definition of gas changed reference to subsection (7) to reference to subsection (10).

1983 Amendment: In definition of gas, substituted reference to "(7)" for "(6)".

Severability Clause: Section 8, Ch. 19, L. 1979, read: "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Administrative Rules

ARM 36.22.302 Definitions.

82-11-103. Lands subject to law.

Compiler's Comments

1991 Amendment: In first sentence after "its" deleted "taxation and" and after "powers" inserted "including all state-owned lands"; and made minor changes in style.

Saving Clause: Section 6, Ch. 734, L. 1991, was a saving clause.

Law Review Articles

Oil and Gas Leases on Federal Lands, Malone, 14 Mont. L. Rev. 20 (1953).

82-11-104. Construction — no conflict with board of land commissioners' authority.

Compiler's Comments

1991 Amendment: At end of section inserted proviso subjecting state lands to laws concerning space and statutory pooling and unitization in absence of agreements; and made minor changes in style.

Saving Clause: Section 6, Ch. 734, L. 1991, was a saving clause.

82-11-111. Powers and duties of board.

Compiler's Comments

1989 Amendment: Inserted (6) requiring Board to determine, for purposes of using account, when person cannot be identified or located or does not have sufficient resources to plug well, sump, or hole or when previously abandoned well, sump, or hole is cause of problems and no responsible party can be identified or located or, if identified or located, does not have resources to correct problem. Amendment effective July 1, 1989.

1987 Amendment: In (2)(a) substituted "disposal or injection of water and disposal of oil field wastes" for "disposal of salt water and oil field wastes"; in (2)(b), after "gas wells", inserted "or class II injection wells"; and inserted (5) referring to jurisdiction over class II injection wells.

1987 Statement of Intent: The statement of intent attached to Ch. 503, L. 1987, provided: "It is the intent of the legislature that the board of oil and gas conservation adopt rules necessary to regulate class II injection wells under the provisions of this act. These rules must establish an enforceable program meeting the requirements of the environmental protection agency for state administration of an underground injection control program and ensuring compliance with state water quality laws."

1983 Amendment: In (2)(a), referring to prevention of contamination of or damage to surrounding land or underground strata, inserted all of subsection except "regulating the disposal of salt water and oil field wastes".

Section Not Codified: Section 60-127(2)(e), R.C.M. 1947, a clause requiring the Board to promulgate rules no later than Nov. 1, 1974, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 288, L. 1953, as amended by sec. 1, Ch. 222, L. 1975.

Administrative Rules

Title 36, chapter 22, subchapter 1, ARM Organizational rule.
Title 36, chapter 22, subchapter 2, ARM Overall procedural rules.
Title 36, chapter 22, subchapter 3, ARM General provisions.
Title 36, chapter 22, subchapter 5, ARM Seismic exploration activities.
ARM 36.22.503 Notification.
Title 36, chapter 22, subchapter 6, ARM Permit to drill.
Title 36, chapter 22, subchapter 7, ARM Well spacing units.
Title 36, chapter 22, subchapter 10, ARM Drilling.
Title 36, chapter 22, subchapter 11, ARM Safety.
Title 36, chapter 22, subchapter 12, ARM Production.
Title 36, chapter 22, subchapter 13, ARM Abandonment, plugging, and restoration.
Title 36, chapter 22, subchapter 14, ARM Underground injection control.
Title 36, chapter 22, subchapter 17, ARM Horizontal wells and enhanced tax recovery incentives.

Case Notes

Common-Law Rule Not Superseded by Authority of Board:

In an action by plaintiffs (lessor's grantees) for damages resulting from defendant lessees' failure under an oil and gas lease to protect the plaintiffs' interests by drilling an offset well, the common-law offset drilling rule, under which plaintiffs seek damages, has not been superseded by

the administrative powers of the Board of Oil and Gas Conservation, as the powers of the Board do not include the authority to adjudicate private rights. As held in the case of Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965), the Legislature gave the Board the duty to consider correlative rights in making orders, but adjudication of those rights must be by civil action in the District Courts. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Under 82-11-201, the Oil and Gas Conservation Commission had authority to consider correlative rights and private interests in making regulatory orders establishing spacing units with respect to fringe owners, but it does not have authority to adjudicate disputes involving those rights. Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965).

Collateral References

Mines and Minerals *key* 92.15, 92.16.

58 C.J.S. Mines and Minerals §§335, 362 through 370, 381, 383.

38 Am. Jur. 2d Gas and Oil §157, et seq.

Relative rights, as between municipality and abutting landowners, to minerals, oil, and gas underlying streets, alleys, or parks. 62 ALR 2d 1311.

82-11-112. Intergovernmental cooperation.

Law Review Articles

Some Legal Aspects of the Unitization of Federal, State and Fee Lands, Hinkle, 14 Mont. L. Rev. 20 (1953).

82-11-118. Fees for processing applications.

Compiler's Comments

1995 Amendment: Chapter 451 in (1) substituted "15-36-303" for "15-23-601 or 15-36-101". Amendment effective January 1, 1996.

Applicability: Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [part 6 now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

1993 Statement of Intent: The statement of intent attached to Ch. 9, Sp. L. November 1993, provided: "A statement of intent is required for this bill because the board of oil and gas conservation is authorized to approve and certify production decline rates for the purpose of determining incremental production from enhanced recovery projects as provided in this bill.

The department of revenue has adopted rules for determining incremental production from tertiary production based on production decline rates. It is the intent of this legislation that the determination of incremental production is more appropriately a function of the board of oil and gas conservation because the board already has comprehensive statutory authority over oil and gas exploration and development activities in Montana.

The legislature intends that the board of oil and gas conservation shall, in consultation with the department of revenue, adopt rules setting forth the methodology by which the board may approve new or expanded secondary and tertiary recovery projects. The rules must include the method for establishing the rate of decline in production in the existing level of development in a

project area. For a secondary or tertiary recovery project for which initial approval is sought, the rules must include the method for establishing the rate of decline in production from existing primary or secondary recovery operations in a proposed project area. In addition, the rules must include the method for determining the level of production from existing wells in a project area in order to establish the level of incremental production that qualifies for the tax incentive rates provided in this bill.

The board of oil and gas conservation is required to establish by rule a fee schedule to defray the expenses associated with reviewing applications for enhanced recovery projects. The fee schedule adopted by the board must take into account the complexity of processing the application.

A statement of intent is also required for this bill because the department of revenue is granted rulemaking authority for determining the allocation of incremental production from enhanced recovery projects to production that is subject to net proceeds taxation and to production that is subject to the local government severance tax. The allocation must be based on the ratio of production from wells drilled before July 1, 1985, in a project area that qualifies for a reduced tax rate on incremental production to production from wells drilled after June 30, 1985, in the project area that qualifies for a reduced tax rate on incremental production."

Report Required: Section 21, Ch. 9, Sp. L. November 1993, provided: "The board of oil and gas conservation shall report at least once a year to the revenue oversight committee [now revenue and transportation interim committee] regarding the implementation of [this act]. The reports must include but are not limited to information regarding:

(1) the methods used to determine production decline rates;

(2) rules adopted to implement [this act];

(3) the number of enhanced recovery projects completed or anticipated to be completed in a year; and

(4) the number of horizontal wells completed or anticipated to be completed in a year and the method of recovery from the horizontal wells."

Severability: Section 23, Ch. 9, Sp. L. November 1993, was a severability clause.

Effective Date — Applicability: Section 24, Ch. 9, Sp. L. November 1993, provided: "[This act] is effective on passage and approval [approved December 17, 1993] and applies to oil production from new or expanded enhanced recovery projects and to tax years that begin after December 31, 1993."

82-11-121. Oil and gas waste prohibited.

Administrative Rules

ARM 36.22.1014 Blowout prevention and well control equipment.
ARM 36.22.1219 Gas waste prohibited.
ARM 36.22.1240 Report of well status change.
Title 36, chapter 22, subchapter 14, ARM Underground injection control.

Collateral References

Mines and Minerals *key* 92.28.
58 C.J.S. Mines and Minerals §§336, 349 through 356, 380.
38 Am. Jur. 2d Gas and Oil §§157, 165 through 167.

82-11-122. Notice of intention to drill or conduct seismic operations — notice to surface owner.

Compiler's Comments

1985 Amendments: Chapter 339 near middle of third sentence, after "explorations", deleted "with explosives".

Chapter 497 inserted second sentence referring to requirement of notice to surface owner.

Administrative Rules

ARM 36.22.306 Organization reports.
Title 36, chapter 22, subchapter 6, ARM Permit to drill.

Attorney General's Opinions

Survey Plat With Intention to Drill — Conformance With Corner Recordation Act Required: Survey plats submitted with a notice of intention to drill under 82-11-122 must be completed in conformance with Title 70, ch. 22, part 1. 41 A.G. Op. 89 (1986).

82-11-123. Requirements for oil and gas operations.

Compiler's Comments

1997 Amendment: Chapter 34 deleted former (5)(b) that read: "(b) if the well is completed after June 30, 1989, until the owner notifies the board that the well is producing oil and gas in commercial quantities and meets the requirements of 82-11-162"; and made minor changes in style. Amendment effective February 24, 1997.

1993 Amendment: Chapter 376 in (2), after "surveys", inserted "geological sample logs, mud logs, core descriptions, and ordinary core analysis"; in (5), in second sentence after "bond", inserted "may be forfeited in its entirety by the board for failure to perform the duty to properly plug each dry or abandoned well and"; and made minor changes in style. Amendment effective April 16, 1993.

Retroactive Applicability: Section 2, Ch. 376, L. 1993, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all wells."

1989 Amendments: Chapter 83 in (3) substituted "strata" for "stratum" and "cave-ins" for "cavings".

Chapter 530 inserted (5)(a) and (5)(b) stating circumstances under which bond may not be canceled or absolved. Amendment effective July 1, 1989.

1987 Amendment: In (3), after "wells", inserted "and class II injection wells"; in (7), near beginning after "gas", inserted "or injects or disposes of water" and near end, after "gas", inserted "or water"; and inserted (8) requiring monitoring equipment or methods in the operation of class II injection wells.

Administrative Rules

ARM 36.22.306 Organization reports.
Title 36, chapter 22, subchapter 10, ARM Drilling.
Title 36, chapter 22, subchapter 11, ARM Safety.
Title 36, chapter 22, subchapter 12, ARM Production.
Title 36, chapter 22, subchapter 13, ARM Abandonment, plugging, and restoration.
ARM 36.22.1308 Plugging and restoration bond.
Title 36, chapter 22, subchapter 14, ARM Underground injection control.

Case Notes

Correlative Rights: Under 82-11-201, the Oil and Gas Conservation Commission had authority to consider correlative rights and private interests in making regulatory orders establishing spacing units with respect to fringe owners, but it does not have authority to adjudicate disputes involving those rights. Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965).

Collateral References

Mines and Minerals *key* 92.15, 92.19.
58 C.J.S. Mines and Minerals §§164, 335, 362 through 370, 381, 383.
38 Am. Jur. 2d Gas and Oil §157, et seq.

82-11-124. Requirements relating to waste prevention.

Administrative Rules

ARM 36.22.607 Drilling permits pending special field rules.
ARM 36.22.702 Spacing of wells.
ARM 36.22.703 Horizontal wells.
Title 36, chapter 22, subchapter 10, ARM Drilling.
Title 36, chapter 22, subchapter 11, ARM Safety.
Title 36, chapter 22, subchapter 12, ARM Production.
ARM 36.22.1217 Water production report.
ARM 36.22.1241 Service company reports.
Title 36, chapter 22, subchapter 13, ARM Abandonment, plugging, and restoration.
Title 36, chapter 22, subchapter 14, ARM Underground injection control.

Collateral References

Mines and Minerals *key* 92.14, 92.28, 92.49.
58 C.J.S. Mines and Minerals §§349 through 356.
38 Am. Jur. 2d Gas and Oil §§165 through 167.
Rights and remedies respecting waste through operations on other lands. 4 ALR 2d 198.

82-11-125. Availability of cores or chips, cuttings, and bottom-hole temperatures to board.

Compiler's Comments

1983 Amendment: In (2) near middle of first sentence after "shall within", changed "6 months" to "3 years" and deleted former second and third sentences, which read: "The cuttings, cores, chips, and logs shall be impounded and kept secure and confidential by the board until such time that the board desires to use the same; however, the board may not use the logs, chips, cores, and cuttings from stratigraphic test wells until a period of 3 years from the date of their impounding by the board has elapsed, unless the owner of the stratigraphic test well consents to their use by the board prior to the expiration of the 3-year period. The board, during the period of impoundment for any cores, cuttings, chips, or logs from any stratigraphic test well, may not give any person access to the cores, chips, cuttings, or logs, and it may not disclose any information relating thereto or derived therefrom."; and deleted former (3), which read: "Notwithstanding subsection (2), bottom-hole temperatures furnished to the board by stratigraphic test well owners shall be public information immediately upon filing with the board."

Administrative Rules

ARM 36.22.1012 Samples of cores and cuttings.

Collateral References

Mines and Minerals *key* 92.18.

82-11-127. Prohibited activity — Makoshika state park.

Compiler's Comments

1999 Amendment: Chapter 522 inserted (3) listing certain prohibited oil and gas development activities in Makoshika state park; inserted (4) allowing directional drilling and access from outside park; inserted (5) pertaining to privately owned mineral rights and school trust lands in the park; and made minor changes in style. Amendment effective April 29, 1999.

Severability: Section 2, Ch. 522, L. 1999, was a severability clause.

Administrative Rules

Title 36, chapter 22, subchapter 14, ARM Underground injection control.

82-11-131. Privilege and license tax.

Compiler's Comments

1995 Amendment: Chapter 573 in (1) increased assessment on market value from "2/10 of 1%" to "3/10 of 1%" and after "petroleum" deleted "originally"; in third sentence in (2), after "crude", substituted "petroleum produced" for "production" and after "natural gas" substituted "produced" for "mentioned in that subsection"; and made minor changes in style. Amendment effective July 1, 1995.

Pursuant to sec. 2, Ch. 573, L. 1995, a coordination section, deleted fifth sentence in (2) that read: "The producer shall be reimbursed for the payments made on crude oil and natural gas produced for another in the same manner as he is reimbursed for net proceeds tax paid under 15-23-607 on crude petroleum or natural gas produced for another"; and in (3) substituted "For the purposes of this section, the provisions of Title 15, chapter 36, part 3, apply to the privilege and license tax assessment" for "The department of revenue shall collect the privilege and license tax assessment in the same manner as the oil and gas severance tax is collected under Title 15, chapter 36." Amendment effective January 1, 1996.

Purported Repeal — Coordination: Section 50, Ch. 451, L. 1995, repealed this section, but sec. 2, Ch. 573, L. 1995, a coordination section, voided the repeal.

Effective Date — Applicability: Section 3, Ch. 573, L. 1995, provided: "(1) Except as provided in subsection (2), [this act] is effective July 1, 1995, and applies to oil and gas production occurring after June 30, 1995.

(2) [Section 2(2) and (3)], which amend 82-11-131(2) and 82-11-131(3), respectively, are effective January 1, 1996."

1987 Amendment: In (2), near end after "tax paid", inserted "under 15-23-607" and at end, after "another", deleted "under 15-23-607".

1983 Amendment: Near beginning of (2), after "shall" substituted phrase relating to the Administrative Procedure Act for "by order, without prior notice or hearing"; after "may from time to time" deleted "without prior notice or hearing"; after "increase the amount thereof as" deleted "in its judgment"; and inserted (3) referring to collection of privilege and license tax assessment.

Statement of Intent: The statement of intent attached to SB 148 (Ch. 93, L. 1983) provided: "A statement of intent is required for Senate Bill 148 because it grants the Board of Oil and Gas Conservation authority to fix an assessment against each barrel of crude petroleum originally produced.

The Legislature intends that the amount assessed be sufficient to provide funds to defray the expenses of enforcing the oil and gas laws and the operations of the board. The assessment shall not be so high as to generate revenue in excess of expenses."

Administrative Rules

ARM 36.22.1242 Reports by producers — tax report — tax rate.

Case Notes

State Taxation of Indian Trust Properties Valid — No Repeal by Implication Found: Where the plaintiff Indian tribe sought declaratory and injunctive relief against the levy and collection of certain taxes by the state and several counties on the production of oil and gas owned by the United States in trust for the plaintiff by non-Indian lessees within the boundaries of the plaintiff's reservation, the court held that the provisions of 25 U.S.C. §398 specifically authorized state taxation of oil and gas on tribal lands and that the provisions of the statute had not been impliedly repealed by 25 U.S.C. §396. The sovereign right asserted by the plaintiff to be free from state taxation has been controlled by Congress, and the plaintiff has not shown that there is such a repugnancy between the two federal statutes as to satisfy their burden of proving a congressional intent to repeal the former by enactment of the latter or that there is an ambiguity in the law which should be construed in favor of the plaintiff. Blackfeet Tribe v. St., 507 F. Supp. 446, 38 St. Rep. 238 (D.C. Mont. 1981).

Collateral References

58 C.J.S. Mines and Minerals §§373, 374.
38 Am. Jur. 2d Gas and Oil §173.

82-11-134. Permit fees.

Administrative Rules

ARM 36.22.603 Permit fees.
ARM 36.22.604 Permit issuance — expiration — extension.
ARM 36.22.605 Transfer of permits.
ARM 36.22.606 Notice and eligibility statement for drilling or recompletion in unit operations.

Collateral References

Mines and Minerals *key* 87, 92.25.
58 C.J.S. Mines and Minerals §§138, 349 through 356, 373, 374.

82-11-135. Money earmarked for board expenses.

Compiler's Comments

2001 Amendment: Chapter 306 in first sentence near middle after "money" substituted "distributed to the board under 15-36-324 and collected" for "collected under 15-36-324(8)(b), (9), and (10)(b) and"; and made minor changes in style. Amendment effective April 21, 2001.

Retroactive Applicability: Section 6, Ch. 306, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to distributions made after June 30, 2000."

1997 Amendment: Chapter 466 in first sentence substituted "15-36-324(8)(b), (9), (10)(b)" for "15-36-324(7)(b)". Amendment effective April 30, 1997.

1995 Amendment: Chapter 451 in first sentence inserted "under 15-36-324(7)(b) and"; and made minor changes in style. Amendment effective January 1, 1996.

Applicability: Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

1992 Special Session Amendment: Chapter 15, Sp. L. July 1992, at beginning inserted exception clause.

Effective Date: Section 38, Ch. 15, Sp. L. July 1992, provided that this act is effective on passage and approval. The act became effective pursuant to Article VI, sec. 10, of the Montana Constitution due to the passage of 25 days after delivery without gubernatorial action on the bill. Effective August 14, 1992.

Applicability — Termination: Section 39(6), Ch. 15, Sp. L. July 1992, provided that this section applies to the tax year beginning after December 31, 1992, and ending before January 1, 1994. This section terminates upon receipt of taxes for tax year 1993.

1987 Amendment: In second sentence, before "biennial", deleted "the approval of the department of administration and".

1983 Amendment: Substituted references to state special revenue fund for references to earmarked revenue fund.

Collateral References

58 C.J.S. Mines and Minerals §§373, 374.

82-11-136. Expenditure of funds from bonds for plugging wells.

Compiler's Comments

1997 Amendment: Chapter 422 deleted second sentence that read: "These funds are statutorily appropriated as provided in 17-7-502." Amendment effective July 1, 1997.

1987 Statement of Intent: The statement of intent attached to Ch. 265, L. 1987, provided: "A statement of intent is provided for this bill in order to describe the need for a statutory appropriation and deletion of current reporting requirements. In the absence of a statutory appropriation authorizing the board of oil and gas conservation to accept and expend funds received from bonds for the proper plugging of abandoned or dry wells, the board must receive separate authorization for this purpose each biennium through the appropriation process. As a result, the board is unable to correct problems resulting from improperly plugged wells for up to 2 years or until it receives authorization to expend the necessary funds received from forfeited bonds.

The board of oil and gas conservation is removed from receiving statements of crude petroleum and natural gas produced and marketed in the state in order to avoid duplicative reporting requirements.

The department of revenue is authorized to adopt administrative rules concerning the administration and collection of the privilege and license tax, including the time for payment and the period covered by payment. The administration and collection of the tax should be similar to the administration and collection of the oil and gas severance tax."

82-11-137. Class II injection well operating fee.

Administrative Rules

Title 36, chapter 22, subchapter 14, ARM Underground injection control.

82-11-141. Administrative procedure.

Compiler's Comments

1987 Amendments: Chapter 238 inserted (4)(b) requiring written notice to record owners of oil and gas and leasehold interests sought to be spaced or pooled; and at beginning of (5) inserted "If written notice is not possible".

Chapter 503 at end of (3), after "effect", substituted "beyond the next regular meeting of the board" for "more than 15 days".

Administrative Rules

ARM 36.22.301 Effective scope of rules.
ARM 36.22.309 Referral of administrative decisions.

Collateral References

Mines and Minerals *key* 92.17.

82-11-142. Subpoena power — civil actions.

Compiler's Comments

1987 Amendment: Inserted first three sentences of (3) providing for protests before the Board, in fourth sentence, after "fails to", inserted "take appropriate enforcement action or to", after "adversely affected" deleted "by the violation", and in two places, before "threatened", deleted "violation or", and in last sentence, before "threatening", deleted "violating or".

Case Notes

Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes: In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Collateral References

Mines and Minerals *key* 92.21, 92.84.
58 C.J.S. Mines and Minerals §§340 through 342.
38 Am. Jur. 2d Gas and Oil §§310, 311, 325.

82-11-143. Rehearing.

Compiler's Comments

1991 Amendment: In second sentence substituted "at the board's next regularly scheduled meeting" for "within 10 days"; and made minor changes in style. Amendment effective April 6, 1991.

Saving Clause: Section 3, Ch. 363, L. 1991, was a saving clause.

Collateral References

Mines and Minerals *key* 92.17.
58 C.J.S. Mines and Minerals §§341 through 356.

82-11-144. Court review.

Case Notes

Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes: In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Collateral Challenge: Order of Commission to create gas unit was res judicata except in appropriate District Court on judicial review as provided in this section; lessor's successors in interest could not collaterally challenge order by suit before different District Court. Armstrong v. High Crest Oils, Inc., 164 M 187, 520 P2d 1081 (1974).

Collateral References

Mines and Minerals *key* 92.21, 92.34, 92.61.
58 C.J.S. Mines and Minerals §§349 through 356.

82-11-145. Injunction or restraining order.

Case Notes

Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes: In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there

was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Collateral References

Mines and Minerals *key* 92.84, 94.
58 C.J.S. Mines and Minerals §§340 through 342.

82-11-146. Appeal.

Case Notes

Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes: In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Collateral References

Mines and Minerals *key* 92.21.
58 C.J.S. Mines and Minerals §§349 through 356.

82-11-147. Violations.

Compiler's Comments

1987 Amendment: In (1) substituted introductory clause for "Whenever it appears"; in (1)(a), after "board", substituted "may" for "shall"; inserted (1)(b) allowing Board to assess civil penalty, require compliance, or both; and in (2), after "suit", inserted "under subsection (1)(a)".

Case Notes

Injunction Not Exclusive Board Remedy in Nonemergency Situations: The Board of Oil and Gas Conservation ordered that Hawley's oil production be terminated because of Hawley's failure to bring wells into substantial compliance. Hawley filed suit against the Board to enjoin enforcement of the Board's order, alleging that absent an emergency action under 82-11-151, the Board had no statutory authority to order termination of production and that the Board's sole remedy was to petition the District Court for an injunction under subsection (1)(a) of this section. The Supreme Court found that Hawley's contention that subsection (1)(a) of this section establishes the Board's exclusive remedy for nonemergency situations rang hollow in light of the provisions of subsection (1)(b) of this section, which clearly grant the Board express authority to issue an order requiring compliance with a prior Board order. Further, under 82-11-149, pursuance of a civil penalty does not bar enforcement by injunction "or other appropriate remedy". Thus, injunction through judicial enforcement is not the exclusive remedy available to the Board in nonemergency situations, and the District Court's vacation of the Board's termination order on those grounds was reversible error. Hawley v. Bd. of Oil & Gas Conserv., 2000 MT 2, 297 M 467, 993 P2d 677, 57 St. Rep. 5 (2000).

Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes: In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Collateral References

Mines and Minerals *key* 92.81, 92.84.
58 C.J.S. Mines and Minerals §§340 through 342.

82-11-148. Criminal penalties.

Compiler's Comments

1987 Amendment: In introductory clause, after "more than", increased fine to "$10,000 per day of violation" from "$5,000".

Administrative Rules

ARM 36.22.1245 Illegal production.

Collateral References

Mines and Minerals *key* 94, 95.

82-11-149. Civil penalties.

Compiler's Comments

1995 Amendment: Chapter 509 inserted (4) concerning depositing civil penalties in general fund. Amendment effective July 1, 1995.

1991 Amendment: In first sentence of (1) revised penalty from at least $5,000 to at least $75 and not more than $10,000 a day for each violation. Amendment effective April 6, 1991.

Saving Clause: Section 3, Ch. 363, L. 1991, was a saving clause.

Case Notes

Injunction Not Exclusive Board Remedy in Nonemergency Situations: The Board of Oil and Gas Conservation ordered that Hawley's oil production be terminated because of Hawley's failure to bring wells into substantial compliance. Hawley filed suit against the Board to enjoin enforcement of the Board's order, alleging that absent an emergency action under 82-11-151, the Board had no statutory authority to order termination of production and that the Board's sole remedy was to petition the District Court for an injunction under 82-11-147(1)(a). The Supreme Court found that Hawley's contention that 82-11-147(1)(a) establishes the Board's exclusive remedy for nonemergency situations rang hollow in light of the provisions of 82-11-147(1)(b), which clearly grant the Board express authority to issue an order requiring compliance with a prior Board order. Further, under this section, pursuance of a civil penalty does not bar enforcement by injunction "or other appropriate remedy". Thus, injunction through judicial enforcement is not the exclusive remedy available to the Board in nonemergency situations, and the District Court's vacation of the Board's termination order on those grounds was reversible error. Hawley v. Bd. of Oil & Gas Conserv., 2000 MT 2, 297 M 467, 993 P2d 677, 57 St. Rep. 5 (2000).

82-11-151. Emergencies — notice and hearing.

Case Notes

Injunction Not Exclusive Board Remedy in Nonemergency Situations: The Board of Oil and Gas Conservation ordered that Hawley's oil production be terminated because of Hawley's failure to bring wells into substantial compliance. Hawley filed suit against the Board to enjoin enforcement of the Board's order, alleging that absent an emergency action under this section, the Board had no statutory authority to order termination of production and that the Board's sole remedy was to petition the District Court for an injunction under 82-11-147(1)(a). The Supreme Court found that Hawley's contention that 82-11-147(1)(a) establishes the Board's exclusive remedy for nonemergency situations rang hollow in light of the provisions of 82-11-147(1)(b), which clearly grant the Board express authority to issue an order requiring compliance with a prior Board order. Further, under 82-11-149, pursuance of a civil penalty does not bar enforcement by injunction "or other appropriate remedy". Thus, injunction through judicial enforcement is not the exclusive remedy available to the Board in nonemergency situations, and the District Court's vacation of the Board's termination order on those grounds was reversible error. Hawley v. Bd. of Oil & Gas Conserv., 2000 MT 2, 297 M 467, 993 P2d 677, 57 St. Rep. 5 (2000).

82-11-161. Oil and gas production damage mitigation account — statutory appropriation.

Compiler's Comments

1997 Amendment: Chapter 34 deleted former (3)(b) that read: "(b) all fees received by the board from owners of producing wells pursuant to 82-11-162"; in (4), near end of first and second sentences after "restore the well", inserted "sump, hole"; and made minor changes in style. Amendment effective February 24, 1997.

1993 Amendment: Chapter 349 at beginning of (2) deleted "On July 1, 1991, and" and after "each" deleted "succeeding"; deleted (6) that read: "(6) The board shall, as provided in 5-11-210, submit to the legislature a complete financial report on the oil and gas production damage mitigation account, including a description of all expenditures made since the preceding report"; and made minor changes in style.

1991 Amendments: Chapter 112 near beginning of (6) inserted reference to 5-11-210 and after "legislature" deleted "at the beginning of each regular session". Amendment effective March 20, 1991.

Chapter 734 in (4), in first sentence after "well", inserted "and either reclaiming or restoring, or both, a drill site or other drilling or producing area damaged by oil and gas operations", after "hole" inserted "drill site, or drilling or producing area", and after "person" substituted "fails or refuses to properly plug, reclaim, or restore the well, drill site, or drilling or producing area within a reasonable time after demand by the board" for "does not have sufficient funds to pay the costs" and near end of second sentence, after "plug", inserted "reclaim, or restore", after "well" inserted "drill site, or drilling or producing area", and after "damage" substituted "for which he is responsible" for "caused by the well"; and made minor changes in style.

Saving Clause: Section 6, Ch. 734, L. 1991, was a saving clause.

1989 Statement of Intent: The statement of intent attached to Ch. 530, L. 1989, provided: "It is the intent of the legislature to create an oil and gas production damage mitigation account to be administered by the board of oil and gas conservation for the purpose of properly plugging and abandoning oil and gas wells when a responsible person cannot be found or when the responsible person does not have sufficient financial resources. The board shall adopt rules to help it define "sufficient financial resources", shall require a responsible person to pay the costs of plugging and abandoning to the extent of his available resources, and shall pursue full cost recovery for funds spent from the account through the procedures provided in [section 9] [82-11-164] or other lawful means. The board may adopt rules to administer instituting a lien on the person's personal and real property to cover the cost of plugging and abandoning.

The legislature intends that the board use the account for reclamation related to land, water, or wildlife resources disturbed by abandoned oil and gas wells, injection wells, sumps, and seismographic shot holes.

It is also the intent to remove producing wells completed after June 30, 1989, from drilling bonds and to limit the liability of the bond or its equivalent to the period between issuance of the bond and either proper plugging and abandoning of a dry hole or completion of a producing well. The board shall adopt forms for the producer to indicate that a well has been completed and shall, upon receipt of the information and payment required under [section 7] [82-11-162, now repealed], release and absolve the owner of the well from the bond required under 82-11-123.

It is further the intent of the legislature that the board of oil and gas conservation respond promptly to emergency situations that may arise."

Saving Clause: Section 12, Ch. 530, L. 1989, was a saving clause.

Effective Date: Section 14, Ch. 530, L. 1989, provided that this section is effective July 1, 1989.

82-11-163. Landowner's bond on noncommercial well.

Compiler's Comments

1999 Amendment: Chapter 278 in three places in section after "deposit" inserted reference to surety bond. Amendment effective October 1, 1999.

Saving Clause: Section 2, Ch. 278, L. 1999, was a saving clause.

Saving Clause: Section 12, Ch. 530, L. 1989, was a saving clause.

Effective Date: Section 14, Ch. 530, L. 1989, provided that this section is effective July 1, 1989.

82-11-164. Lien created.

Compiler's Comments

1991 Amendment: In middle of (1), after "person", deleted "if that person is subsequently identified or located" and after "or" substituted "in which the responsible person has an interest" for "the responsible person, if that person is known but cannot or will not fully reimburse the oil and gas production damage mitigation account"; at end of (3), before "liens", deleted "mortgages and"; and made minor changes in style.

Saving Clause: Section 6, Ch. 734, L. 1991, was a saving clause.

Saving Clause: Section 12, Ch. 530, L. 1989, was a saving clause.

Effective Date: Section 14, Ch. 530, L. 1989, provided that this section is effective July 1, 1989.

82-11-172. Short title.

Compiler's Comments

Severability: Section 8, Ch. 578, L. 2001, was a severability clause.

Effective Date: Section 9(1), Ch. 578, L. 2001, provided that this section is effective on passage and approval. Approved May 5, 2001.

82-11-173. Legislative findings — purpose.

Compiler's Comments

Severability: Section 8, Ch. 578, L. 2001, was a severability clause.

Effective Date: Section 9(1), Ch. 578, L. 2001, provided that this section is effective on passage and approval. Approved May 5, 2001.

82-11-174. Offset permitting — geographic requirements.

Compiler's Comments

Severability: Section 8, Ch. 578, L. 2001, was a severability clause.

Part 2
Unit Operations

Part Administrative Rules

ARM 36.22.606 Notice and eligibility statement for drilling or recompletion in unit operations.

Title 36, chapter 22, subchapter 7, ARM Well spacing units.

Part Law Review Articles

Hardwicke, Antitrust Laws, et al. v. Unit Operation of Oil or Gas Pools (1961), reviewed, Sullivan, 23 Mont. L. Rev. 258 (1962).

Some Legal Aspects of the Unitization of Federal, State and Fee Land, Hinkle, 14 Mont. L. Rev. 49 (1953).

Part Collateral References

Mines and Minerals *key* 92, 92.23.

38 Am. Jur. 2d Gas and Oil §194.

Validity of prohibition or regulation of removal or exploitation of oil, minerals, soil, or other natural products within municipal limits. 10 ALR 3d 1226.

Validity, under police power, of compulsory pooling or unitization statute requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like. 37 ALR 2d 436.

Statute or ordinance limiting rights of surface owner in respect of oil or gas. 99 ALR 1119; 67 ALR 1346.

Construction, application, and effect of statutes regulating production of oil or gas in a manner or under conditions constituting waste. 86 ALR 431.

Constitutionality of statute limiting or controlling exploitation or waste of natural resources. 78 ALR 834; 24 ALR 307.

82-11-201. Establishment of well spacing units.

Compiler's Comments

1993 Amendment: Chapter 313 near middle of (1), after "chapter", inserted "to avoid the drilling of unnecessary wells, or to protect correlative rights"; inserted (1)(a) regarding temporary spacing units; at beginning of (1)(b) substituted "permanent" for "well", before "pool" inserted "discovered", and after "pool" deleted "as to oil wells or as to gas wells or both" and deleted second sentence that read: "Spacing units when established shall insofar as possible be of uniform size and shape for the entire pool"; substituted (2) regarding size and shape of temporary spacing units for former language that read: "The size and the shape of spacing units shall be such as will result in the efficient and economic development of the pool as a whole, and the size shall be the area that can be efficiently drained by one well"; inserted (3) regarding size and shape of permanent spacing units; at beginning of first sentence of (4) deleted "Subject to this chapter" and before "spacing units" inserted "temporary or permanent" and inserted third and fourth sentences regarding Board action to ensure equitable production; near beginning of (5), after "establishing", inserted "temporary or permanent"; at beginning of (6) substituted "The board, upon application" for "When found necessary for the prevention of waste, an order establishing spacing units in a pool may be modified after", near middle, after "size of", inserted "a temporary or permanent", and at end substituted "a spacing unit for a purpose mentioned in subsection (1)" for "the pool on a reasonably uniform plan"; and made minor changes in style.

Administrative Rules

ARM 36.22.607 Drilling permits pending special field rules.

ARM 36.22.702 Spacing of wells.

ARM 36.22.703 Horizontal wells.
ARM 36.22.1610 Special findings and determinations — new onshore production wells.

Case Notes

Oil Lease Construed to Make All Provisions Effective: Texaco argued that the one productive well it had drilled was sufficient to extend the lease on all lands covered by the lease for as long as the well produced. The Supreme Court held that the general duration clause in the lease relied on by Texaco was modified by a subsequent provision that limited the lease extension to the 320-acre spacing unit on which the producing well was located. Fed. Land Bank of Spokane v. Texaco, Inc., 250 M 471, 820 P2d 1269, 48 St. Rep. 998 (1991).

Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes: Where the parties entered into a mineral lease for the production of oil underlying plaintiff's property, there was by common law implied in this and every oil and gas lease a covenant on the part of the lessee to protect the premises of his lessor from drainage by an adjacent producing well by drilling an offset well. The implied covenant was not per se eliminated by the enactment of the 1953 oil and gas conservation law, and an oil and gas lessee still has a duty under the implied covenant to protect his premises from drainage by drilling an offset well, if doing so would not be in violation of the statutes or of a valid rule or order of the Oil and Gas Conservation Board. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Common-Law Rule Not Superseded by Authority of Board: In an action by plaintiffs (lessor's grantees) for damages resulting from defendant lessees' failure under an oil and gas lease to protect the plaintiffs' interests by drilling an offset well, the common-law offset drilling rule, under which plaintiffs seek damages, has not been superseded by the administrative powers of the Board of Oil and Gas Conservation, as the powers of the Board do not include the authority to adjudicate private rights. As held in the case of Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965), the Legislature gave the Board the duty to consider correlative rights in making orders, but adjudication of those rights must be by civil action in the District Courts. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Limiting Production of an Exception Location Well: Under 82-11-201, authorizing the Commission to grant exceptions to field spacing rules, the Commission must hear evidence on the issue of injury to correlative rights of adjoining landowners and determine if there are grounds for exercise of its authority to limit production of an exception location well, even in the absence of a showing of waste. Chevron Oil Co. v. Oil & Gas Conserv. Comm'n, 150 M 351, 435 P2d 781 (1968).

Adjudication of Private Rights by Board of Oil and Gas Conservation: Section 82-11-201(3) (now (4)) was sufficiently broad to permit the Oil and Gas Conservation Commission to consider private rights in making orders. Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965).

Granting of Exception Allowed: Under 82-11-201(3) (now (4)), where property lies on the projected edge of a petroleum reservoir, an exception may be granted if requiring the well to be drilled at the authorized location on the spacing units would be inequitable or unreasonable. Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965).

Collateral References

Mines and Minerals *key* 92.23, 92.27, 92.28, 92.32.
58 C.J.S. Mines and Minerals §§335, 362 through 370, 381, 383.
38 Am. Jur. 2d Gas and Oil §177.

82-11-202. Pooling of interest within spacing unit.

Compiler's Comments

1993 Amendment: Chapter 313 near middle of (1)(a), after "within a", inserted "temporary or permanent"; at beginning of first sentence of (1)(b) deleted "In the absence of voluntary pooling within the spacing unit", near middle, before "spacing", inserted "permanent", and at end inserted "of the permanent spacing unit and the allocation of production if the applicant has made an unsuccessful, good faith attempt to voluntarily pool the interests within the permanent spacing unit", inserted second sentence requiring that the applicant own an interest in the oil or gas, and in third, fourth, and fifth sentences, before "spacing", inserted "permanent"; deleted former first sentence of (2)(a) that read: "The pooling order shall provide for the drilling and operating of a well on the spacing unit and for the payment of the cost thereof, which cost may include a reasonable charge for supervision, handling, and storage", near beginning of first sentence, after "costs of", substituted "development or other operations referred to in subsection (1)" for "drilling and operating the well" and near middle, before "spacing", inserted "permanent", inserted second

sentence providing for drilling and payment of costs when a well has not been drilled prior to hearing on the application, in third sentence, before "order", inserted "subsequent" and after "order" inserted "after notice and hearing", and in last sentence, before "spacing", inserted "permanent"; substituted (2)(b) regarding costs included in the order for former language that read: "If an owner refuses to pay his share of the costs of drilling and operating the well, the order must include as cost"; inserted (2)(e) providing for payment of costs when an owner of an interest in a temporary spacing unit refuses to pay drilling and operating costs; inserted (3) clarifying when an owner is presumed to have refused to pay costs; and made minor changes in style.

1985 Amendment: In (2)(a), near end of second sentence, inserted "and excluding the royalty provided for in subsection (2)(c) of this section"; inserted (2)(b) providing for percentage of costs to be assessed against refusing owner; inserted (2)(c) referring to refusing owner's landowner royalty interest; and inserted (2)(d) referring to accounting due from operator to refusing owner.

Case Notes

Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes: Where the parties entered into a mineral lease for the production of oil underlying plaintiff's property, there was by common law implied in this and every oil and gas lease a covenant on the part of the lessee to protect the premises of his lessor from drainage by an adjacent producing well by drilling an offset well. The implied covenant was not per se eliminated by the enactment of the 1953 oil and gas conservation law, and an oil and gas lessee still has a duty under the implied covenant to protect his premises from drainage by drilling an offset well, if doing so would not be in violation of the statutes or of a valid rule or order of the Oil and Gas Conservation Board. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Unitization of Reservoir Containing Multilease Lands: Under 82-11-202, an application by an oil and gas lessee to the Oil and Gas Conservation Commission for unitization of a reservoir did not constitute breach of a one-well pooling provision in the lease since such unitization of an extensive reservoir containing multilease lands, multiproducing wells, multipools, and multispacing or drilling units was different from a lease provision relating to pooling. Armstrong v. High Crest Oil, Inc., 164 M 187, 520 P2d 1081 (1974).

Creation of Unit an Exercise of Police Power: Oil and gas conservation laws and rules have the effect of modifying provisions of existing leases, and statutory and administrative action creating a gas unit is an exercise of police power, and the fact that in some instances an oil and gas lease may have been procured prior to legislative or administrative pronunciation is immaterial. Armstrong v. High Crest Oil, Inc., 164 M 187, 520 P2d 1081 (1974).

Indian Lands: Under 82-11-202, the matter in controversy in a suit by Indian tribes for an injunction to restrain the Oil and Gas Conservation Commission from enforcing an order "pooling" tribes' lands with lands of another to form a "spacing unit" was not the lands or royalties but the regulation and right to be free from it. Since the tribes failed to show the jurisdictional amount in controversy, the suit was not properly brought in Federal Court. Yoder v. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation, 339 F2d 360 (1964).

Law Review Articles

The Joint Operating Agreement in a Hostile Environment, Boigon, 38 Inst. on Oil & Gas L. & Tax'n 5.1 (1987).

An Economic Analysis of Oklahoma's Oil and Gas Forced Pooling Law, Eubanks & Mueller, 26 Nat. Resources J. 469 (1986).

Compulsory Pooling and Unitization: State Options in Dealing With Uncooperative Owners, Kramer, 7 J. Energy L. & Pol'y 255 (1986).

Collateral References

Mines and Minerals *key* 92.23.

58 C.J.S. Mines and Minerals §§335, 362 through 370, 381, 383.

38 Am. Jur. 2d Gas and Oil §§186, 187.

Validity of compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like. 37 ALR 2d 434.

82-11-204. Hearing on operation of pool as unit.

Case Notes

Unitization of Entire Reservoir: Application by oil and gas lessee to the Commission for unitization of a reservoir did not constitute a breach of one-well pooling provision in lease; unitization of an entire reservoir under this section is entirely different from one-well pooling pursuant to 82-11-202. Armstrong v. High Crest Oils, Inc., 164 M 187, 520 P2d 1081 (1974).

Collateral References
Mines and Minerals *key* 92.32.

82-11-205. Board order for unit operation — criteria.

Collateral References
Mines and Minerals *key* 92.78, 92.79.

82-11-206. Terms and conditions of plan for unit operations.

Collateral References
Mines and Minerals *key* 92.78.

82-11-207. Approval of plan for unit operations by persons paying costs.

Collateral References
Mines and Minerals *key* 92.79, 92.80.

82-11-211. Operations considered as done by all owners in unit.

Case Notes
Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes: Where the parties entered into a mineral lease for the production of oil underlying plaintiff's property, there was by common law implied in this and every oil and gas lease a covenant on the part of the lessee to protect the premises of his lessor from drainage by an adjacent producing well by drilling an offset well. The implied covenant was not per se eliminated by the enactment of the 1953 oil and gas conservation law, and an oil and gas lessee still has a duty under the implied covenant to protect his premises from drainage by drilling an offset well, if doing so would not be in violation of the statutes or of a valid rule or order of the Oil and Gas Conservation Board. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

82-11-212. Property rights and operator's lien.

Collateral References
Mines and Minerals *key* 111.
58 C.J.S. Mines and Minerals §§412 through 423.
38 Am. Jur. 2d Gas and Oil §§146 through 148, 150 through 152.
Assertion of statutory mechanics' or materialmen's lien against oil and gas produced or against proceeds attributable to oil and gas sold. 59 ALR 3d 278.

82-11-213. Contract not terminated by board order.

Collateral References
38 Am. Jur. 2d Gas and Oil §186.

82-11-215. Unit operation not restraint of trade.

Collateral References
38 Am. Jur. 2d Gas and Oil §194.

82-11-216. No creation of relationship between parties in unit.

Collateral References
38 Am. Jur. 2d Gas and Oil §189.

Part 3
Interstate Oil and Gas Conservation Compact

Part Collateral References
Mines and Minerals *key* 92.8, 92.12.
38 Am. Jur. 2d Gas and Oil §§165 through 167.
Statute or ordinance limiting rights of surface owner in respect of oil or gas. 99 ALR 1119; 67 ALR 1346.
Construction, application, and effect of statutes regulating production of oil and gas in a manner or under conditions constituting waste. 86 ALR 431.
Constitutionality of statute limiting or controlling exploitation or waste of natural resources. 78 ALR 834; 24 ALR 307.

82-11-301. Authorization to join interstate compact for conservation of oil and gas.

Compiler's Comments

Extension of Interstate Oil Compact: The interstate compact to conserve oil and gas has been extended from time to time by the various states with the approval of Congress. See compiler's comment to 82-11-302.

Collateral References

Constitutional Law *key* 81; Mines and Minerals *key* 92.8.

16 C.J.S. Constitutional Law §§174 through 180, 188; 58 C.J.S. Mines and Minerals §§335 through 339, 362 through 370, 381, 383.

16A Am. Jur. 2d Constitutional Law §§211, 229.

82-11-302. Interstate oil and gas compact.

Compiler's Comments

Interstate Compact Extended: The original interstate compact to conserve oil and gas, which was to expire September 1, 1937, has been extended from time to time by the various states with the approval of Congress. It had been extended to 1947 at the time Montana ratified the compact. The latest extension was granted on May 2, 1979, by Senate Joint Resolution 72, which provides for the approval by Congress effective from January 1, 1979, "until Congress withdraws such consent".

All the states mentioned in Article I, except California, have ratified the compact. Additional states which have ratified the compact are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New York, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

CHAPTER 15
REGULATION OF PETROLEUM PRODUCTS

Chapter Law Review Articles

A Fifty-Year Perspective on World Petroleum Arrangements, Smith & Dzienkowski, 24 Tex. Int's L.J. 13 (1989).

Chapter Collateral References

Gas *key* 3.

58 C.J.S. Mines and Minerals §§334 through 342, 349 through 356, 362 through 383.

Liability in connection with fire or explosion incident to bulk storage, transportation, delivery, loading, or unloading of petroleum products. 32 ALR 3d 1169.

Liability of one maintaining pipeline for transportation of gas or other dangerous substances for injury or property damage sustained by one using surface. 30 ALR 3d 685.

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits. 10 ALR 3d 1226.

Overflow: liability for injury to property occasioned by oil, water, or the like flowing from well. 19 ALR 2d 1025.

Part 1
Regulation of Manufacture and Distribution

Part Collateral References

Mines and Minerals *key* 94, 95.

38 Am. Jur. 2d Gas and Oil §§157 through 164, 171, 172.

82-15-101. Definitions.

Compiler's Comments

2001 Amendment: Chapter 483 in definition of department substituted reference to department of labor and industry for reference to department of commerce and substituted "part 17" for "part 18"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 65 inserted definitions of liquefied petroleum product, liquefied petroleum product container, and owner; and made minor changes in style.

1981 Amendment: Substituted "department of commerce" for "department of business regulation" in (2).

82-15-102. Enforcement of part — rules.

Administrative Rules

ARM 8.77.301 Sampling of petroleum products.

ARM 8.77.302 Standards for petroleum products.

Collateral References

Gas *key* 1.

38A C.J.S. Gas §§2, 17.

82-15-103. Standards for petroleum products.

Administrative Rules

ARM 8.77.302 Standards for petroleum products.

82-15-105. Licenses and fees — status of license on transfer of ownership.

Compiler's Comments

1999 Amendment: Chapter 54 in second sentence in (3) substituted "within 60 days of the licensee's anniversary date" for "before March 1 of each year in which the vehicle tank, meter, or measuring device is in use". Amendment effective March 15, 1999.

1997 Amendment: Chapter 366 in (2) inserted second sentence regarding payment of fees by credit card and discounting of fees; in (3), at end of first sentence, substituted "the anniversary date established by rule by the board of review established in 30-16-302" for "December 31 of each year"; and in (4)(b)(i), after "expire on", substituted "the anniversary date of that year, as provided in subsection (3)" for "December 31 of that year".

1997 Statement of Intent: The statement of intent attached to Ch. 366, L. 1997, provided: "A statement of intent is required for this bill because [section 1] [30-16-104] grants rulemaking authority to the board of review established in 30-16-302 for the purpose of implementing a one-stop business licensing pilot project required by the 54th Legislature."

1993 Amendment: Chapter 498 substituted (2) requiring Department to adopt rules establishing licensing fees based upon the measuring devices used by dealers and requiring fees to be deposited in special revenue account for administering and enforcing this part for former (2) that read: "The fee for this license is determined as follows and depends upon the number of devices utilized by the dealer:

(a) each gasoline pump, diesel pump, or fuel oil pump measuring device—$7;

(b) each petroleum vehicle tank meter or bulk petroleum meter of 2 inches (5.08 centimeters) and under—$20;

(c) each bulk petroleum meter over 2 inches (5.08 centimeters)—$25;

(d) each liquefied petroleum liquid meter—$30;

(e) each vapor meter—$4;

(f) each petroleum and liquefied petroleum vehicle tank up to and including 2,000 gallons (7,570 liters)—$25;

(g) each petroleum and liquefied petroleum vehicle tank over 2,000 gallons (7,570 liters)—$25 plus $5 for each additional 1,000 gallons (3,785 liters)"; at end of (4)(b)(ii) deleted "prescribed in subsection (2)"; and made minor changes in style. Amendment effective January 1, 1994.

1993 Statement of Intent: The statement of intent attached to Ch. 498, L. 1993, provided: "A statement of intent is required for this bill in order to provide the department of commerce the authority to establish by rule license fees for petroleum dealers and liquefied petroleum dealers. The fees must be set in an amount necessary to cover costs of the department to administer and enforce the provisions of Title 82, chapter 15, part 1."

Implementation: Section 2, Ch. 498, L. 1993, provided: "The department of commerce may adopt rules implementing [this act] to be in place on January 1, 1994." Effective April 24, 1993.

Effective Date — Applicability: Section (3)(1), Ch. 498, L. 1993, provided: "[Section 1] [82-15-105] is effective January 1, 1994, and applies to license fees beginning after December 31, 1993."

1991 Amendment: In (2)(a) increased fee from $5 to $7; in (2)(b) increased fee from $15 to $20; in (2)(c) increased fee from $20 to $25; in (2)(d) increased fee from $25 to $30; in (2)(e) increased

fee from $3 to $4; in (2)(f) increased fee from $20 to $25; in (2)(g) increased fee from $20 plus $4 to $25 plus $5; in first sentence of (3), after "annual", deleted "and nontransferable as to person or location"; inserted (4) clarifying status of licenses upon change of ownership of measuring devices; and made minor changes in style. Amendment effective January 1, 1992.

Effective Date — Applicability: Section 2, Ch. 56, L. 1991, provided: "[This act] is effective January 1, 1992, and applies to licenses and fees for years beginning after December 31, 1991."

1983 Amendment: Increased the fee in (2)(a) from $3 to $5, in (2)(b) from $10 to $15, in (2)(c) from $15 to $20, and in (2)(d) from $15 to $25.

Collateral References

Gas *key* 10.

38A C.J.S. Gas §20.

82-15-106. Refusing, suspending, and revoking licenses — hearing required.

Collateral References

Gas *key* 10.

38A C.J.S. Gas §20.

82-15-107. Inspections, sampling, and tests by department to insure compliance with part.

Administrative Rules

ARM 8.77.301 Sampling of petroleum products.

Collateral References

Gas *key* 11.

82-15-109. Full compartment sales — approval of meter.

Administrative Rules

ARM 8.77.303 Charges for liquefied petroleum gas.

82-15-110. Unlawful acts.

Collateral References

Gas *key* 23.

38A C.J.S. Gas §5.

82-15-111. Penalty for violations.

Collateral References

Gas *key* 22.

Part 2
Price Discrimination

82-15-202. Purpose.

Collateral References

Gas *key* 14, 14.1, 14.1(1).

38A C.J.S. Gas §64.

82-15-203. Discrimination in price of petroleum products.

Collateral References

Gas *key* 14.1(2), 14.4; Trade Regulation *key* 891, et seq., 911, et seq.

38A C.J.S. Gas §§87 through 104; 87 C.J.S Trademarks, Trade Names, and Unfair Competition §240, et seq.

54A Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices §§1069, 1071 through 1076.

82-15-204. Investigation of complaints — revocation of license.

Collateral References

Gas *key* 10, 14.3; Licenses *key* 38, 41; Trade Regulation *key* 895, et seq., 926, et seq.

38A C.J.S. Gas §20; 53 C.J.S. Licenses §44; 87 C.J.S. Trademarks, Trade Names, and Unfair Competition §245.

54A Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices §1076.

82-15-205. County attorney to prosecute violations.

Collateral References
District and Prosecuting Attorneys *key* 9.
27 C.J.S. District and Prosecuting Attorneys §15(1).

82-15-206. Penalty.

Collateral References
Gas *key* 14.5; Licenses *key* 41.
53 C.J.S. Licenses §63.

82-15-207. Liability for civil and exemplary damages.

Collateral References
Gas *key* 14.5; Trade Regulation *key* 926, et seq.
87 C.J.S. Trademarks, Trade Names, and Unfair Competition §258, et seq.

TITLES 83 AND 84

RESERVED

TITLE 85
WATER USE

Title Law Review Articles

The Prior Appropriation Doctrine in Montana: Rooted in Mid-Nineteenth Century Goals—Responding to Twenty-First Century Needs, MacIntyre, 55 Mont. L. Rev. 303 (1994).

Privatization of the Water Resource: Salvage, Leases and Changes, Stone, 54 Mont. L. Rev. 99 (1993).

Antidegradation Policy and Outstanding National Resource Waters in the Northern Rocky Mountain States, Brawer, 20 Pub. Land. & Resources L. Rev. 13 (1999).

"Moral Obligations of the Highest Responsibility and Trust": An Analysis of the Federal Trust Responsibility in Parravano v. Babbitt, Lombardi, 18 Pub. Land & Resources L. Rev. 213 (1997).

Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine: An Underrated Solution, Clifford, 16 Pub. Land L. Rev. 117 (1995).

Montana's Nondegradation Laws: Will We Allow Continued Degradation of Montana's Waters?, Parker, 14 Pub. Land L. Rev. 185 (1993).

Water Quality Nondegradation in Montana: Is Any Deterioration Too Much?, Horwich, 14 Pub. Land L. Rev. 145 (1993).

Instream Flow Policy in Montana: A History and Blueprint for the Future, McKinney, 11 Pub. Land L. Rev. 81 (1990).

Endangered Species Act Enforcement and Western Water Law, Bricker & Filippi, 30 Envtl. L. 735 (2000).

Implied Warranties for Sales of Water: Have the Courts Applied the Wrong Test?, Othman, 30 U.C. Davis L. Rev. 543 (1997).

Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suites, Healy, 24 Ecology L.Q. 393 (1997).

The Fourth Amendment Goes "Underground": EPA Soil and Water Sampling, Justice & Hicks, 11 Nat. Resources & Env't 40 (1997).

Application of Park City Principles to Federal-State Conflicts (The Park City Principles: A New Paradigm for Managing Western Water), DuMars, 31 Land & Water L. Rev. 313 (1996).

A Watershed Issue: The Role of Streamflow Protection in Northwest River Basin Management, Benson, 26 Envtl. L. 175 (1996).

International Water Law and the Protection of River System Ecosystem Integrity, Tarlock, 10 B.Y.U. J. Pub. L. 181 (1996).

Mining and Water Quality Under the Clean Water Act, Barry, 25 Colo. Law. 93 (1996).

Retooling Western Water Management: The Park City Principles (The Park City Principles: A New Paradigm for Managing Western Water), Bell, Clark, Doerman, & Johnson, 31 Land & Water L. Rev. 303 (1996).

Water Management Reform Mission Impossible?, Parker & Mann, 70 Fla. B.J. 20 (1996).

Acid Mine Drainage: Common Law, SMCRA, and the Clean Water Act (Surface Mining Control Reclamation Act), Henrich, 10 J. Nat. Resources & Envtl. L. 235 (1995).

Addressing Barriers to Watershed Protection, Adler, 25 Envtl. L. 973 (1995).

Expanding State Authority to Determine Clean Water Act Certification Standards, Borne, 22 N. Ky. L. Rev. 139 (1995).

The Constitutional Mythology of Western Water Law, Klein, 14 Va. Envtl. L.J. 343 (1995).

The Takings Issue in the Local Government and Watershed Context, Johnson, 1995 Det. C.L. Rev. 17 (1995).

Troubled Waters: Population and Water Scarcity, LeRoy, 6 Colo. J. Int'l Envtl. L. & Pol'y 299 (1995).

Water Quality Standards for Rivers and Lakes: Emerging Issues, Baron, 27 Ariz. St. L.J. 559 (1995).

Water Rights and Water Quality: Recent Developments, Laitos, 23 Colo. Law 2343 (1994).

Protecting and Enhancing Wild and Scenic Rivers in the West, Frost, 29 Idaho L. Rev. 313 (1993).

The Public Interest in Western Water, Babbitt, 23 Envtl. L. 933 (1993).

Impact of Global Change on Water Resources, Smerdon, 9 Ariz. J. Int'l & Comp. L. 155 (1992).

The Milk River: Deferred Water Policy Transitions in an International Waterway, Wolfe, 32 Nat. Resources J. 55 (1992).

When Rivers Run Dry Under a Big Sky: Balancing Agricultural and Recreational Claims to Scarce Water Resources in Montana and the American West, Morris, 11 Stan. Envtl. L.J. 259 (1992).

The Clean Water Act: New Regulatory Requirements for the Mining and Energy Industries, Raisch, 37 Rocky Mtn. Min. L. Inst. Proc. 4-1 (1991).

Upstream, Downstream: Rationalizing Different State Water Quality Standards on Interstate Streams, Tarlock, 37 Rocky Mtn. Min. L. Inst. Proc. 23-1 (1991).

Water Quality, Water Quantity: The Reluctant Marriage, Squier, 21 Envtl. L. 1081 (1991).

Water Resources Planning and Management in the United States Federal System: Long Term Assessment and Intergovernmental Issues, Dworsky, Allee, & North, 31 Nat. Resources J. 475 (1991).

Western Water Law, Global Warming, and Growth Limitations, Tarlock, 24 Loy. L.A.L. Rev. 979 (1991).

The Constitution, Property Rights and the Future of Water Law, Sax, 61 U. Colo. L. Rev. 257 (1990).

New Challenges to Western Water Law, 29 Nat. Resources J. 327 (1989).

The Federal Power Act and Western Water Law—Can States Maintain Their Own Water Use Priorities?, Vencill, 27 Nat. Resources J. 213 (1987).

The Endangered Species Act and Western Water Rights, Tarlock, 20 Land & Water L. Rev. 1 (1985).

Title Collateral References

Montana's Revised Water Quality Monitoring, Assessment, and Improvement Program: An EQC Oversight Report to the Montana Legislature, Environmental Quality Council (1999).

A Guide to Montana Water Quality Regulation, Legislative Environmental Policy Office (3rd Edition, 1998).

Montana Department of Fish, Wildlife, & Parks' Water Leasing Study: Environmental Quality Council Final Report to the 56th Legislature, Environmental Quality Council (1998).

Montana's Water Policy—1997-98: An EQC Communique to the Montana Legislature, Environmental Quality Council (1998).

Wading Into Montana Water Rights, Legislative Environmental Policy Office (1997).

Our Montana Environment . . . Where Do We Stand?, Environmental Quality Council (1996).

Montana Environmental Policy Act Handbook (Revised Ed.), Environmental Quality Council (1995).

Final Report of the Select Committee on Water Marketing, Environmental Quality Council (1985).

Recreational Use of Montana's Waterways, Montana Legislative Council (1984).

Water Rights Adjudication/Stream Access for Recreational Use, State Bar of Mont. (1984).

A Water Protection Strategy for Montana—Missouri River Basin, Montana Department of Natural Resources and Conservation, Water Resources Division (1982).

Montana Water Law for the 1980's, Stone (1981).

Montana Water Law Handbook, Doney, State Bar of Mont. (1981).

CHAPTER 1
WATER RESOURCES

Chapter Compiler's Comments

Sections Not Codified: Sections 89-3001 and 89-3002, R.C.M. 1947, a temporary provision relating to international apportionment of the waters of Sage Creek, were not codified in the MCA. The sections have not been repealed and are still valid law. Reference may be made to Ch. 23, L. 1957.

Part 1
General Provisions

Part Compiler's Comments

Study of Water User Fees — 1992 Report: Section 6, Ch. 659, L. 1991, provided for a study by the Department of Natural Resources and Conservation on the feasibility of increasing fees

charged to diversionary water users. A written report must be submitted to the Water Policy Committee by July 1, 1992.

85-1-101. Policy considerations.

Compiler's Comments

Section Not Codified: Section 89-101.1, R.C.M. 1947, a short title clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 1, Ch. 158, L. 1967, as amended by sec. 118, Ch. 253, L. 1974.

Collateral References

Final Report of the Select Committee on Water Marketing, Environmental Quality Council (1985).

A Water Protection Strategy for Montana—Missouri River Basin, Montana Department of Natural Resources and Conservation, Water Resources Division (1982).

Water Resources, Montana Legislative Council (1982).

85-1-102. Definitions.

Compiler's Comments

1997 Amendment: Chapter 436 inserted definition of tribal government; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments: Chapter 18 in definition of cost of works, in (e) after "legal", substituted "services" for "expenses"; near end of definition of renewable resource grant and loan program state special revenue account substituted reference to renewable resource grant and loan program for reference to water development program; and made minor changes in style.

Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 478 inserted definitions of renewable resource grant and loan program state special revenue account and renewable resource loan debt service fund; deleted water development account as defined term and applied former definition to renewable resource loan proceeds account and substituted "renewable resource grant and loan program" for "water development program"; deleted definition of water development debt service fund that read: ""Water development debt service fund" means a separate fund created by 85-1-603 within the debt service fund type of the state treasury to be used as provided in 85-1-619"; in definition of water development project inserted (b) providing that for purposes of renewable resource grant and loan program, water development activities must be included; deleted definition of water development state special revenue account that read: ""Water development state special revenue account" means a separate account created by 85-1-604 within the state special revenue fund of the state treasury for the purposes of the water development program as set forth in 85-1-604"; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: In definition of water development account, after "recipients", inserted "and to purchase liens and operate property, as provided in 85-1-615"; and made minor changes in phraseology. Amendment effective April 11, 1989.

1987 Amendment: Inserted definitions of administrative costs and cost of operation and maintenance; in (4), after "cost of construction", inserted "including any rehabilitation or alteration of the project"; and in (13) changed reference to subsection (6) to subsection (8).

1983 Amendment: In definition of water development account, near beginning before "account" deleted "clearance", and substituted "state special revenue fund" for "bond proceeds and insurance clearance fund"; and in definition of water development state special revenue account substituted "state special revenue account" for "earmarked account" and "state special revenue fund" for "earmarked revenue fund"; in definition of water development debt service fund substituted references to debt service fund for references to sinking account and sinking fund.

1981 Amendment: Inserted (5) defining private person; and inserted (7) through (12) defining public benefits, water development clearance account, water development activity, water development earmarked account, water development project, and water development sinking account.

85-1-111. Public ways.

Case Notes

Public Right to Use Beaverhead River for Recreational Purposes: Following the decision in Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984), the Supreme Court held that: (1) the Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water; (2) determination of navigability for title is not necessary; (3) the public does not have the right to trespass over private property in order to reach the state-owned waters; and (4) plaintiff's action did not constitute inverse condemnation because public use of waters, rather than title, was determined. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Navigability for Title Purposes — Federal Test — Dearborn River Navigable: Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Public Recreational Use Rights on Dearborn River — Limits: Navigability for public use is governed by state law and is separate from the question of navigability under federal law for title purposes. The question is whether waters owned by the State under Art. IX, sec. 3(3), Mont. Const., are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines the availability of the waters for recreational use by the public. Whether or not a private party owns the bed beneath the waters is irrelevant. The constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State, and any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Title to and Public Use of Dearborn River — Federal Commerce Clause Navigability Immaterial: In action for determination of the public's right to use the Dearborn River, whether Montana has adopted the log-floating test of commercial navigability and whether the Dearborn is navigable under the federal commercial use test were immaterial because the question was one of recreational use or navigability, not commercial navigability. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found: Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Law Review Articles

Public Use of the Banks and Beds of Montana Streams, Stone, 52 Mont. L. Rev. 107 (1991).

Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine: An Underrated Solution, Clifford, 16 Pub. Land L. Rev. 117 (1995).

Judicial Recognition of the Public Interest in Water Recreation: Nebraska and United States Supreme Court Realities, Longo & Elder, 15 Pub. Land L. Rev. 199 (1994).

The Shadow of the Mono Lake [National Audubon Society v. The Superior Court of Alpine County, 658 P.2d 709 (Cal.)] Decision in Montana, Summerville, 6 Pub. Land L. Rev. 203 (1985).

Forging Public Rights in Montana's Waters, Thorson, Brown, & Desmond, 6 Pub. Land L. Rev. 1 (1985).

Recreational Use of Montana's Waterways: An Analysis of Public Rights, Frantz, 3 Pub. Land L. Rev. 133 (1982).

Equitable Compensation for Public Trust Takings, Rasband, 69 U. Colo. L. Rev. 1 (1998).

The Public Trust Doctrine as a Source of State Reserved Water Rights, Fahmy, 63 Den. U.L. Rev. 585 (1986).

Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses, Ausness, 1986 U. Ill. L. Rev. 407 (1986).

Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest (Symposium on Access to Waterways), Frank, 16 U.C. Davis L. Rev. 579 (1983).

Collateral References

Navigable Waters *key* 1(1).

65 C.J.S. Navigable Waters §1, et seq.

Recreational Use of Montana's Waterways, Montana Legislative Council (1984).

85-1-112. Navigable waters.

Case Notes

Public Right to Use Beaverhead River for Recreational Purposes: Following the decision in Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984), the Supreme Court held that: (1) the Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water; (2) determination of navigability for title is not necessary; (3) the public does not have the right to trespass over private property in order to reach the state-owned waters; and (4) plaintiff's action did not constitute inverse condemnation because public use of waters, rather than title, was determined. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Navigability for Title Purposes — Federal Test — Dearborn River Navigable: Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Navigability for Title Purposes — Summary Judgment — Dearborn River: The District Court properly granted the coalition for stream access and two state departments summary judgment on the issue of navigability of the Dearborn River in 1889 for title purposes. The affidavits and depositions of plaintiffs' two competent historians were admissible because the historians were qualified experts who provided evidence of the history of the river, their affidavits and depositions disclosed circumstantial guarantees of trustworthiness, and the facts and data they relied on were of a type reasonably relied on by experts in their field; the facts and data did not themselves have to be admissible. The affidavits of defendant landowner's witnesses were worthless, were not admissible, and did not create any genuine issue of material fact concerning the navigability of the river at the time Montana became a state in 1889. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Title to and Public Recreation on Dearborn River — Ex Post Facto, Contract Clause, and Irrevocable Privileged Considerations: The Supreme Court held that the State, not the landowner along the Dearborn River, held title to the bed of the river under the federal test of navigability for purposes of determining title to the riverbed. The court also held that landowner had no right to exclude the public from recreational use of the waters of the Dearborn. Because of these holdings, landowner's questions relating to ex post facto laws, violation of the contract clause of the constitution, and irrevocable rights and privileges were not germane to the case. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Title to and Public Use of Dearborn River — Federal Commerce Clause Navigability Immaterial: In action for determination of the public's right to use the Dearborn River, whether Montana has adopted the log-floating test of commercial navigability and whether the Dearborn is navigable under the federal commercial use test were immaterial because the question was one of recreational use or navigability, not commercial navigability. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found: Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Attorney General's Opinions

Access to Rivers and Streams Via County Road Right-of-Way and Bridges: Given that the public has the right to use public highways in any manner and for any purpose consistent with or reasonably incidental to public travel, this right includes the use of public rights-of-way created by county roads to gain access to rivers and streams. Using a county road right-of-way as an access point to a river or stream right-of-way is consistent with and reasonably incidental to the public's right to travel on county roads. Further, a bridge and its abutments, as part of a public highway, offer the same access to rivers and streams for recreational use as the highway to which they are attached. However, the public's right of access is not unlimited and is subject to the following limitations: (1) the recreating public must stay within the county road and bridge right-of-way, which is assumed to be 60 feet unless otherwise stated by petition or dedication; (2) access may be limited by the reasonable exercise of a governing body's police power to control the use of roads for

purposes such as safety and parking; and (3) use of a public highway may be limited by the manner in which it was created, such as a road created by prescriptive easement, which is limited both in size and usage to the original use during the prescriptive period and may include access for hunting, fishing, and recreation. 48 A.G. Op. 13 (2000).

Collateral References

Recreational Use of Montana's Waterways, Montana Legislative Council (1984).

Part 2
Administration

Part Case Notes

Federal Court Without Jurisdiction of Action Against Board — Under Section 89-101, R.C.M. 1947: The Montana Water Conservation Board, precursor to the Department of Natural Resources and Conservation, is a mere arm of the state; hence, an action by a nonresident corporation against the Board and its members to enjoin interference with corporation's water rights was in effect an action against the state, so that federal District Court was without jurisdiction to entertain it. (Citing sections 89-101 to 89-141, R.C.M. 1947, now partially contained in Title 85, ch. 1.) Broadwater-Missouri Water Users' Ass'n v. Mont. Power Co., 139 F2d 998 (9th Cir. 1944).

85-1-201. Rules.

Compiler's Comments

1995 Amendment: Chapter 418 at beginning substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Subsection Not Codified: Subsection (6) of section 89-132.1, R.C.M. 1947, was not codified in the MCA as it is redundant with this section. The subsection has not been repealed and is still valid law. Reference may be made to sec. 5, Ch. 158, L. 1967, as amended by sec. 138, Ch. 253, L. 1974.

Administrative Rules

Title 36, chapter 30, subchapter 1, ARM Marketing of water.

85-1-203. State water plan.

Compiler's Comments

1995 Amendments: Chapter 418 in (2), near beginning after "formulate and", deleted "with the approval of the board". Amendment effective July 1, 1995.

Chapter 545 in (3) and (7) substituted "environmental quality council established in 5-16-101" for "water policy committee established in 85-2-105". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1985 Amendment: In (2)(a) near middle, after "environmental quality council", inserted "of the state library"; and in (2)(b) near beginning, substituted "state library" for "department of administration", and near end substituted "library's" for "department's".

1989 Amendment: Inserted (4) authorizing Legislature to revise state water plan by resolution; and made minor changes in phraseology, style, and grammar.

1985 Amendment: In (3) near beginning, after "submit to", inserted "the water policy committee established in 85-2-105 and to"; and inserted (6) requiring the Department to consult and solicit the advice of the Water Policy Committee in developing and revising the state water plan.

Collateral References

Final Report of the Select Committee on Water Marketing, Environmental Quality Council (1985).

A Water Protection Strategy for Montana—Missouri River Basin, Montana Department of Natural Resources and Conservation, Water Resources Division (1982).

85-1-204. Department powers over state water.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) near end inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1995 Amendments: Chapter 301 in (1), in first and third sentences after "department", deleted "with the approval of the board" and in last sentence, after "acquire", deleted "with the approval of the board"; in last sentence in (4) substituted "measure" for "police"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), in first and second sentences after "department", and in fourth sentence, after "acquire", deleted "with the approval of the board"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 19, Ch. 301, L. 1995, was a severability clause.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: In (1) inserted second sentence authorizing the Department to lease water under state water leasing program upon approval of the Board of Natural Resources and Conservation.

Collateral References

States *key* 67; Waters and Water Courses *key* 133, et seq., 217, 254.

94 C.J.S. Waters §§345 through 347, 762.

85-1-205. Acquisition of water in federal reservoirs.

Compiler's Comments

1985 Amendment: In first sentence, after "distribution for", substituted "any beneficial use" for "industrial and other uses" and at end deleted "except as provided in subsection (2)"; and deleted former (2) that read: "Until a final decree has been issued pursuant to 85-2-234 concerning the waters in a federal reservoir, the department may sell, rent, or distribute such water only after a permit has been issued to an applicant for purchase, rent, or distribution of water in accordance with part 3 of this chapter."

Temporary Changes Made Permanent: Section 7, Ch. 706, L. 1983, provided that the amendments made by Ch. 706 were to terminate on July 1, 1985. Section 23, Ch. 573, L. 1985, amended sec. 7, Ch. 706, L. 1983, to provide that only one section (Ch. 706, sec. 4), that established the Select Committee on Water Marketing, would terminate on July 1, 1985. Thus the amendments to this section made by Ch. 706, L. 1983 (set forth below in the 1983 amendment note), are now permanent, except insofar as the section was further amended in 1985.

1983 Amendment: Near beginning of (1), after "acquire water" inserted "or water storage"; after "federal government from" substituted "any federal reservoir" for "the Fort Peck Reservoir"; at end of first sentence of (1), after "industrial" deleted "use" and inserted "and other

uses"; at end of (1) added "except as provided in subsection (2)"; and inserted (2) authorizing the Department to sell, rent, or distribute water in a federal reservoir until a final decree is issued only after an applicant has been issued a permit for purchase, rent, or distribution of water.

85-1-206. Construction of works by department.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 301 at beginning of (1) deleted "Subject to the approval of the board"; at end of first sentence in (3), after "projects", deleted "designed for those purposes", in second sentence, after "approved", deleted "by the board", and in last sentence, after "failure", deleted "of the board"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), at beginning, deleted "Subject to the approval of the board"; in (3), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Severability: Section 19, Ch. 301, L. 1995, was a severability clause.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: In (1), in middle of first sentence after "grant", inserted "or loan", in second and third sentences, after "cost of", substituted "operation and maintenance" for "maintaining, repairing, and operating it", and in third sentence, before "the principal", deleted "to pay" and before "revenue bonds" inserted "loans or"; and in (3), at end of second sentence after "maintenance", substituted "and the principal and interest of loans and revenue bonds issued to finance the construction" for "and repair and the amortization of the cost of the construction".

Collateral References

Waters and Water Courses *key* 217.

94 C.J.S. Waters §762.

85-1-207. Determination of costs of works.

Compiler's Comments

1987 Amendment: Substituted language concerning determination of cost of water projects for former language that read: "The department, in determining the cost of works, may make nonreimbursable allowances for costs of public benefits, including but not limited to irrigation, recreation, flood prevention, fish and wildlife, and stream stabilization."

Collateral References

Statutes *key* 179, 199.

85-1-208. Construction across streams, highways, or other obstacles.

Case Notes

Affirmative Duty to Maintain Bridges: The State Water Conservation Board (precursor to the Department of Natural Resources and Conservation) built bridges over its irrigation ditch where the ditch intersected city streets. Concomitant with the duty to construct bridges so as to restore streets to their former usefulness is a duty to maintain the bridges. Although this section is silent regarding the duty to maintain, such a duty can be implied from reading all the sections of the Water Conservation Act (section 89-101, et seq., R.C.M. 1947, now partially contained in Title 85, ch. 1) together. State ex rel. Livingston v. St. Water Conserv. Bd., 134 M 403, 332 P2d 913 (1958).

Collateral References

Waters and Water Courses *key* 217.

85-1-209. Acquisition of property by department.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) in first sentence substituted "Title 70, chapter 30" for "laws applicable to the condemnation of property for public use"; in (2) near beginning of first sentence substituted "Title 70, chapter 30" for "the powers of eminent domain"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1995 Amendments: Chapter 301 near beginning of (1), after "department", deleted "subject to the approval of the board under 85-1-202"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), at beginning after "department", deleted "subject to the approval of the board under 85-1-202"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 19, Ch. 301, L. 1995, was a severability clause.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 36, chapter 30, subchapter 1, ARM Marketing of water.

Case Notes

Ditches — Under Former Law: Ditches of the State Water Conservation Board (precursor to the Department of Natural Resources and Conservation) belong to the state. State ex rel. Livingston v. St. Water Conserv. Bd., 134 M 403, 332 P2d 913 (1958).

Collateral References

Eminent Domain *key* 28, 29; Waters and Water Courses *key* 217.

29A C.J.S. Eminent Domain §§45, 47; 94 C.J.S. Waters §762.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves. 35 ALR 3d 1293.

Right to condemn property in excess of needs for particular public purpose. 6 ALR 3d 297.

Measure and items of compensation or damages for flooding property under the right of eminent domain. 106 ALR 955.

85-1-210. Disposal of property by department.

Compiler's Comments

1995 Amendments: Chapter 301 near middle of first sentence and at beginning of second sentence, after "department", deleted "with the approval of the board"; at beginning of third sentence inserted exception clause; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in first and second sentences, after "department", deleted "with the approval of the board"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 19, Ch. 301, L. 1995, was a severability clause.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: In second sentence, after "issued", deleted "by the board"; and inserted last sentence requiring determination of market value of water project to consider liens, encumbrances, and project limitations.

Severability: Section 4, Ch. 305, L. 1987, was a severability section.

1981 Amendment: Inserted "with the approval of the board" after "The department" in the second sentence; substituted "water project" for "waterworks system which is not operated for the purpose of irrigation or development of power" near the beginning of the second sentence; substituted "The department shall make a determination of the market value of the water project prior to its sale or other disposition" for "however, no such sale or other disposition may be made except to a municipality, political subdivision, authority, or other public body of the state" at the end of the section.

Collateral References

Waters and Water Courses *key* 254.

94 C.J.S. Waters §762.

85-1-211. Management of property — water contracts.

Compiler's Comments

1999 Amendment: Chapter 120 in (5) inserted fourth sentence requiring the department to comply with 85-6-109 and give purchase preference in the disposal of a project; deleted former (6)

that read: "(6) (a) The department shall attempt to dispose of its canal projects by June 30, 1995. The canal projects to be disposed of include the:

(i) Columbus canal;
(ii) Delphia-Melstone canals;
(iii) Hysham pumping canals;
(iv) Lewistown ditch;
(v) Livingston ditch;
(vi) Florence canal;
(vii) Paradise canal;
(viii) Park Branch canal;
(ix) Sidney pumping canals;
(x) South Side canal;
(xi) Vigilante canal; and
(xii) West Bench canal.

(b) The department may dispose of a canal project by sale, transfer to a water users' association, abandonment, or other legal conveyance. If there is an existing water users' association on the canal project, the provisions of 85-6-109 must be complied with in the disposal of the canal project. The department shall give preference to existing water users' associations operating and maintaining the canal project.

(c) Upon the sale or transfer of a canal project, the department shall either cancel or write off from the accounts receivable carried on the books of the department a sum not to exceed any previous 1-year cost of operating and maintaining the canal project or make a payment not to exceed any previous 1-year cost of operating and maintaining the canal project. For a canal project not disposed of by June 30, 1995, the water users of the canal project are responsible for the department's administrative costs and the actual costs of operation and maintenance of the canal project"; in (6) in first sentence in two places before "project" deleted "canal"; and made minor changes in style. Amendment effective March 19, 1999.

1995 Amendments — Composite Section: Chapter 301 at beginning of first sentence of (5) deleted "Subject to the approval of the board under 85-1-202" and after "abandon" inserted "lease or rent" and at beginning of second sentence inserted exception clause; in (6)(b) deleted reference to subsection (5) of 85-6-109; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (5), at beginning, deleted "Subject to the approval of the board under 85-1-202"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Severability: Section 19, Ch. 301, L. 1995, was a severability clause.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 53 in (6)(a) inserted reference to Lewistown ditch; and made minor changes in style. Amendment effective February 18, 1993.

1991 Amendment: Inserted (6) listing canal projects to be disposed of and specifying means of disposal; and inserted (7) allowing entry on land to facilitate disposal. Amendment effective April 15, 1991.

1987 Amendment: In two places in (5), after "easements", substituted "properties, or interests" for "or property", after "therefrom" inserted language concerning disposition of property, in second sentence, before "a determination", inserted "Prior to the department's sale, transfer, or other disposition", and inserted last sentence requiring determination of market value of water project to consider liens, encumbrances, and project limitations.

Severability: Section 4, Ch. 305, L. 1987, was a severability section.

1981 Amendment: Deleted "when it determines that they are no longer needed for the purposes of this chapter" after "the department may sell . . . easements, or property" in (5).

Administrative Rules

Title 36, chapter 30, subchapter 1, ARM Marketing of water.

Case Notes

Mixed or Common Possession of Land — Possession to Person With Legal Title — No Adverse Possession as Against Legal Title: In reversing a District Court grant of a first priority water right for irrigation on the basis of adverse use, the Supreme Court adopted the rule that in case of a mixed or common possession of land by both parties to a suit, the law adjudges the rightful

possession to the party who holds legal title, and no length of time of possession can give title by adverse possession as against the legal title. Mielke v. Daly Ditches Irrigation District, 225 M 172, 731 P2d 927, 44 St. Rep. 129 (1987).

Collateral References

States *key* 127; Waters and Water Courses *key* 257.
81A C.J.S. States §158; 94 C.J.S. Waters §890, et seq.

85-1-213. Institution of court actions by department.

Collateral References

States *key* 67; Waters and Water Courses *key* 217, 254.
94 C.J.S. Waters §762.

85-1-215. Department duties — records and operations.

Compiler's Comments

1995 Amendment: Chapter 301 in first sentence substituted language requiring Department to keep accounting records of each project and to prepare financial statements by July 1 of each year for former language that required full and complete accounts concerning all matters and things relating to the works and annual preparation of balance sheets and income and profit and loss statements, after "financial" substituted "status" for "condition", and after "project" deleted "and file copies thereof with the secretary of state"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 19, Ch. 301, L. 1995, was a severability clause.

85-1-216. Limitations on liabilities and obligations.

Collateral References

States *key* 127.

85-1-219. State-owned works — department approval — bids — procurement of goods and services.

Compiler's Comments

2001 Amendment: Chapter 382 in (3)(c) at end substituted "$50,000 or less" for "less than $25,000"; inserted (3)(e) allowing the department to negotiate a contract without competitive bidding if the cost of goods, nonconstruction services, or professional services is $15,000 or less; at beginning of (4)(a) inserted exception clause and after "awarded" inserted "for construction"; at end of (4)(b) substituted "$50,000 or less" for "less than $25,000"; inserted (4)(c) exempting the department from solicitation and selection procedures for contracts up to $15,000 for goods or nonconstruction services; inserted (4)(d) allowing the department to contract by direct negotiation for professional services costing less than $15,000; and made minor changes in style. Amendment effective April 28, 2001.

85-1-220. State water project hydroelectric power generation special revenue account created — revenue allocated.

Compiler's Comments

1997 Amendment: Chapter 422 deleted (5) and (6) that read: "(5) There is a statutory appropriation pursuant to 17-7-502 to allow the department to transfer available funds from the state water project hydroelectric power generation special revenue account when needed to pay debt service on state water project bonds, including but not limited to broadwater power project bonds.

(6) There is a statutory appropriation pursuant to 17-7-502 for the department to transfer available funds from the broadwater replacement and renewal account when needed to pay debt service on the broadwater power project bonds"; and made minor changes in style. Amendment effective July 1, 1997.

Effective Date: Section 5, Ch. 370, L. 1991, provided: "[This act] is effective July 1, 1991."

85-1-221. Contracts with the United States.

Collateral References

Waters and Water Courses *key* 217.
94 C.J.S. Waters §762.

85-1-222. Conformity to federal regulations authorized.

Collateral References
Waters and Water Courses *key* 133, et seq.
94 C.J.S. Waters §358, et seq.

85-1-223. Negotiations with other states by the department.

Collateral References
Compacts between states, 78 Am. Jur. 2d Waters §§66, 71 through 77.

85-1-224. Contracts with state agencies and counties.

Collateral References
Waters and Water Courses *key* 254, 258.
94 C.J.S. Waters §762.

Part 3
Finance

85-1-301. Water conservation revenue bonds.

Compiler's Comments
1995 Amendment: Chapter 418 in (1), in four places, and (2), in three places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.
1981 Amendment: Deleted "not exceeding 6% per annum" after "bonds shall bear" near the middle of (1); deleted language in (2) relating to sale of the bonds at less than a price which would yield 6% per annum to the purchaser.

Case Notes
Issuance of Revenue Bonds in Aid of Emergency Relief Act: Issuance of revenue bonds by the Water Conservation Board, formed pursuant to prior law, to aid in the construction of a dam and reservoir under sec. 1, Ch. 85, L. 1937 (omitted), to the extent of agreeing to take up relief warrants issued by the county sponsoring the project with the proceeds, the bonds to be secured by revenue obtained from the members of a water users' association using the stored water, is not a lending of the credit of the state or any of its subdivisions to the association, within the meaning of Art. XIII, sec. 1, 1889 Mont. Const., or a violation of Art. XIII, sec. 4, 1889 Mont. Const., prohibiting the state from assuming the debt of a county or municipal corporation. Kraus v. Riley, 107 M 116, 80 P2d 864 (1938).
Power of Board to Issue Revenue Bonds to Be Retired by Funds Obtained From Water Users: Contention that the Water Conservation Board, formed pursuant to prior law, was without power to issue revenue bonds to be retired by funds obtained from water users was erroneous since such power is expressly conferred by sections 89-109, R.C.M. 1947 (85-1-301), and 89-111, R.C.M. 1947 (85-1-307). Kraus v. Riley, 107 M 116, 80 P2d 864 (1938).
Bonds Issued Not State Indebtedness — Under 1889 Constitution: Issuance of bonds by the Water Conservation Board, formed pursuant to prior law, does not create a debt of the state in excess of the constitutional limit prescribed by Art. XIII, sec. 2, 1889 Mont. Const. (revised by Art. VIII, sec. 8, 1972 Mont. Const.), since section 89-109, R.C.M. 1947 (85-1-302), provides that all bonds shall contain a statement that they do not constitute a state debt or liability and the bonds are made payable only from revenue of the works to be constructed. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Collateral References
States *key* 147, et seq.
81A C.J.S. States §§179 through 190.

85-1-303. Procedure in case of insufficient bond proceeds.

Compiler's Comments
1995 Amendment: Chapter 418 in third sentence substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-1-304. Lien upon bond proceeds.

Compiler's Comments

1983 Amendment: Substituted "debt service fund" for "sinking fund".

85-1-305. Use of trust indenture to secure bonds.

Compiler's Comments

1995 Amendment: Chapter 418 in first sentence, in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-1-306. Provisions for protecting bondholders.

Compiler's Comments

1995 Amendment: Chapter 418 in first sentence, near middle after "state", deleted "the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-1-307. Provisions to secure payment of bonds.

Compiler's Comments

1995 Amendment: Chapter 418 near end of introductory clause, (4)(c), (5), (6), and (12) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: At end of (1), substituted "debt service fund" for "sinking fund".

85-1-308. Provisions for conveyance in trust or mortgage.

Compiler's Comments

1995 Amendment: Chapter 418 in first and third sentences substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-1-309. Actions by trustee and bondholders.

Compiler's Comments

1995 Amendment: Chapter 418 in (1)(b), before "department", deleted "board or the"; in (2), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Collateral References

States *key* 168.

81A C.J.S. States §262.

85-1-310. Refunding revenue bonds.

Compiler's Comments

1995 Amendment: Chapter 418 in three places substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-1-321. Funds in general.

Compiler's Comments

1995 Amendment: Chapter 418 in first, second, and third sentences substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: In first sentence, substituted "debt service fund" for "sinking fund".

Collateral References

States *key* 127; Waters and Water Courses *key* 217.

94 C.J.S. Waters §762.

85-1-322. Construction capital projects funds.

Compiler's Comments

1983 Amendment: Substituted "construction capital projects fund" for "construction fund" in four places; and near end of section, substituted "debt service fund" for "sinking fund".

Collateral References

States *key* 146 through 168.

85-1-323. Debt service funds.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) and (2)(a)(i) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: Throughout section, substituted "debt service fund" for "sinking fund".

Collateral References

States *key* 146 through 168.

81A C.J.S. States §260.

85-1-332. Disposition of money collected.

Compiler's Comments

1999 Amendment: Chapter 144 at end of (1) substituted "water storage state special revenue account created by 85-1-631" for "renewable resource grant and loan program state special revenue account created by 85-1-604"; and made minor changes in style. Amendment effective July 1, 1999.

Code Commissioner Correction: The Code Commissioner substituted reference to renewable resource for reference to water development. Chapter 478, L. 1993, combined the water development and renewable resource development programs. The Code Commissioner has made the change to reflect changes made by Ch. 478. Authority for the change is found in sec. 84, Ch. 10, L. 1993.

1985 Amendment: Deleted former (1) that read: "all sums of money donated or contributed by the federal government or any department or agencies thereof"; renumbered introductory clause as (1) and former subsections as subsections of (1); and inserted (2) requiring all money donated or contributed by the federal government or a federal department or agency to be deposited in a federal special revenue account.

1983 Amendment: In introductory clause, substituted "water development state special revenue account" for "water development earmarked account".

1981 Amendment: In introductory clause of (1), substituted "water development earmarked account created by 85-1-604" for "earmarked revenue fund for the use of the department"; deleted the lead-in to former (2) that read "The following shall be deposited in the state general fund"; renumbered former (2)(a) and (2)(b) as (6) and (7); and inserted "except as otherwise provided by law" at the beginning of (6) and (7).

Case Notes

Acts Not Impliedly Repealed: This section did not impliedly repeal Ch. 35, L. Ex. Sess. 1933-34 (Section 89-101, et seq., R.C.M. 1947), or Ch. 95, L. 1935, amending the same. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Collateral References

States *key* 127.

81A C.J.S. States §224.

Part 5
Power Generation at Projects

Part Compiler's Comments

1981 Preamble: The preamble to Ch. 503, L. 1981 (SB 229), provided: "WHEREAS, the availability of energy from traditional sources is diminishing; and

WHEREAS, the demand for energy from the state's citizens is increasing, due to population growth and economic expansion; and

WHEREAS, because of newly developing technology and increasing energy costs, small-scale hydroelectric power generation is becoming an economically feasible additional source of energy; and

WHEREAS, the state of Montana currently owns and controls many water projects which may have potential capacity for the small-scale generation of hydroelectric energy; and

WHEREAS, it is in the best interest of the people of Montana to utilize Montana's water resources to the fullest extent possible."

Part Case Notes

Private Appropriations — Control by State Required: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Section 2 of Ch. 705, L. 1983, authorized the creation of state debt for development of hydroelectric power at three state-owned dams. Under Title 85, ch. 1, part 5, the Department of Natural Resources and Conservation and Board of Natural Resources and Conservation (functions now transferred to Department of Natural Resources and Conservation) are mandated to make the completed projects available for lease to utilities, electric cooperatives, or a state corporation proposing to use a substantial portion of the generated power. Plaintiff contended that this scheme violated Art. V, sec. 11, Mont. Const., by benefiting the public utilities, electric cooperatives, or a private corporation. The court stated that as long as the provisions relating to the expenditure of the funds derived from the proceeds of the bonds are under the control of the State, the constitutional mandate is satisfied. In this case, the proceeds of the coal severance tax bonds will be expended by a state agency under the control of the State for construction of hydroelectric projects. The appropriations therefore are made for an agency of the State. The fact that the State may afterwards lease the projects to a private association or corporation is no more offensive constitutionally than is the power of the State to lease its state-held lands to private parties. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Part Law Review Articles

Battle Looms Over Hydroelectric Dam Relicensing, Simpson, 131 Pub. Util. Fort. 50 (1993).

State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act, Bogardus, 12 Va. Envtl. L.J. 43 (1992).

Hydroelectric Power, the Federal Power Act, and State Water Laws: Is Federal Preemption Water Over the Dam? Delgado & Vaught, 17 U.C.D. L. Rev., 1179 (1984).

85-1-501. Survey of power generation capacity.

Case Notes

Delegation of Legislative Authority — Contingent Authorization Allowed: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff contended that Ch. 705, L. 1983, granted the Board of Natural Resources and Conservation (BNRC) (now abolished) the power and authority to determine the feasibility of various water conservation projects and make recommendations on the projects to the Board of Examiners. Plaintiff contended the delegation was unconstitutional in that it failed to set forth adequate standards or to place limits on the discretion of the BNRC. The court found standards imposed with reasonable

clarity in 85-1-501 and 85-1-502. Under these statutes, the Department of Natural Resources and Conservation (DNRC) is required to study the economic and environmental feasibility of constructing and operating power generating facilities on water projects. Once DNRC has reached its determination, it is the BNRC's duty to determine feasibility and public interest. The court found the legislative enactments complete and sufficiently clear, definite, and certain to enable the agencies to know their respective rights and obligations. The court found that determinations of economic and environmental feasibility are more appropriate in the administrative than the legislative sector. The court found nothing improper in the Legislature's making its authorizations contingent upon administrative decisions properly made in the executive side of state government. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

85-1-502. Notice of availability of lease sites.

Compiler's Comments

1995 Amendment: Chapter 418 at beginning of (1) and in (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: At end of (1), inserted "unless" clause relating to forfeiture.

Case Notes

Delegation of Legislative Authority — Contingent Authorization Allowed: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff contended that Ch. 705, L. 1983, granted the Board of Natural Resources and Conservation (BNRC) (now abolished) the power and authority to determine the feasibility of various water conservation projects and make recommendations on the projects to the Board of Examiners. Plaintiff contended the delegation was unconstitutional in that it failed to set forth adequate standards or to place limits on the discretion of the BNRC. The court found standards imposed with reasonable clarity in 85-1-501 and 85-1-502. Under these statutes, the Department of Natural Resources and Conservation (DNRC) is required to study the economic and environmental feasibility of constructing and operating power generating facilities on water projects. Once DNRC has reached its determination, it is the BNRC's duty to determine feasibility and public interest. The court found the legislative enactments complete and sufficiently clear, definite, and certain to enable the agencies to know their respective rights and obligations. The court found that determinations of economic and environmental feasibility are more appropriate in the administrative than the legislative sector. The court found nothing improper in the Legislature's making its authorizations contingent upon administrative decisions properly made in the executive side of state government. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

85-1-503. Receipt of applications.

Compiler's Comments

1995 Amendment: Chapter 418 in (2) and (3) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: In (1) after "submitted by any", substituted "person qualified to do business in Montana" for "public utility, as defined in 69-3-101, or electric cooperative, organized under Title 35, chapter 18, that sells power to Montana customers or by any Montana corporation proposing to use a substantial portion of the electricity to be generated in its own operation".

85-1-504. Determinations by department.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) and (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-1-505. Lease conditions.

Compiler's Comments

1995 Amendment: Chapter 418 in (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-1-506. Compliance with federal law.

Compiler's Comments

1985 Amendment: At beginning of sentence substituted "The department may" for "If the project must", and after "federal law", substituted "on a project" for "the license, permit, or exemption shall be held by the department".

85-1-508. Duties of the department.

Compiler's Comments

1995 Amendment: Chapter 418 deleted second sentence that read: "Any disputes that arise between the department and the lessee may be appealed to the board, upon written petition of either party"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-1-509. Power generation by department authorized.

Compiler's Comments

1999 Amendment: Chapter 209 deleted (3) prohibiting department sale of power generated at a facility except to a public utility, rural electric cooperative, or federal power-marketing agency organized in Montana and selling to Montana customers; and made minor changes in style. Amendment effective March 30, 1999.

1995 Amendment: Chapter 418 in (1) and (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-1-510. Sale of power and allocation of revenue.

Compiler's Comments

1991 Amendment: Inserted (2) requiring deposit of revenue in state water project hydroelectric power generation special revenue account and designating use of funds in the account. Amendment effective July 1, 1991.

85-1-514. Power generation negotiation process.

Compiler's Comments

1995 Amendment: Chapter 418 deleted (6) that read: "(6) Department actions under this section are subject to prior approval of the board as provided in 85-1-202." Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 6
Water Development Program

Part Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 478, L. 1993, provided: "This bill is introduced as a result of a legislative request to combine the water development and renewable resource development programs. These grant and loan programs have been administered as essentially one program for the past 4 bienniums. The renewable resource grant and loan program keeps the critical elements of both the water development and renewable resource development programs and does not expand either eligible projects or eligible applicants.

The long-range planning subcommittee of the appropriations and finance and claims committees stated its intent to establish minimum funding levels for these grant programs in House Bill No. 6 (Chapter 551, Laws of 1991) and House Bill No. 8 (Chapter 552, Laws of 1991) passed by the 1991 legislature. Over the past several bienniums grant funding has decreased. At the same time, revenues allocated to the water development, renewable resource development, and reclamation and development accounts have increased. Appropriations to natural resource agencies have made up the difference and have increased at a rate surpassing the growth in resource indemnity trust (RIT) interest income. This bill establishes minimum funding levels for the renewable resource grant and loan program, the reclamation and development grants program, and the water storage account.

In order to reflect the combining of the water development and renewable resource development programs, the allocation of interest earnings from the RIT is changed. Currently, 30% and 8%, respectively, of the RIT interest earnings are allocated to water development and the renewable resource development state special revenue accounts. This bill would eliminate these accounts. In their place, the renewable resource grant and loan program state special revenue account would be established and 38% of the RIT interest earnings would be allocated to this account.

Resource indemnity tax proceeds are allocated to the renewable resource grant and loan program and the reclamation and development grants state special revenue accounts. This will ensure funding for the operation of state natural resource agencies."

Severability: Section 18, Ch. 613, L. 1993, was a severability clause.

Study of Recreational User Fees — 1992 Report: Section 5, Ch. 659, L. 1991, provided for a study by the Department of Fish, Wildlife, and Parks, in cooperation with the Department of Natural Resources and Conservation, of the feasibility of charging recreational beneficiaries of water storage projects fees to assist in the repayment of a portion of those project costs. A written report must be submitted to the Water Policy Committee by July 1, 1992.

1989 Statement of Intent: The statement of intent attached to Ch. 491, L. 1989, provided: "This bill would allow the department of natural resources and conservation to use funds in the water development special revenue account and water development general obligation bond proceeds to protect loans made under the water development private loan program.

The program has made approximately 55 loans totalling [sic] $4 million to private individuals, primarily for irrigation projects. In the event that any lien holder or the department would have to foreclose on any of these loans, the department would need to be in a position to protect its security interests. These loans are primarily secured with real estate mortgages. In those instances where the department is not in first lien position and a foreclosure is necessary, the department would need funds to buy out the first lien holder to gain control of the property. The property would then be resold to recoup the funds used to buy out the first lien as well as the department's initial loan funds.

This bill would also allow the department to use these funds to operate a project if a loan should go into default. If the loan recipient should walk away from a project, the department may need to temporarily operate the project to secure its interests until foreclosure proceedings are complete. An example would be a hydropower project that requires continual attention to guard against breakdown or damage.

This bill is intended to give the department access to funds that would be used to protect its security interests when other loan collection efforts have not worked. It is the intent of the legislature that every effort be made to avoid forced loan collections. It is further the intent of the legislature that any property acquired in the manner provided for in HB 367 be resold as expeditiously as possible to recover funds used under 85-1-65 [sic, 85-1-605] and funds loaned to the borrower."

Part Administrative Rules

Title 36, chapter 17, subchapter 6, ARM Renewable resources grant and loan program — Conservation and Renewable Resource Development Division.

Part Case Notes

Special Legislation — Permissible When General Act Cannot Be Provided: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. Plaintiff contended that the appropriation of funds for favorable loans to a score of small municipalities, water districts, and portions of counties constituted special legislation and was

unconstitutional. The court noted that Art. V, sec. 12, Mont. Const., is not absolutely prohibitory. The court noted that the Legislature can not draft a general act of statewide application providing for the issuance and sale of revenue bonds and at the same time keep a handle on the way the proceeds are to be spent or loaned except through its direct authorization of projects. The court held that the passage of Ch. 705, L. 1983, was an implementation of Title 85, ch. 1, part 6, and excluded no class of governmental entity. Therefore, those enactments were "general" legislation within the meaning of Art. V, sec. 12, Mont. Const. The court also held sections 5 and 6 of Ch. 705, L. 1983, were valid in any event because even though local in effect, these were provisions for which a general act could not be provided. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

85-1-601. Purpose and policies.

Compiler's Comments

1997 Amendment: Chapter 436 near end of (1) inserted reference to tribal government entities; and made minor changes in style. Amendment effective July 1, 1997.

1993 Amendment: Chapter 478 in (1), after "enjoy", substituted "the benefits of the state's water and other renewable resources" for "the full economic and recreational benefits of the state's water resources", after "long-term" substituted "renewable resource grant and loan program" for "water development program", and after "assistance" substituted "to private for-profit, private nonprofit, local government, and state government entities for renewable resource grant and loan projects" for "to private, local, and state entities for water resource development projects and activities"; near beginning of (2) substituted "renewable resource grant and loan program" for "water development program" and after "water resources" inserted "and to invest in renewable natural resource projects that will preserve for the citizens of Montana the economic and other benefits of the state's natural heritage"; in (3) substituted "The legislature recognizes the value of Montana's renewable resources; therefore, it is appropriate that a portion of the taxes and other revenue from nonrenewable resources be invested in the replacement of nonrenewable resources with the development of renewable resource projects that will continue to provide tax and other revenue and will preserve for the citizens the economic and other benefits of the state's natural heritage" for "The legislature recognizes that water is one of the most valuable and important renewable resources in Montana; therefore, it is appropriate that a portion of the taxes on the removal of nonrenewable resources be dedicated to the conservation, development, and beneficial use of water resources"; at beginning of (4) substituted "The conservation, development, management, and preservation of water and other renewable resources are high priorities" for "The development of water resources is of a high priority" and at end substituted "these resources" for "water"; inserted (5) providing that developments supported by this part may not significantly diminish the quality of existing public resources, such as land, air, fish, wildlife, and recreational opportunities; at beginning of (6) substituted "This renewable resource grant and loan program supports in part" for "This water development program is an integral part of" and inserted second sentence requiring the Department in making funding recommendations to give preference to projects that will implement state water plan priorities if, in all other respects, the proposed projects are equal in public benefit and technical feasibility; and made minor changes in style. Amendment effective July 1, 1993.

85-1-602. Objectives.

Compiler's Comments

2001 Amendment: Chapter 169 inserted (2)(d) authorizing funding of water-related projects that improve water quality, including livestock containment facility projects; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 436 at end of (1)(c) substituted "state, tribal, and federal water projects" for "state-tribal, state-federal, and state-tribal-federal water projects". Amendment effective July 1, 1997.

1993 Amendment: Chapter 478 substituted present language concerning enhancement of renewable resources through various projects for former section that read: "The department shall administer a water development program to accomplish such objectives as rehabilitation of state-owned water projects and works; promotion of private, local government, and state water development; development of water-based recreation and the protection of water resources for the benefit of agriculture, flood control, and other uses; development of offstream and tributary storage; encouragement of projects or programs that improve water use efficiency, including development of new, efficient water systems, rehabilitation of older, less efficient water systems,

and acquisition and installation of measuring devices required under 85-2-113; and development of state-tribal, state-federal, and state-tribal-federal water projects. The storage of water for existing and future beneficial uses shall be given the highest priority unless a water development project or activity designed to accomplish another objective is demonstrated to be more beneficial to a greater number of people. The water development program is the key implementation portion of the state water plan and shall be administered to accomplish the objectives of the plan." Amendment effective July 1, 1993.

1991 Amendment: Near end of first sentence, after "less efficient water systems", inserted "and acquisition and installation of measuring devices required under 85-2-113"; and made minor change in style.

1989 Amendment: Near end of first sentence inserted clause relating to improving water use efficiency.

85-1-603. Renewable resource loan debt service fund created — coal severance tax allocated — renewable resource loan loss reserve fund created.

Compiler's Comments

1997 Amendment: Chapter 332 in (1)(b)(ii) substituted "85-1-613(5)(a)" for "85-1-613(4)(a)"; and in (2)(b) substituted "85-1-613(5)(b)" for "85-1-613(4)(b)". Amendment effective April 21, 1997.

Applicability: Section 4, Ch. 332, L. 1997, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for existing projects that were initiated after July 1, 1995.

(2) [This act] applies to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for new projects initiated after [the effective date of this act]." Effective April 21, 1997.

1995 Amendment: Chapter 442 in (1)(b)(i), at beginning, substituted "0.95%" for "2 ½%" and at end deleted "and remaining after allocation of the tax under 15-35-108(1) and (2)". Amendment effective July 1, 1995.

1993 Amendment: Chapter 478 in (1)(a) and (1)(b), before "debt service", substituted "renewable resource loan" for "water development"; at beginning of (1)(b)(i) increased 1 ¼% to 2 ½%; in (1)(b)(ii) substituted "85-1-613(4)(a)" for "85-1-613(3)(a)"; in (1)(b)(iii) substituted "renewable resource grant and loan program bonds" for "water development bonds"; in (1)(b)(iv) substituted "renewable resource grant and loan program state special revenue account" for "water development state special revenue account"; in (1)(b)(v), (2)(a), (2)(b), and (2)(c) substituted "renewable resource loan" for "water development loan"; in (2)(c) substituted "renewable resource loan debt service" for "water development debt service"; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: In (1)(b)(ii) inserted "under 85-1-613(3)(a)"; inserted (1)(b)(v) relating to loan loss money received from the water development loan loss reserve fund; and inserted (2) relating to creation of and allocation to a water development loan loss reserve fund. Amendment effective April 11, 1989.

1987 Amendment: At end of (2)(a) substituted "under 15-35-108(1) and (2)" for "to the trust fund established under Article IX, section 5, of The Constitution of the State of Montana".

1986 Amendment: Inserted (2)(b) through (2)(d) relating to allocation of money received from water development bonds or revenue paid into the water development state special revenue account.

1983 Amendment: In (1), substituted "debt service fund within the debt service fund type" for "sinking account within the sinking fund"; and in (2), substituted "debt service fund" for "sinking account".

85-1-604. Renewable resource grant and loan program state special revenue account created — revenue allocated — limitations on appropriations from account.

Compiler's Comments

1999 Amendment: Chapter 144 deleted former (2)(a) that read: "(a) all revenue of the works and other money as provided in 85-1-332"; deleted former (2)(e) that read: "(e) the resource indemnity and ground water assessment tax proceeds as provided in 15-38-106(2)(b)"; substituted (3) concerning appropriations for designated projects and administrative expenses for former text that read: "Appropriations may be made from the renewable resource grant and loan program state special revenue account for the following purposes and subject to the following conditions:

(a) The amount of resource indemnity trust fund interest earnings allocated to the special revenue account under 15-38-202(2)(a)(ii) must be used for renewable resource grants.

(b) An amount less than or equal to that paid into the account under 85-1-332 and only that amount may be appropriated for the operation and maintenance of state-owned projects and works. If the amount of money available for appropriation under this subsection (3)(b) is greater than that necessary for operation and maintenance expenses, the excess may be appropriated as provided in subsection (3)(c).

(c) An amount less than or equal to that paid into the account from the resource indemnity trust account plus any excess from subsection (3)(b) and only that amount may be appropriated from the account for expenditures that meet the policies and objectives of the renewable resource grant and loan program. If the amount of money available for appropriation under this subsection (3)(c) is greater than that necessary for operation and maintenance expenses, the excess may be appropriated as provided in subsection (3)(d).

(d) An amount less than or equal to that paid into the account from the sources provided for in subsections (2)(c) and (2)(d) and any excess from subsection (3)(c) and only that amount may be appropriated from the account for loans and grants for renewable resource projects; for purchase of liens and operation of property as provided in 85-1-615; for administrative expenses, including but not limited to the salaries and expenses of personnel, equipment, and office space; for the servicing of loans, including arrangements for obtaining security interests; and for other necessities incurred in administering the loans and grants"; and made minor changes in style. Amendment effective July 1, 1999.

The amendment to this section made by sec. 7, Ch. 552, L. 1999, was rendered void by sec. 12(2), Ch. 552, L. 1999, a contingent voidness provision.

1997 Amendments: Chapter 42 in (2)(e) substituted "resource indemnity and ground water assessment tax proceeds" for "resource indemnity tax proceeds"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 444 in (2)(e) substituted "resource indemnity and ground water assessment tax proceeds" for "resource indemnity tax proceeds"; in (3)(a) substituted "to the special revenue account under 15-38-202(2)(a)(ii)" for "under 15-38-202(2)(b)(iii)"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 577 in (2)(b), at beginning, deleted "38% of"; in (2)(e), at beginning, deleted "20% of" and at end inserted "as provided in 15-38-106(2)(b)"; and in (3)(a) inserted reference to subsection (iii) of 15-38-202(2)(b). Amendment effective July 1, 1995.

1993 Amendment: Chapter 478 in (1), (2), and (3), before "state special revenue account", substituted "renewable resource grant and loan program" for "water development"; near beginning of (2) and (2)(c), before "debt service", substituted "renewable resource loan" for "water development"; in (2)(b) increased 30% to 38%; inserted (2)(e) including 20% of the resource indemnity tax proceeds; inserted (3)(a) requiring the amount of resource indemnity trust fund interest earnings allocated under 15-38-202(2)(b) to be used for renewable resource grants; near middle of second sentence of (3)(b) substituted reference to this subsection for reference to subsection (3)(a) and at end substituted reference to subsection (3)(c) for reference to subsection (3)(b); substituted (3)(c) concerning appropriation from resource indemnity trust account for former (3)(b) that read: "(b) An amount less than or equal to that paid into the account from the resource indemnity trust account plus any excess from subsection (3)(a) and only that amount may be appropriated from the account for:

(i) the rehabilitation of state-owned projects and works, including the rehabilitation of spillways of state-owned dams;

(ii) the formulation of downstream emergency warning and evacuation plans for state-owned dams;

(iii) the development of the hydropower potential of state-owned dams;

(iv) assistance in the implementation of the water reservations established under 85-2-316 of conservation districts;

(v) the promotion of the development of offstream and tributary storage;

(vi) the promotion of joint state-tribal, state-federal, and state-tribal-federal water development;

(vii) projects or programs that improve water use efficiency, including development of new, efficient water systems, rehabilitation of older, less efficient water systems, and acquisition and installation of measuring devices required under 85-2-113;

(viii) administrative expenses, including but not limited to the salaries and expenses of personnel, equipment, office space, and other necessities incurred in the administration of the water development program except the administration of loans and grants; and

(ix) any other expenditures that meet the policies and objectives of the state water development program"; near beginning of (3)(d), after "provided for in", substituted "subsections (2)(c) and (2)(d) and any excess from subsection (3)(c)" for "(c) and (d) of subsection (2)" and near middle substituted "renewable resource projects" for "water development projects and activities"; deleted (4) requiring an amount equal to 25% of money available for grants under former subsection (3)(c) to be transferred to the water storage state special revenue account created under 85-1-631; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendments: Chapter 543 at end of (3)(b)(vii) inserted "and acquisition and installation of measuring devices required under 85-2-113"; and made minor change in style.

Chapter 659 inserted (4) requiring transfer of money to the water storage state special revenue account. Amendment effective July 1, 1991.

1989 Amendments: Chapter 116 inserted (3)(b)(vii) relating to projects that improve water use efficiency; and made minor changes in form.

Chapter 491 in (3)(c) inserted "for purchase of liens and operation of property as provided in 85-1-615". Amendment effective April 11, 1989.

1986 Amendment: In (2) at beginning inserted exception clause; deleted former (2)(d) that read: "any principal and accrued interest received in repayment of a loan made from the proceeds of bonds issued under 85-1-617"; and deleted former (2)(f) that read: "all interest income earned on proceeds of water development bonds".

1985 Amendment: Inserted (2)(f) requiring all interest on proceeds of water development bonds to be deposited into the water development state special revenue account.

1983 Amendments: Chapter 149 inserted (2)(d) and (2)(e) requiring the deposit into the water development state special revenue account of any principal or accrued interest received in repayment of loans from proceeds of water development bonds and fees or charges collected by the Department for loan servicing; in (3)(c), near beginning substituted "sources provided for in (c) through (e) of subsection (2)" for "water development sinking account" and near end inserted "for the servicing of loans, including arrangements for obtaining security interests".

Chapter 298, in (1), (2), and (3), substituted "state special revenue account" for "earmarked account"; in (1), substituted "state special revenue fund" for "earmarked revenue fund"; in (2)(b), substituted "trust fund" for "trust account"; and in (2)(c), substituted "water development debt service fund" for "water development sinking account".

Applicability of 1985 Amendment: Section 21, Ch. 512, L. 1985, provided: "Section 10 [amending 85-1-604] applies retroactively, within the meaning of 1-2-109, to all occurrences after July 1, 1981."

85-1-605. Grants, loans, and bonds for state, local, or tribal government assistance.

Compiler's Comments

1999 Amendment: Chapter 498 in (1) near end of first sentence inserted reference to regional water and wastewater authorities; and made minor changes in style. Amendment effective April 27, 1999.

Severability: Section 26, Ch. 498, L. 1999, was a severability clause.

1997 Amendments: Chapter 50 in (4), in first sentence, substituted "$10 million" for "$1 million"; and made minor changes in style. Amendment effective March 13, 1997.

Chapter 436 in (1), at end of first sentence, inserted reference to tribal government; in middle of (3) inserted reference to tribal government; in (4), in second sentence, inserted reference to tribal government; inserted (6) providing additional grant and loan conditions; and made minor changes in style. Amendment effective July 1, 1997.

1993 Amendment: Chapter 478 at beginning of (1) substituted "The department may recommend to the legislature that grants and loans be made from revenue deposited in the renewable resource grant and loan program state special revenue account, that loans be made from renewable resource bond proceeds deposited in the renewable resource loan proceeds account established in 85-1-617(5)" for "The department may recommend to the legislature that grants and loans be made from coal severance tax proceeds deposited in the water development state special revenue account, that loans be made from water development bond proceeds deposited in the water development account"; inserted (2) providing that nothing in this part creates or expands the state's or a local government's authority to incur debt and that the Legislature may authorize loans only to state and local government entities otherwise structured to incur debt; inserted (3) providing that loans may not be authorized except to a state or local government entity that agrees to secure the authorized loan with its bond; in first sentence of (4) substituted "In addition to implementing those projects approved by the legislature, the

department may request up to 10% of the grant funds available and up to $1 million for loans from the renewable resource grant and loan program state special revenue account and the renewable resource loan proceeds account in any biennium to be used for emergencies. These emergency grant projects or loan projects, or both, may not be made because of the gross negligence of the state or local government applicant, must be approved by the department, and must be defined as those projects otherwise eligible for either grant funding or loan funding, or both, that" for "In addition to implementing those projects approved by the legislature, the department may request up to 10% of the funds available for grants from the water development special revenue account in any biennium to be used for emergencies. These emergency projects must be approved by the department and be defined as those projects which"; in (5) substituted "The grants and loans provided for by this section may be made for projects that enhance renewable resources in the state through conservation, development, management, or preservation; for assessing feasibility or planning; for implementing renewable resource projects" for "The grants and loans provided for by this section may be made for the purchase, lease, development, or construction of water development projects and activities for the conservation, management, use, development, or protection of the water and related agricultural, land, fish, wildlife, and water recreation resources in the state; for the purpose of feasibility and design studies for such projects; for development of plans for and the rehabilitation, expansion, and modification of water development projects; for other water development projects and activities that will enhance the water resources of the state"; and made minor changes in style. Amendment effective July 1, 1993.

1985 Amendment: Inserted (2) authorizing the Department, for emergencies, to request up to 10% of the funds available for grants from the water development special revenue account in any biennium.

1983 Amendments: Chapter 149, in middle of (1), inserted "and that coal severance tax bonds be authorized pursuant to Title 17, chapter 5, part 7, to provide financial assistance".

Chapter 298, in first sentence of (1), substituted "water development state special revenue account" for "water development earmarked account" and "water development account" for "water development clearance account".

Administrative Rules

ARM 36.17.603 Evaluation and prioritization of public grants — ranking criteria.

ARM 36.17.605 Terms and conditions for grant and loan agreements.

85-1-606. Grants and loans to private persons.

Compiler's Comments

1993 Amendment: Chapter 478 near beginning of (1) and in (2) and (3) substituted "water-related projects" for "water development projects and activities"; in (1) substituted "renewable resource grant and loan program state special revenue account" for "water development state special revenue account" and substituted "renewable resource loan proceeds account" for "water development account"; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: In (1), substituted "water development state special revenue account" for "water development earmarked account" and "water development account" for "water development clearance account".

85-1-608. Applications for grants and loans to private persons.

Compiler's Comments

1993 Amendment: Chapter 478 in (1) substituted "water-related project" for "water development project or activity"; and in (2), after "prescribed by", substituted "rule" for "the board" and in two places, after "project", deleted "or activity". Amendment effective July 1, 1993.

85-1-609. Eligibility for a loan or grant to a private person.

Compiler's Comments

1993 Amendment: Chapter 478 in (1)(h), (2), (3), (4), and (5) substituted "project" for "water development project or activity"; in (1) substituted "water-related project" for "water development project or activity"; in (1)(a) substituted "renewable resource grant and loan program" for "water development program"; in (1)(c), after "A project", deleted "or activity" and substituted "quantifiable" for "tangible"; in (1)(g), after "project", deleted "or activity"; at end of (2) substituted "renewable resource grant or loan" for "water development grant or loan"; and made minor changes in style. Amendment effective July 1, 1993.

85-1-610. Evaluation of grants and loans to private persons.

Compiler's Comments

1993 Amendment: Chapter 478 in introductory clause, (2), and (3) substituted "water-related project" for references to water development project or activity; deleted second sentence in (3) defining activity; in (4) substituted "renewable resource grant and loan projects" for "water development projects and activities"; in (5) substituted "project will effectively utilize" for "water development project or activity will fully utilize"; in (6), after "Projects", deleted "or activities"; in (7) substituted "project" for "water development project or activity" and substituted "renewable resource grant and loan program" for "water development program"; and made minor changes in style. Amendment effective July 1, 1993.

1985 Amendment: In (3) inserted second sentence defining activity to include all necessary work associated with a project, from application preparation through the implementation of a water reservation by a qualified state applicant.

Administrative Rules

ARM 36.17.604 Application of criteria for award of grants and loans to private applicants.

85-1-611. Department to solicit views.

Compiler's Comments

1997 Amendment: Chapter 436 near end inserted reference to tribal government. Amendment effective July 1, 1997.

1993 Amendment: Chapter 478 after "projects" deleted "and activities". Amendment effective July 1, 1993.

85-1-612. Rulemaking authority.

Compiler's Comments

1993 Amendment: Chapter 478 at beginning substituted "department" for "board"; in (1), after "prescribing", inserted "a reasonable application fee and"; inserted (5) requiring rules describing the ranking criteria used to evaluate and prioritize grants to governmental entities; and inserted (6) requiring rules specifying any other procedures necessary to accomplish the objectives of the renewable resource grant and loan program. Amendment effective July 1, 1993.

Statement of Intent: The statement of intent attached to SB 409 (Ch. 505, L. 1981) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] in section 13.

The intent is to provide the Board with the authority to adopt those rules necessary to administer the loan and grant portion of the water development program. The authority is limited by section 13 to prescribing the form and content of applications for grants and loans, to adopting rules governing the application of the criteria for awarding loans and grants to private persons, to adopting rules providing for the servicing of loans including arrangements for obtaining security interests and the establishment of reasonable fees or charges to be made, and to prescribing the terms and conditions for making grants and loans, the security instruments, and the agreements necessary."

Administrative Rules

Title 36, chapter 17, subchapter 6, ARM Renewable resources development grant and loan program — Conservation and Renewable Resource Development Division.

85-1-613. Limits on loans.

Compiler's Comments

1997 Amendments: Chapter 332 in (1), near beginning, inserted "that is not a water users' association or ditch company organized and incorporated pursuant to Title 35, chapter 1, part 2, or Title 85, chapter 6, part 1"; inserted (2) providing guidelines for loans to certain water users' associations or ditch companies from the renewable resource grant and loan program special revenue account or the renewable resource loan proceeds account; inserted (6) providing "A loan made under this part may not be used for the cost of operation and maintenance of a project"; and made minor changes in style. Amendment effective April 21, 1997.

Chapter 436 near beginning of (3) inserted reference to tribal government; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 4, Ch. 332, L. 1997, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to loans made by the department of natural resources and conservation

from the renewable resource grant and loan program to water users' associations for existing projects that were initiated after July 1, 1995.

(2) [This act] applies to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for new projects initiated after [the effective date of this act]." Effective April 21, 1997.

1993 Amendment: Chapter 478 substituted first sentence in (1) concerning restrictions on a loan to a private person for a renewable resource grant and loan program project for "No loan for a water development project or activity may be made from the water development state special revenue account or water development account that exceeds the least of $200,000, 10% of the estimated total funds potentially available for loans in the water development state special revenue account and water development account in the biennium in which the loan will be made, or 80% of the fair market value of the security given therefor"; inserted (2) providing that the Department may not make a loan to the state or a local government for a renewable resource grant and loan program project from the renewable resource grant and loan program state special revenue account or renewable resource loan proceeds account if the loan exceeds the lesser of $200,000 or the project sponsor's remaining debt capacity; in (4), before "interest", deleted "board shall from time to time establish the"; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: In (3), at end of introductory clause, inserted "that is sufficient to"; inserted (3)(a) relating to bond debt service; and inserted (3)(b) relating to establishment and maintenance of a loan loss reserve fund. Amendment effective April 11, 1989.

1983 Amendments: Chapter 149, in (1), increased specified dollar amount loan limit alternative from $100,000 to $200,000.

Chapter 298, in first sentence of (1), substituted two references to the water development state special revenue account for the water development earmarked account and substituted two references to the water development account for the water development clearance account.

Administrative Rules

ARM 36.17.605 Terms and conditions for grant and loan agreements.

ARM 36.17.606 Arrangements for obtaining security interests.

85-1-614. Limits on grants from renewable resource grant and loan program state special revenue account.

Compiler's Comments

1993 Amendment: Chapter 478 in (1)(a) substituted "renewable resource grant and loan state special revenue account" for "water development state special revenue account" and before "grants" inserted "public or private"; inserted (2) providing that this part does not limit the amount of grant funds that may be appropriated by the Legislature to fund state or local government projects; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: Substituted "state special revenue account" for "earmarked account".

85-1-615. Security interests — purchase, operation, and resale of encumbered property.

Compiler's Comments

2001 Amendment: Chapter 7 in introductory clause of (2) substituted "85-1-604" for "85-1-604(3)(d)". Amendment effective October 1, 2001.

1997 Amendment: Chapter 332 in (1), in second sentence, inserted "shares of stock in a water users' association, revenue of a water users' association, accounts receivable of a water users' association, water purchase agreements"; and made minor changes in style. Amendment effective April 21, 1997.

Applicability: Section 4, Ch. 332, L. 1997, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for existing projects that were initiated after July 1, 1995.

(2) [This act] applies to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for new projects initiated after [the effective date of this act]." Effective April 21, 1997.

1993 Amendment: Chapter 478 in (1) substituted "renewable resource grant and loan state special revenue account or the renewable resource loan proceeds account" for "water development state special revenue account or water development account"; in (2) substituted "85-1-604(3)(d)" for "85-1-604(3)(c)"; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: Inserted (2) relating to purchase of a prior lien and operation of encumbered property; and inserted (3) relating to resale of encumbered property. Amendment effective April 11, 1989.

1983 Amendment: In first sentence, substituted "water development state special revenue account or water development account" for "water development earmarked or clearance account".

Administrative Rules

ARM 36.17.606 Arrangements for obtaining security interests.

85-1-616. Administration of loans and grants.

Compiler's Comments

1993 Amendment: Chapter 478 in second sentence of (3) substituted "renewable resource grant and loan program state special revenue account" for "water development state special revenue account"; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendments: Chapter 149 inserted last sentence requiring the deposit of fees and charges for servicing water development loans into the water development state special revenue account.

Chapter 281, in last sentence, substituted "water development state special revenue account" for "water development earmarked account".

Administrative Rules

Title 36, chapter 17, subchapter 6, ARM Renewable resources development grant and loan program.

85-1-617. Issuing renewable resource bonds — renewable resource loan proceeds account.

Compiler's Comments

1999 Amendment Void: The amendment to this section made by sec. 10, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

1993 Amendment: Chapter 478 in (1), (2), and (3) substituted "renewable resource bonds" for "water development bonds"; in (1), at end of first sentence, substituted "renewable resource grant and loan program" for "water development loan program"; in (2), near beginning, substituted "department" for "board of natural resources and conservation"; near middle of (3) substituted "renewable resource loan debt service" for "water development debt service"; in (5) substituted "renewable resource loan proceeds account" for "water development account"; near beginning of (6) substituted "renewable resource loan proceeds account" for "water development account", in two places, before "debt service", substituted "renewable resource loan" for "water development", near end of first sentence substituted "renewable resource loan loss reserve fund" for "water development loan loss reserve fund", and near end of second sentence, after "board", inserted "of examiners"; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: In (6) inserted reference to the water development loan loss reserve fund. Amendment effective April 11, 1989.

1986 Amendment: In (6) at end of first sentence substituted "debt service fund pursuant to 85-1-603" for "state special revenue account pursuant to 85-1-604".

1985 Amendment: At end of (2) inserted reference to 17-5-731; in (4) inserted reference to notes after each occurrence of "bonds"; near beginning of (6) inserted "or notes" after "proceeds of bonds".

1983 Amendments — Composite: House Bill 533 (Ch. 298, L. 1983) was entitled in part: "AN ACT TO GENERALLY REVISE LANGUAGE IN CODE SECTIONS DEALING WITH THE ISSUANCE OF BONDS IN ORDER THAT REFERENCES TO THE TREASURY FUND STRUCTURE CONFORM TO CHAPTER 28, LAWS OF 1981." Section 42 of Ch. 298, at end of first sentence of 85-1-617(6) after "deposited in the", substituted "water development debt service fund" for "water development sinking account". Chapter 149, in the same subsection of 85-1-617, substituted "water development earmarked account pursuant to 85-1-604" for "water development sinking account and must be applied to the payment, redemption premiums, and interest on the particular bond issue from whose proceeds the loan was made". The Code Commissioner determined that the change made by Ch. 149 took precedence over that made by Ch. 298 because Ch. 149 made a substantive change whereas Ch. 298 substituted one term for its

equivalent in the former treasury fund structure. Under the authority of sec. 55 of Ch. 298, the Code Commissioner then changed "water development earmarked account" to "water development state special revenue account" as that account was renamed by sec. 36 of Ch. 298.

Further changes made by Ch. 298 are as follows: in (3) and (6), substituted "water development debt service fund" for "water development sinking account"; in (5), substituted "water development account within the state special revenue fund" for "water development clearance account within the bond proceeds and insurance clearance fund"; and in (6), substituted "water development account" for "water development clearance account".

Administrative Rules

ARM 36.17.605 Terms and conditions for grant and loan agreements.

85-1-618. Restrictions on use of bond proceeds.

Compiler's Comments

1993 Amendment: Chapter 478 at beginning substituted "Renewable resource" for "Water development" and near middle substituted "renewable resource grant and loan program" for "water development program". Amendment effective July 1, 1993.

1989 Amendment: At end inserted "or for purchasing liens and operating property as provided in 85-1-615". Amendment effective April 11, 1989.

85-1-619. Debt service fund — pledge and administration of sufficient balance.

Compiler's Comments

1999 Amendment Void: The amendment to this section made by sec. 11, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

1993 Amendment: Chapter 478 throughout section, before "debt service", substituted "renewable resource loan" for "water development"; in (2) substituted "renewable resource bonds" for "water development bonds"; in (3), at end, substituted "renewable resource grant and loan program state special revenue account" for "water development state special revenue account"; and made minor changes in style. Amendment effective July 1, 1993.

1985 Amendment: Near beginning of (2) before "to pay interest", deleted "first"; in (2) substituted "and for bonds issued prior to 1985" for "second", and at end of (2) deleted "to the amount required each month to meet those payments due within 12 months thereafter; and third, to restore the reserve to this amount after each payment"; near beginning of (3) inserted "for bonds issued prior to 1985", and deleted last sentence of (3) that read: "If the balance on hand at any time in the water development debt service fund is not sufficient to accumulate required reserves under subsection (2) and is not restored to the required amount within 3 months thereafter from funds specifically pledged and appropriated to the water development debt service fund, the treasurer in accordance with the pledge of the full faith and credit and taxing powers of the state shall transfer an amount sufficient to restore the required balance from the general fund to the water development debt service fund."

1983 Amendment: Throughout section, substituted "water development debt service fund" for "water development sinking account"; and in first sentence of (3), substituted "water development state special revenue account" for "water development earmarked account".

85-1-620. Renewable resource refunding bonds.

Compiler's Comments

1999 Amendment Void: The amendment to this section made by sec. 12, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

1993 Amendment: Chapter 478 throughout section substituted "renewable resource loan debt service" for "water development debt service"; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: In two places in (1) and (2), substituted "water development debt service fund" for "water development sinking account".

85-1-621. Report.

Compiler's Comments

1995 Amendment: Chapter 545 at end substituted "environmental quality council established in 5-16-101" for "water policy committee established in 85-2-105". Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1985 Amendment: In (2)(a) near middle, after "environmental quality council", inserted "of the state library"; and in (2)(b) near beginning, substituted "state library" for "department of administration", and near end substituted "library's" for "department's".

1993 Amendments: Chapter 349 in first sentence, after "report", deleted "to the legislature"; and in fifth sentence, after "submitted", deleted "to the president of the senate and the speaker of the house", after "to" deleted "the members of", and after "85-2-105" deleted "and, as provided in 5-11-210, to the legislature".

Chapter 478 at end of first sentence substituted "renewable resource grant and loan program" for "water development program"; in second sentence, after "projects", deleted "and activities"; in third sentence, after "department", substituted "has received applications" for "desires to seek congressional authorization and funding and the efforts the department will undertake in attempting to secure such authorization and funding"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: In last sentence inserted reference to 5-11-210, before "the legislature" deleted "such other members of", and after "legislature" deleted "as may request a copy". Amendment effective March 20, 1991.

1985 Amendment: Inserted third sentence requiring Department's biennial report to the Legislature to identify and prioritize water development projects and the efforts to be undertaken to secure Congressional authorization and funding; and in fifth sentence, after "speaker of the house", inserted "to the members of the water policy committee established in 85-2-105", and after "other members", inserted "of the legislature".

85-1-624. Authorization of bonds.

Compiler's Comments

1999 Amendment: Chapter 14 at end increased outstanding principal amount for bonds from $10 million to $20 million. Amendment effective July 1, 1999.

Effective Date: Section 5, Ch. 437, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 14, 1995.

85-1-631. Water storage state special revenue account created — revenues allocated — appropriations from account.

Compiler's Comments

1999 Amendment: Chapter 144 at end of (2) inserted "and all revenue of the works and other money as provided in 85-1-332"; inserted (3) concerning restriction on appropriation of money; and made minor changes in style. Amendment effective July 1, 1999.

1993 Amendment: Chapter 478 in (2), after "account", substituted "money allocated from the resource indemnity trust fund interest earnings pursuant to 15-38-202" for "(a) money from the water development state special revenue account as provided in 85-1-604; and

(b) money from the renewable resource development account as provided in 90-2-111"; inserted (4) requiring deposits into the water storage state special revenue account to be placed in short-term investments and the interest accrued to also be placed into the water storage state special revenue account; in (6) substituted "renewable resource grant and loan program" for "water development program" and near end substituted "renewable resource grants and loans" for "water development grants and loans"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Statement of Intent: The statement of intent attached to Ch. 659, L. 1991, provided: "A statement of intent is required for this bill to provide guidance in the preparation of rules and other matters pertaining to the allocation of grants and loans from the water storage state special revenue account. This bill is introduced as a result of and should be interpreted consistently with the 1990 state water plan section on water storage. It is the legislature's intent that money may not be expended from the water storage state special revenue account during fiscal years 1992 and 1993. Rather, money deposited in the account is to accumulate for expenditure during fiscal years 1994 and 1995. Deposits to the account are to be placed in short-term investments and accrue interest, which is also to be deposited in the water storage state special revenue account.

Rules are to be adopted and implemented that govern the process of application, administrative application review and ranking, and conditions for the disbursal of grants and loans as soon as possible after this bill is enacted. Applications for grants and loans from the account are to be accepted by May 1992. These application and administrative recommendations will be considered during the 1993 legislative session, and that legislature may appropriate money accumulated in the account for expenditure during fiscal years 1994 and 1995.

It is also the legislature's intent that rules governing the allocation of money from the water storage state special revenue account do not limit the amount that may be provided to any one applicant. Also, private entities, as well as public entities, are to be eligible for grants and loans from the account."

Effective Date: Section 13, Ch. 659, L. 1991, provided: "[This act] is effective July 1, 1991."

Part 7
Water Storage Policy

Part Compiler's Comments

Effective Date: Section 13, Ch. 659, L. 1991, provided: "[This act] is effective July 1, 1991."

85-1-703. Water storage policy.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 659, L. 1991, provided: "A statement of intent is required for this bill to provide guidance in the preparation of rules and other matters pertaining to the allocation of grants and loans from the water storage state special revenue account. This bill is introduced as a result of and should be interpreted consistently with the 1990 state water plan section on water storage. It is the legislature's intent that money may not be expended from the water storage state special revenue account during fiscal years 1992 and 1993. Rather, money deposited in the account is to accumulate for expenditure during fiscal years 1994 and 1995. Deposits to the account are to be placed in short-term investments and accrue interest, which is also to be deposited in the water storage state special revenue account.

Rules are to be adopted and implemented that govern the process of application, administrative application review and ranking, and conditions for the disbursal of grants and loans as soon as possible after this bill is enacted. Applications for grants and loans from the account are to be accepted by May 1992. These application and administrative recommendations will be considered during the 1993 legislative session, and that legislature may appropriate money accumulated in the account for expenditure during fiscal years 1994 and 1995.

It is also the legislature's intent that rules governing the allocation of money from the water storage state special revenue account do not limit the amount that may be provided to any one applicant. Also, private entities, as well as public entities, are to be eligible for grants and loans from the account."

Part 8
Lease Management Program

Part Compiler's Comments

Severability: Section 19, Ch. 301, L. 1995, was a severability clause.

Effective Date: Section 21, Ch. 301, L. 1995, provided: "[This act] [85-1-801 through 85-1-811] is effective July 1, 1995."

85-1-802. Leases authorized.

Compiler's Comments

1999 Amendment: Chapter 121 in (2) inserted language restricting the lease of project lands to the department of fish, wildlife, and parks for public recreational purposes to not more than 30 years; deleted former (3) that read: "(3) All cabin site leases issued prior to July 1, 1994, expire March 31, 1996"; and made minor changes in style. Amendment effective March 19, 1999.

85-1-803. Rulemaking.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 301, L. 1995, provided: "A statement of intent is necessary for this bill because [section 3] [85-1-803] authorizes the department of natural resources and conservation to adopt rules implementing the leasing program established in this bill.

The legislature intends that rules adopted by the department specify the procedure to be used by the department in determining how it will lease project lands and specify the standards, conditions, limitations, and requirements it will use as terms of the lease under the statutory guidelines provided in [section 3] [85-1-803]."

Severability: Section 19, Ch. 301, L. 1995, was a severability clause.

CHAPTER 2
SURFACE WATER AND GROUND WATER

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 497, L. 1997, provided: "WHEREAS, the Montana Supreme Court, in In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti; 64988-g76L, Starner; and Application for Change of Appropriation Water Right No. G15152-s761, Pope, which was decided August 22, 1996, held that an applicant for a permit or change of use authorization on the Flathead Indian Reservation may not as a matter of law meet the applicant's burden of proof to establish that the proposed use will not interfere unreasonably with planned uses or developments for which water has been reserved until the Confederated Salish and Kootenai Tribes' federal reserved water rights are quantified; and

WHEREAS, in 1973, Montana enacted comprehensive legislation referred to as the Montana Water Use Act of 1973, codified in Title 85, chapter 2, to implement Article IX, section 3(4), of the Montana Constitution, which requires that the Legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights, and to implement Article IX making the water of the state subject to appropriation for beneficial use by its citizens; and

WHEREAS, Title 85, chapter 2, as amended, provides for the comprehensive adjudication of water rights and the continued development of Montana's water resources through a permit and change authorization process; and

WHEREAS, historically in Montana, water has been developed, water use rights acquired, and changes in water use completed in the absence of the adjudication of water rights in a source of supply; and

WHEREAS, since July 1, 1973, it has been the intent of the Legislature that provisional permits and change authorizations be issued pursuant to statutory standards in the absence of a completed adjudication in a source of supply; and

WHEREAS, the dissent filed with the Montana Supreme Court decision raises a concern that the majority decision may be interpreted to apply statewide, but that interpretation does not reflect the intent of the Legislature to allow for the continued wise and efficient use of Montana's water resources and Montana's growing economy as required under Title 85, chapter 2."

Water Claims Rulemaking Authority: See compiler's comments under 85-2-243.

Section Not Codified: Section 89-8-102.1, R.C.M. 1947, a saving clause, was not codified in the MCA. It has not been repealed and is still valid law. Reference may be made to sec. 14, Ch. 485, L. 1975.

Chapter Administrative Rules

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau, Montana Water Use Act.

Title 36, chapter 12, subchapter 2, ARM Procedural rules for contested case hearings.

Title 36, chapter 16, subchapter 1, ARM Water reservation rules.

Chapter Case Notes

Water Right Held Through Pre-1973 Mesne Conveyances — Summary Judgment Incorrectly Granted — Abandonment of Right Factually Dependent: Duncan, who lived on a tract of land in Madison County, used water from a spring located on property (the large parcel) now owned separately from the parcel (the small parcel) lived on by Duncan. In 1950, Duncan conveyed all the property in what is now the large and small parcels to Baker. In 1951, Baker divided the property, conveying the large parcel and all appurtenances to Halse and reserving the small parcel for herself. Baker made no express reservation of water rights with the reserved property, and the deed to Halse conveying the large parcel made no express grant of water rights. For the next 10 years, Baker made no use of the house located on the small parcel. In 1961, Baker conveyed the small parcel to the Hunts, expressly conveying water rights on the property. In 1963, Halse filed a declaration of vested ground water rights for the "total flow of all springs" located on the large parcel. Fosseco, who acquired the large parcel from Halse, conveyed it, through mesne conveyances, to M.S. Consulting. The Hunts conveyed the small parcel, through mesne conveyances, to the Axtells. All uses of the water were for livestock and domestic use. In 1993, the Axtells filed a notice of water rights with the Department of Natural Resources and Conservation. M.S. Consulting subsequently served the Axtells with notice that their water rights would be cut off in 45 days, and the Axtells brought an action to enjoin the discontinuance of their water supply. The District Court granted summary judgment for the Axtells, and M.S. Consulting appealed. The Supreme Court reviewed the background of the prior appropriation law in Montana, noting that because the current statutes recognize existing water rights, the law before the 1973 statutes were enacted is still the law with regard to water rights acquired before 1973. The Supreme Court reviewed the pre-1973 law and concluded that the water rights appurtenant to all the property passed to Baker but that there was a factual issue whether, as a result of Baker's nonuse of the property and its water rights for over 10 years, Baker had abandoned the water rights conveyed to her by Duncan. If the abandonment occurred, there was no reservation of conveyance and no right to use of the water after that period of nonuse. The issue of abandonment, the Supreme Court noted, depended in turn upon several other issues, such as whether Baker intended to abandon her water right. The Supreme Court also agreed with M.S. Consulting that several other issues of fact raised by the company may also exist, although it noted that these other issues were only material if the District Court ruled a particular way on the question of abandonment. Because there were genuine issues of material fact, the Supreme Court held that the District Court erred in granting summary judgment to the Axtells. Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

EPA Regulations Granting "Treatment as State" Status to Develop Water Standards Within Flathead Indian Reservation Upheld: In 1987, Congress added section 518(e) to the Clean Water Act, which authorized the Environmental Protection Agency (EPA) to permit Indian tribes "to be treated as a state" (TAS) for purposes of promulgating water quality standards. In 1992, the Confederated Salish and Kootenai Tribes (tribes) applied for TAS status for all surface waters within the Flathead Indian Reservation. Montana opposed the EPA's grant of TAS status to the tribes because it would extend to lands and surface water within reservation boundaries owned in fee by nontribal members. After the EPA Director, upon determining that the tribes possessed inherent authority over nonmembers on fee land, approved the tribes' TAS application, Montana filed suit, arguing that the EPA's regulations granting TAS status to all sources of pollutant emissions within the boundaries of the Flathead Indian Reservation permitted the tribes to exercise broader authority over nonmembers than the inherent tribal powers recognized as necessary to self-governance. The District Court granted summary judgment to the EPA and tribes. In affirming the District Court decision, the Ninth Circuit Court, citing its previous holdings in Mont. v. U.S., 450 US 544 (1981), and Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997), ruled that based upon the finding that the activities of the nonmembers posed such a serious and substantial threat to tribal health and welfare, the EPA's

decision to grant the tribes TAS authority was valid and reflected the appropriate application of inherent tribal regulatory authority over nonconsenting nonmembers. Mont. v. U.S. Envtl. Protection Agency, 137 F3d 1135 (9th Cir. 1998), certiorari denied, 142 L Ed 2d 227, 119 S Ct 275 (1998).

Abandonment of Water Right by Nonuse Distinguished From Abandonment of Easement or Ditch Right: After hearing, the Water Court determined that three water rights held by appellants Pitsch had been abandoned because of nonuse over approximately 40 years. The Supreme Court held that the Water Court did not err in holding that the case was not governed by E.E. Eggebrecht, Inc. v. Waters, 217 M 291, 704 P2d 422 (1985), and that there was no conflict between Eggebrecht and 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215 (1983). Eggebrecht concerns the abandonment of easements by grant, more analogous to a ditch right by grant than a water right, while 79 Ranch concerns abandonment of a water right. There is no reason why Montana law on abandonment of those interests should be identical. In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

State Water Court — Jurisdiction to Adjudicate Indian Reserved Water Rights: In an original proceeding to determine jurisdiction over controversies involving federal water rights of the Water Court over Indian tribes and water flowing through state reservations, the Supreme Court held that Article I of the Montana Constitution does not bar state jurisdiction to adjudicate Indian reserved water rights. With the 1952 McCarran amendment, the U.S. Congress diminished the scope of absolute federal jurisdiction over controversies involving federal water rights by allowing state courts concurrent jurisdiction to adjudicate federal water rights. In Colo. River Water Conserv. District v. U.S., 424 US 800 (1976), the U.S. Supreme Court held that the McCarran amendment applied to Indian water rights. The state Legislature's enactment of the Water Use Act (Title 85, ch. 2) pursuant to Art. IX, sec. 3, Mont. Const., constitutes a valid and binding consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

Water Use Act — Adjudication of Federal and Indian Reserved Water Rights:

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate federal reserved water rights. Although federal reserved rights differ from state appropriative rights in origin, determination of priority date, and quantification standards, the Water Use Act recognizes the distinction between federal reserved rights and state-created appropriative rights. As the Act permits each different class of water rights to be treated differently, the Act is adequate to allow for adjudication of federal reserved rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate Indian reserved water rights. Although state appropriative water rights and Indian reserved water rights differ in origin and definition, the Water Use Act, as amended, permits the Water Court to treat Indian reserved water rights differently from state appropriative rights. The Water Use Act does not state explicitly that the Water Court shall apply federal law in adjudicating Indian reserved rights; however, state courts are required to follow federal law with regard to those water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

Forty Years of Nonuse as Raising Rebuttable Presumption of Intent to Abandon: In litigation to establish plaintiff's and defendant's respective priorities to water appropriated from Big Coulee Creek, the evidence showed that neither had used previously appropriated water for a period of at least 40 years. Thus, the District Court did not err in holding that under section 89-802, R.C.M. 1947 (now repealed), the appropriation rights of both parties had been abandoned for lack of use of the water. While abandonment of a water right is a question of fact, nonuse for a period of at least 40 years raises, in effect, a rebuttable presumption of abandonment. A claim that the predecessors of the parties could not afford to use the water by irrigating their land did not excuse the failure to use the water or rebut the presumption of abandonment since economics could excuse nearly every otherwise abandoned water right. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992), in which nonuse for 23-plus years was sufficient to constitute a presumption of abandonment despite the fact that the water right was carried as an asset on the county's books during the period of nonuse. See also Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

Lack of Reasonable Diligence Shown in Three-Year and Three-Month Delay in Diversion: Where the evidence, in litigation between the plaintiff and defendant to establish their relative rights to appropriated water, showed that the defendant's predecessor in interest filed a notice of appropriation for 30 cfs of water on May 30, 1973, but failed to divert the water to a sprinkler irrigation system until 3 years and 3 months later, the District Court did not err in holding that the defendant's predecessor failed to exercise reasonable diligence in diversion of the water. Under the rationale of Dept. of Natural Resources and Conservation v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976), the defendant was required to show there had been an ongoing effort to divert the water. The lack of parts for the sprinkler system notwithstanding, the record showed no ongoing effort to proceed to completion of the sprinkler system and the diversion. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983).

Priority of Senior Main Stem Water Rights Over Junior Tributary Water Rights: Appellant owns water rights in Clear Creek dating to 1910. Petitioners have water rights in Rock Creek dating to 1896. Clear Creek is a tributary of Rock Creek. In 1970, appellant obtained a court order directing the Rock Creek Water Commissioner to "carry out" the Clear Creek water rights of appellant. Following the District Court order, the Water Commissioner honored in full the requests of appellant for water without regard to any priority in the relationship of the creeks' water rights. As a result, at times of water shortage, senior Rock Creek decreed waters are cut off. In 1977, petitioners filed this action to rescind the 1970 order and to direct the Water Commissioner to subject the Clear Creek water rights to the priorities of Rock Creek water rights. The District Court ruled that the 1970 court order, applied by the Water Commissioner to fulfill junior appropriations ahead of prior decreed rights, was improper. The Supreme Court affirmed the District Court's order and further stated that the order did not violate due process. The Supreme Court reasoned that the only rights affected by the District Court order were the rights of the parties before the court. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

Chapter's Application to Rights Perfected Prior to Its Effective Date: Except where it indicates a contrary intent, this chapter applies to water rights perfected prior to the effective date of this chapter; and failure to comply with the terms of this chapter does not render a conveyance or reservation void but suspends ability to use the right until the statutorily mandated permission is granted by the Department of Natural Resources and Conservation. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying, on rehearing, 38 St. Rep. 1618 (1981).

Chapter Law Review Articles

The Adjudication of Montana's Waters—A Blueprint for Improving the Judicial Structure, MacIntyre, 49 Mont. L. Rev. 211 (1988).

A New Rule of Law for the Abandonment of Water Rights, Hightower, 45 Mont. L. Rev. 167 (1984).

Montana Water Rights—A New Opportunity, Stone, 34 Mont. L. Rev. 57 (1973).

Modern Western Legislation as a Pattern for Changes in the Montana Law of Water Rights, 28 Mont. L. Rev. 95 (1966).

Problems Arising Out of Montana's Law of Water Rights, Stone, 27 Mont. L. Rev. 1 (1965).

Improving Montana Water Law, Stone, 20 Mont. L. Rev. 60 (1958).

Groundwater Ecosystems and the Service of Water Purification, Herman, Culver, & Salzman, 20 Stan. Envtl. L.J. 479 (2001).

Get Off Farmer Brown's Back: A Common Sense Approach to Farmer Liability for Groundwater Contamination Caused by the Normal Application of Pesticides, Munson, 18 Hamline L. Rev. 521 (1995).

A Comparison of State Groundwater Laws, Patrick & Archer, 30 Tulsa L.J. 123 (1994).

Beyond Reserved Rights: Water Resource Protection for the Public Lands, Rice, 28 Idaho L. Rev. 715 (1992).

Examination of Title to Western Water Rights, Campbell, 1992 Rocky Mtn. Min. L. Found. 9-1 (1992).

The Effect of the Federal Endangered Species Act on State Water Rights, Estes, 22 Envtl. L. 1027 (1992).

The Reasonable Use Rule in Surface Water Law, Graham, 57 Mo. L. Rev. 223 (1992).

Will Federal Environmental Regulation Be Permitted to Infringe on State Vested Water Rights?, Dorrity, 11 UCLA J. Envtl. L. & Pol'y 113 (1992).

Chapter Collateral References

Final Report of the Select Committee on Water Marketing, Environmental Quality Council (1985).

Water Rights Adjudication/Stream Access for Recreational Use, State Bar of Mont. (1984).
Montana Water Law for the 1980's, Stone (1981).
Montana Water Law Handbook, Doney, State Bar of Mont. (1981).

Part 1
General Provisions

85-2-101. Declaration of policy and purpose.

Compiler's Comments

1997 Amendment: Chapter 497 inserted (5) concerning provisional permitting in absence of complete adjudication of water rights in source of supply; inserted (6) concerning legislative intent that state retain and exercise authority to regulate water use; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

Retroactive Applicability: Section 24, Ch. 497, L. 1997, provided: "[Section 1] [85-2-101] applies retroactively, within the meaning of 1-2-109, to all permits and change authorizations issued by the department of natural resources and conservation after July 1, 1973."

1973 Title: The title of Ch. 452, L. 1973, read: "An act providing a system for the appropriation and use of surface and groundwater; providing a procedure for the determination and confirmation of existing water rights; establishing a system of centralized records of all water rights; repealing sections 89-121 through 89-123, 89-801 through 89-804, 89-807 through 89-816, 89-829 through 89-842, 89-844 and 89-845, 89-847 through 89-855, 89-857 through 89-864, 89-2912, 89-2913, 89-2919 through 89-2925, and 89-2935, R.C.M. 1947; amending sections 89-1001, 89-2911, 89-2915, 89-2917, and 89-2918, R.C.M. 1947."

Section Not Codified: Section 89-865, R.C.M. 1947, a short title clause, was not codified in the MCA. The clause has not been repealed and is still valid law. Reference may be made to sec. 1, Ch. 452, L. 1973.

Administrative Rules

ARM 36.16.101 Policy and purpose of water reservation rules.

Case Notes

Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional: In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by 85-2-311. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under 85-2-702 or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive

reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

No Implied Severance of Water From School Trust Lands: Neither 77-6-115, nor the principles of the Water Use Act set forth in 85-2-101, nor the prior appropriation doctrine gives rise to an implied severance of water from land in the school trust land leases or estops the state from claiming title to the water rights on school trust land. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Navigability for Title Purposes — Federal Test — Dearborn River Navigable: Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Public Recreational Use Rights on Dearborn River — Limits: Navigability for public use is governed by state law and is separate from the question of navigability under federal law for title purposes. The question is whether waters owned by the State under Art. IX, sec. 3(3), Mont. Const., are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines the availability of the waters for recreational use by the public. Whether or not a private party owns the bed beneath the waters is irrelevant. The constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State, and any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

Public Use — Irrigation — Eminent Domain: Pursuant to Title 69, ch. 4, part 4, an agricultural landowner may request a utility to relocate an overhead utility line for the purpose of installing an improved irrigation system. The use of water in the irrigation of farmland is a public use for which the right of eminent domain will lie. McTaggart v. Mont. Power Co., 184 M 329, 602 P2d 992, 36 St. Rep. 2079 (1979).

"All Existing Rights": The right to acquire water rights is a valuable right, and its value often depends on its priority; hence, to deprive plaintiff of his priority by dismissal because petition was filed under former law is to deprive him of an existing and valuable water right. Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

Beneficial Impoundment: Counterclaim against petition of irrigation district for additional appropriation of water was properly denied where evidence was uncontradicted that water was going to waste and that impoundment would be beneficial. Sunset Irrigation District v. Ailport, 166 M 11, 531 P2d 1349 (1974).

Private Beneficial Use a Public Use: Because Art. III, sec. 15, Mont. Const., declares a private beneficial use of water to be a public use, individuals who have put water to a beneficial use should not have their rights arbitrarily diluted, under claim of sovereign rights or otherwise. Paradise Rainbow v. Fish & Game Comm'n, 148 M 412, 421 P2d 717 (1966).

Law Review Articles

The Adjudication of Montana's Waters—A Blueprint for Improving the Judicial Structure, MacIntyre, 49 Mont. L. Rev. 211 (1988).

Water Law: Recognition of a Public Water Right, 28 Mont. L. Rev. 249 (1967).

An Analysis of the Potential Conflict Between the Prior Appropriation and Public Trust Doctrines in Montana, Josephson, 8 Pub. Land L. Rev. 81 (1987).

Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses, Ausness, 1986 U. Ill. L. Rev. 407 (1986).

Collateral References

Diversion or extraction of water and use thereof, 78 Am. Jur. 2d Waters §§73 through 77.

Priority as to appropriation of water, 78 Am. Jur. 2d Waters §362.

Recreational Use of Montana's Waterways, Montana Legislative Council (1984).

85-2-102. Definitions.

Compiler's Comments

2001 Amendment: Chapter 78 inserted definition of developed spring; and made minor changes in style. Amendment effective March 20, 2001.

Extension of Termination Date: Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999. Section 14, Ch. 487, L. 1995, provided a termination date of June 30, 2005, for one version of this section; however, the 1995 termination date was not extended by Ch. 123, L. 1999.

1997 Amendment: (All three versions) Chapter 497 in definition of existing right inserted "or "existing water right"" and inserted second sentence concerning water rights reserved under federal law and water rights created under state law; inserted definition of state water reservation; in definition of watercourse, near end, substituted "constructed" for "manmade"; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1995 Amendments: Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302"; and made minor changes in style. Amendment effective July 1, 1995.

(Temporary version) Chapter 487 in definition of appropriate inserted (d) to include the maintenance and enhancement of streamflows in the Upper Clark Fork basin; in definition of beneficial use inserted (d) to include the maintenance and enhancement of streamflows in the upper Clark Fork basin; and made minor changes in style. Amendment effective April 14, 1995, and terminates June 30, 2005.

(Version effective July 1, 1999) In definition of appropriate inserted (c) to include the maintenance and enhancement of streamflows in the Upper Clark Fork basin; in definition of beneficial use inserted (c) to include the maintenance and enhancement of streamflows in the Upper Clark Fork basin; and made minor changes in style. Amendment effective July 1, 1999, and terminates June 30, 2005.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Severability: Section 11, Ch. 487, L. 1995, was a severability clause.

Applicability: Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

1993 Amendments: Chapter 370 inserted definitions of correct and complete and substantial credible information; and made minor changes in style. Amendment effective April 16, 1993.

Chapter 629 inserted definition of late claim. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that

the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under Rule 11, Montana Rules of Civil Procedure; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

Retroactive Applicability: Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

Saving Clause: Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

Severability — Partial Nonseverability: Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

1991 Amendments — Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

Chapter 308 inserted definition of salvage.

Chapter 543 inserted definition of watercourse.

Chapter 805 in definition of ground water, after "water", substituted "that is beneath the ground surface" for "beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not part of that surface water". Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 308, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of

natural resources and conservation concerning the adoption of rules to allow the appropriation, use, and change of use of salvaged water. The legislature directs the department of natural resources and conservation to adopt rules that promote the conservation and efficient use of water by implementing the provisions of this bill."

Saving Clause: Section 5, Ch. 308, L. 1991, was a saving clause.

1989 Amendment: In definition of appropriate inserted (c) regarding water leasing; in definition of beneficial use inserted (c) regarding water use pursuant to lease; inserted definition of Commission; and made minor changes in phraseology and form. Amendment effective May 11, 1989, and terminates June 30, 1993.

1985 Amendment: Inserted (2)(b) expanding the definition of beneficial use to include water leasing; inserted definition of change in appropriation right; and deleted former (12) that read: ""Slurry" means a mixture of water and insoluble material."

Administrative Rules

ARM 36.12.101 Definitions — Water Use Act.

Case Notes

DECISIONS UNDER CURRENT LAW

Post-1973 Evidence Unpersuasive as to Adjudication of Existing Water Right: The purpose of statewide water rights adjudication is to adjudicate those rights as they existed on July 1, 1973, the effective date of the Montana Water Use Act. Therefore, the Water Court did not err in refusing to consider evidence pertaining to a water right claimant's actions taken after 1973 as showing a lack of intent to abandon the water right. In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992).

"Beneficial Use": No matter how a water right is expressed in the decrees of the Water Court, that expression of amount is not the final determining factor. Beneficial use is the basis, the measure, and the limit of all rights to the use of water. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

"Water" — Diffuse Surface Water: In light of the common-law rules pertaining to appropriation of diffuse surface water and the 1977 amendment of the definition of "water" so as to include diffuse surface water, it was reasonable for the appellant to believe that diffuse surface water was not subject to the provisions of the Water Use Act in 1975. State ex rel. Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982).

DECISIONS UNDER FORMER LAW

Existing Right to Appropriate Distinguished From Valid Appropriation: When a corporation posted and filed notices of appropriation as required by section 89-810, R.C.M. 1947 (now repealed), it acquired an "existing right" to appropriate water. However, this "existing right" was not synonymous with a valid appropriation and would not ripen into such an appropriation until the remaining requirements under section 89-811, R.C.M. 1947 (now repealed), were met. Dept. of Natural Resources and Conservation v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976).

Slough — Natural Watercourse: A slough naturally followed a channel which was cut down in gravel and rock, and was fed by natural springs, seepage, surface drainage and wastewater from a canal. Such a slough constituted a natural watercourse and was subject to appropriation. Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

Diffused Surface Water Defined — Not Subject to Appropriation: The essential characteristics of diffused surface waters are that their flows are short-lived and that the waters are spread over the ground and not concentrated or confined in flows of legal watercourses or bodies of water conforming to the definition of lakes or ponds. Diffused surface waters in a gulch on land above where a natural channel has developed are not subject to appropriation. Doney v. Beatty, 124 M 41, 220 P2d 77 (1950).

"Watercourse" Defined:

A "watercourse", within the meaning of the water right laws, from which an appropriation for purposes of irrigation may be made, may consist of a well-defined channel into which water from a slough fed by irrigation of adjoining lands through seepage or through a ditch constructed by the owners of such lands for draining purposes finds its way, and which water through years of so flowing has acquired a permanent character as the natural drainage of the particular watershed. W. Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938). (See 1991 amendment.)

Where waters flowing in a channel with regularity from year to year were made to do so through the instrumentality of man and have through years of so flowing acquired a permanent

character as the natural drainage of the watershed or where they come from springs formed from seepage or percolation or surface water collecting in a canyon or from wells accidentally developed while drilling for oil, etc., they constitute a watercourse. Popham v. Holloron, 84 M 442, 275 P 1099 (1929), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962). (See 1991 amendment.)

Beneficial Use — Swimming Pool or Fishpond: Diversion of water to maintain a swimming pool or fishpond may have been for a beneficial use and hence the basis of a valid appropriation. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Appropriation on Private Land: An appropriation of water is not confined to waters flowing in streams upon public land but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

Beneficial Use — Immediate Use Unnecessary: While the appropriation must be for some useful or beneficial purposes, the use to which the water is to be applied need not be immediate but may be prospective or contemplated. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

Beneficial Use — Intent of Claimant: This section requires that, at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900); Power v. Switzer, 21 M 523, 55 P 32 (1898).

Beneficial Use — Irrigation: Where a successor in interest of an appropriator of water greatly increased the amount of grass for pasture by irrigation, such use of the water was a useful and beneficial one within the meaning of the statute. Sayre v. Johnson, 33 M 15, 81 P 389 (1905).

Collateral References

Domestic purposes, definition of, 78 Am. Jur. 2d Waters §51.

85-2-103. Measurement of water.

Case Notes

"Beneficial Use": No matter how a water right is expressed in the decrees of the Water Court, that expression of amount is not the final determining factor. Beneficial use is the basis, the measure, and the limit of all rights to the use of water. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Expression of Water Rights in Volume Rather than Flow Rate — Not Unconstitutional: Even though almost every irrigation water right prior to the 1973 water use law was expressed in flow rate, the requirement of 85-2-234(5)(b) that the final decree state "the amount of water, rate, and volume, included in the right" is not unconstitutional under Article IX, sec. 3(1) of the Montana Constitution. The amount, rate, and volume are at all times subject to the requirement of beneficial use. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Supreme Court Original Jurisdiction Over Declaratory Action Concerning Statewide Water Adjudication: The Supreme Court had power to determine an action for declaratory judgment involving the constitutionality of the requirement in 85-2-234 that final water decrees state "the amount of water, rate, and volume, included in the right". The issue affects all rights in the statewide adjudication process. Determination of the issue by the Supreme Court: (1) will provide guidance to the water court; (2) is in the interests of judicial economy; and (3) would serve the public policy of the state by expediting the determination of existing water rights. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Measurement of Water in Reservoir: Devices for measuring the water in a storage reservoir should be such that at a glance anyone may tell the exact number of acre-feet therein at any time, thus obviating the necessity of calling in engineers or others to measure it. The details of operation, presenting a practical or engineering problem rather than a judicial one, should properly be left to the parties interested; and if the court's intervention or assistance is required in that regard, a motion for modification of the decree should suffice. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

One Miner's Inch Per Acre — Not Rule of Thumb: The trial court awarded a 3-acre-foot water right to be used over a 4-month irrigation season. This was the equivalent of one-half miner's inch continuous flow. Although the courts of this state have generally observed the rule of thumb of 1 miner's inch per acre, there is no law in Montana to this effect. The better rule is that the

requirements of the lands in a particular locality for adaptable crops should fix the amount of a water right. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

Water Right Decrees: For many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used. This may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied. Nor should this fact be interpreted as a right to expand appropriations to the detriment of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

Measurement of Water for Irrigation: In the absence of a statute regulating the amount of water reasonably necessary for irrigation, the rule has generally been observed by the court to allow 1 inch an acre in fixing the amount required for economical use unless the evidence discloses that a greater or less amount is required. Further, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard. However, an appropriator cannot be compelled to divert the water according to the most scientific method known. Worden v. Alexander, 108 M 208, 90 P2d 160 (1939).

Collateral References

Acre-foot as unit of measurement of volume of static water, 78 Am. Jur. 2d Waters §77.

Recreational Use of Montana's Waterways, Montana Legislative Council (1984).

85-2-105. Environmental quality council — water policy duties.

Compiler's Comments

1999 Amendment: Chapter 275 inserted (2)(c) requiring environmental quality council to assist with interagency coordination related to Montana's water resources; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 275, L. 1999, provided: "WHEREAS, Montana's river and stream corridors and associated riparian areas play a critical role in supporting beneficial uses of water, agricultural production, fish and wildlife values, recreation opportunities, and related economic and aesthetic benefits; and

WHEREAS, Montana's river and stream corridors are experiencing tremendous pressure from increased use and development; and

WHEREAS, owners of land along Montana's rivers and streams, water users, and recreationists recognize the importance of maintaining and conserving these corridors and would increase their efforts to do so if they had information on relevant and affordable voluntary best management practices (BMPs); and

WHEREAS, although there are a variety of efforts at the federal, state, local, and watershed levels to address river and stream corridor issues, there is a continuing need to pool scarce resources, increase effectiveness through improved coordination of policies, data, and implementation, and provide a greater opportunity for innovative solutions such as voluntary BMPs; and

WHEREAS, Montana is fortunate to have a successful BMP and streamside management policy model that was developed by Montana's forestry community, with the assistance of the Environmental Quality Council, that can serve as an example for other river and streamside land uses; and

WHEREAS, the Montana Legislature's bipartisan Environmental Quality Council has a 28-year history of helping Montanans constructively solve complex and divisive natural resource issues and has the capability and the unique perspective to facilitate the compilation and dissemination of BMP information for river and streamside land uses and to assist with interagency coordination."

Streamside Corridor and Riparian Management: Section 2, Ch. 275, L. 1999, provided: "**Streamside corridor and riparian management — coordination and dissemination of best management practice information.** Consistent with its authorities set forth in Titles 75 and 85, the environmental quality council, in cooperation with affected and interested stakeholders, shall:

(1) review and summarize state, federal, and local policies and programs related to streamside corridor and riparian management in Montana and identify overlapping or conflicting goals or implementation mechanisms;

(2) coordinate with existing groups to evaluate existing streamside and riparian best management practices and existing educational and informational programs regarding the

dissemination of information regarding voluntary BMPs, to ensure coordination in water quality protection efforts and consistency with 75-5-702 and 75-5-703; and

(3) coordinate with others to develop cost-effective mechanisms to compile and disseminate the conclusions from activities conducted pursuant to subsections (1) and (2) and in doing so, maximize the likely implementation of the practices."

1997 Amendment: Chapter 45 in (3)(d), at end, substituted "water information system maintained by the natural resource information system under 90-15-305" for "water resources data management system maintained by the department under 85-2-112".

1995 Amendments: Chapter 418 in (2)(b), after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 545 in (1) deleted former first four sentences that read: "There is a permanent water policy committee of the legislature. The committee consists of eight members. The senate committee on committees and the speaker of the house of representatives shall each appoint four members on a bipartisan basis. The committee shall elect its chairman and vice-chairman"; at beginning of first sentence of (1), in (2), in introductory clause, and in (3), in introductory clause, substituted "environmental quality council" for "committee"; substituted (4) regarding staff assistance for former language that read: "The environmental quality council shall provide staff assistance to the committee. The committee may contract with experts and consultants, in addition to receiving assistance from the environmental quality council, in carrying out its duties under this section"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1985 Amendment: In (2)(a) near middle, after "environmental quality council", inserted "of the state library"; and in (2)(b) near beginning, substituted "state library" for "department of administration", and near end substituted "library's" for "department's".

1993 Amendment: Chapter 478 in (3)(b) substituted "renewable resource grant and loan program" for "water development program". Amendment effective July 1, 1993.

Late Claim Interim Study — Water Policy Committee: Section 10, Ch. 629, L. 1993, provided: "(1) The water policy committee, in coordination with the department of justice, the department of natural resources and conservation, and the reserved water rights compact commission, shall conduct an interim study analyzing the need for and desirability and impacts of allowing the remission of forfeited water rights in addition to the remissions authorized under the provisions of [this act] [Ch. 629, L. 1993]. The study must analyze the impacts of additional forfeiture remission on:

(a) the general stream adjudication process, including but not limited to the issues of adequacy and Montana's and the federal government's concurrent water rights adjudication jurisdiction;

(b) the federal government and Indian tribes regarding existing and future negotiated water rights compacts, including but not limited to the issues of equal protection;

(c) timely claimants' water use;

(d) timely claimants' legal rights, including but not limited to constitutional requirements regarding the taking of property;

(e) the potential reduction in agricultural production resulting from not granting additional forfeiture remissions and the associated social and economic impacts;

(f) the issue of fairness to both late and timely claimants;

(g) the potential increased costs to the state and to late and timely claimants;

(h) potential losses in revenue to the state resulting from the state's failure to file claims to existing water rights on or before April 30, 1982;

(i) implications involving the state's trust responsibilities;

(j) potential litigation against the state by private parties; and

(k) impacts on municipal and county governments resulting from late claims.

(2) The study must include an analysis of the potential for identifying individuals or classes of individuals whose additional forfeiture remission could be authorized in a manner that would have an acceptable impact on those issues identified under subsection (1). The classes of late claimants include but are not limited to previously decreed water rights holders and classes established according to filing date.

(3) The study must be completed in consultation with other relevant state and federal agencies, relevant groups and organizations, and other interested and affected citizens.

(4) The water policy committee shall report the results of the study to the 54th legislature by October 1, 1994. The report must include any legislative or other policy options recommended by the water policy committee."

1991 Amendment: In (3)(e) substituted "as provided in 5-11-210" for "not less than once every biennium". Amendment effective March 20, 1991.

Study of Dam Safety and Water Reservation Laws — 1991: Section 7, Ch. 659, L. 1991, provided for a study of dam safety and water reservation laws and regulations by the Water Policy Committee, with the cooperation of the Department of Natural Resources and Conservation.

Preamble: The preamble to Ch. 573, L. 1985, provided: "WHEREAS, the Select Committee on Water Marketing was commissioned by the 1983 Legislature to undertake a study of the advantages and disadvantages of water marketing; and

WHEREAS, the Select Committee in completing its study determined that Montana needs to address broader questions of water policy in order to secure Montana's interests in allocation and management of state waters; and

WHEREAS, the Select Committee has presented a comprehensive package of recommendations that must be considered as a whole; and

WHEREAS, these recommendations serve to revise Montana's water policy in order to maximize Montana's authority over management of state waters and other natural resources and to conserve water for existing and future beneficial uses by Montanans.

THEREFORE, the Legislature of the State of Montana finds that this legislation and other recommendations of the Select Committee on Water Marketing constitute an appropriate revision of state water policy necessary to secure Montana's interests for present and future benefit to Montanans."

85-2-112. Department duties.

Compiler's Comments

1997 Amendment: Chapter 45 deleted former (4) that read: "(4) in cooperation with other state agencies, institutions, colleges, and universities, establish and maintain a centralized and efficient water resources data management system sufficient to make available and readily accessible, in a usable format, to state agencies and other interested persons, information on the state's water resources, out-of-state water resources that affect the state, existing and potential uses, and existing and potential demand. All other state agencies, institutions, and colleges and universities shall cooperate with the department in the development and maintenance of this system"; and made minor changes in style.

1995 Amendment: Chapter 418 in (1), after "adopted", deleted "by the board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: Inserted (4) requiring the Department to establish and maintain a centralized water resources data management system.

1983 Amendment: Deleted "declarations" before "claims" twice in (2) and once in (3); in (5) after "filing" deleted "declarations with the department or"; and inserted (6) requiring the Department to adopt rules necessary to reject, modify, or condition permit applications in highly appropriated basins or subbasins.

Statement of Intent: The statement of intent attached to SB 370 (Ch. 448, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Department of Natural Resources and Conservation in sections 1 and 17.

The intent is to provide the Department with the authority to adopt rules necessary to reject, modify, or condition water use permit applications in highly appropriated basins or subbasins. A rule may only be adopted under this section upon a petition signed by a certain percentage of water users in the source of supply or by direction of the Legislature. The petition must allege certain facts showing the need for the adoption of a rule. The Department must act on the petition within 60 days by: denying the petition and providing reasons to the petitioners; informing the petitioners that additional study of the allegations is necessary before denying or proceeding with the petition; or initiating the rulemaking proceeding. The rulemaking procedure must follow the notice requirements of the Montana Administrative Procedure Act, and in addition the Department must publish notice of the rulemaking hearing once a week for three successive weeks in a newspaper of general circulation in which the source is located and also serve an individual copy of the notice on any known water right holder in the source of supply according to the Department's records.

This bill also delegates rulemaking authority to the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] in section 2.

The intent is to provide the Board with the authority to adopt, through rules, fees to be paid by applicants, petitioners, and others for services provided. Fees could be adopted for: rulemaking hearings to reject, modify, or condition water use permit applications in highly appropriated basins or subbasins; administrative hearings conducted by the Department to settle objections to permit or change applications; costs incurred during the field investigation of a complaint against a permittee and related revocation proceedings; and for costs incurred in the field verification of issued and completed permits and change approvals."

1981 Amendment: Added "subject to the powers and duties of the supreme court under 3-7-204" to (1).

Administrative Rules

Title 36, chapter 12, subchapter 10, ARM Petitions for rule closure in highly appropriated basins.

85-2-113. Department powers and duties.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), (2), (2)(b), (3), (4)(a), in two places, and (4)(b) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendments: Chapter 543 inserted (4) concerning controls on chronically dewatered watercourse.

Chapter 805 at end of (2)(b) substituted "the limitation contained in 85-2-306(1)" for "100 gallons a minute". Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 543, L. 1991, provided: "A statement of intent is required to provide guidance to the board of natural resources and conservation [functions now transferred to department of natural resources and conservation] in adopting rules to implement the provisions of [this act]. The legislature understands that many Montana watercourses or portions of watercourses suffer chronic dewatering. The legislature further understands that this dewatering severely impairs important beneficial uses of those watercourses, including but not limited to fisheries and agricultural, industrial, municipal, and recreational uses. It is the intent of the legislature, where reasonable and practical, to identify those watercourses or portions of watercourses where chronic dewatering significantly impairs these beneficial uses. It is also the intent of the legislature to require measuring devices on diversions in chronically dewatered watercourses or portions of watercourses to ensure that

appropriators withdraw only the amounts they are entitled to withdraw under valid appropriative rights and water use permits."

1985 Statement of Intent — Section Numbering: The statement of intent attached to Ch. 573, L. 1985, provided: "A statement of intent is needed for House Bill 680 [Ch. 573, L. 1985] because section 21 [section 22] extends the authority of the board [functions now transfered to department of natural resources and conservation] and the department of natural resources and conservation to adopt rules relating to the provisions of the bill. Such extension of authority would include the authority to adopt rules relating to the implementation of water reservations on the Missouri River basin under section 15 [section 16, 85-2-331] and relating to the leasing of water under section 12 [section 13, 85-2-141].

In their implementation of this bill, the long-range goal of the board and the department must be to conserve and protect the water resources of Montana for the use of all Montanans. Since agricultural uses of water constitute the largest uses by far, and a healthy economy of the state depends upon agriculture, the agricultural uses of water in Montana must be particularly conserved and protected.

In developing rules implementing this bill, and in entering into lease agreements with potential water users under section 12 [section 13, 85-2-141], it is the intent of the legislature that the department establish leasing rates which are commercially reasonable and take into account the financial abilities of a particular sector of the economy to lease water at various rates. Accordingly, it is contemplated that leasing rates for agricultural uses of water will be considerably lower than rates for industrial uses, as an example.

It is also the intent of the legislature that water be made available through the leasing program at minimal cost to potential users who may wish to benefit from a water use project of a third party. An example would be an irrigation district or a municipality in Montana that may desire to tap into a pipeline conveying water out of state. Provision for such incidental beneficial uses is authorized under section 12(8) [section 13(8), 85-2-141(8)] of the bill.

In entering into a lease of water, the department shall include a provision in the lease that other existing or planned uses of water in Montana will be fully protected during a low-water year. All of the criteria listed in 85-2-311 must be applied and considered by the department before it decides to enter into a lease of water.

In the implementation of water reservations in the Missouri River basin, it is the intent of the legislature that applicants for agricultural reservations be given equal treatment and opportunity to reserve water as that afforded applicants for instream uses. To the extent possible, equal treatment and opportunity includes the provision of financial resources and technical assistance to such applicants.

If an application for a slurry pipeline is received by the department of natural resources and conservation under the Montana Major Facility Siting Act, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] shall consider and document the potential adverse economic impacts, if any, on railroads and railroad employment as required by 75-20-301(3) and 75-20-503 [now repealed]. The board shall also, to the extent feasible, require mitigation of these adverse impacts."

In the course of its passage through the Legislature, Ch. 573, L. 1985, was amended and consequently certain sections were renumbered. The statement of intent attached to the bill was not amended to reflect the renumbering. For clarity, the annotator has inserted in brackets, following each section number reference, the proper section number. If a section was codified, the annotator has also included the Montana Code Annotated number assigned to that section.

1983 Amendment: Substituted (1), authorizing Board of Natural Resources and Conservation to prescribe public service fees or charges, for the former text, which read: "The board may prescribe fees or service charges for any public service rendered by the department under this chapter, including fees for the filing of applications or for the issuance of permits and certificates. There shall be no fees for the filing of declarations or for any action taken by the department at the request of the water judge or for the issuance of certificates of existing rights."; in (2)(b) after "maximum" substituted "appropriation" for "yield".

Administrative Rules

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau, Montana Water Use Act.

Title 36, chapter 12, subchapter 2, ARM Procedural rules for water right contested case hearings.

Title 36, chapter 13, subchapter 1, ARM Water measurement.

Title 36, chapter 16, subchapter 1, ARM Water reservation rules.

85-2-114. Judicial enforcement.

Compiler's Comments

2001 Amendment: Chapter 457 in (3) inserted second sentence concerning independent county attorney action and third sentence concerning voluntary compliance provisions of subsection (4); in (4) at end substituted "must extend over a period of at least 7 days and may not exceed 30 working days" for "may not exceed 3 working days"; and made minor changes in style. Amendment effective April 30, 2001.

1991 Amendment: In (1), after "use the water", inserted "or violating a provision of this chapter, it may, after reasonable attempts have failed to obtain voluntary compliance as provided in subsection (4)"; inserted (1)(c) providing for injunctions; at beginning of (2) inserted "Upon the issuance of an order or injunction"; at end of (3) inserted "or violation"; inserted (4) concerning voluntary compliance; and made minor changes in style. Amendment effective April 27, 1991.

Law Review Articles

Once-Released Irrigation Waters: Liability and Litigation, 36 Mont. L. Rev. 14 (1975).

85-2-115. Entry on land.

Administrative Rules

ARM 36.12.225 Site visit.
ARM 36.13.104 Enforcement.

85-2-117. Water right records for filing with local clerk and recorder.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 805, L. 1991, provided: "A statement of intent is required for this bill in order to provide a guideline on the payment of fees. Rulemaking authority is granted to the board of natural resources and conservation [functions now transferred to department of natural resources and conservation] to establish a fee schedule for payment of fees to be paid to the department for its costs incurred in providing water rights record information to a clerk and recorder. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs. A published fee schedule will enable a clerk and recorder to know the cost prior to seeking the information from the department."

Effective Date: Section 15, Ch. 805, L. 1991, provided that this section is effective July 1, 1991.

85-2-121. Administrative proceedings.

Administrative Rules

ARM 36.12.221 Rules of evidence.

Collateral References

Waters and Water Courses *key* 10, 132.
94 C.J.S. Waters §352.

85-2-122. Penalties.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 381 at beginning of (2) inserted exception clause; and made minor changes in style. Amendment effective April 27, 2001.

Chapter 457 in (3)(a) at beginning inserted exception clause; inserted (3)(b) concerning fine collected by independent action; and made minor changes in style. Amendment effective April 30, 2001.

1995 Amendment: Chapter 418 in (1) and (2) substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: Inserted (2) providing a civil penalty; and inserted (3) providing for deposit of fines. Amendment effective April 27, 1991.

1985 Amendment: Substituted "the provisions of this chapter" for "85-2-301, 85-2-402(1), and 85-2-403(3)".

Administrative Rules

ARM 36.13.104 Enforcement.
ARM 36.13.105 Complaints.

85-2-123. Deposit of fees and penalties.

Compiler's Comments

2001 Amendment: Chapter 457 at beginning in exception clause inserted "85-2-122 and". Amendment effective April 30, 2001.

1999 Amendment: Chapter 389 near beginning after "85-2-124" deleted "and 85-2-241"; and made minor changes in style. Amendment effective July 1, 1999.

1991 Amendment: At beginning of second sentence inserted exception clause. Amendment effective April 27, 1991.

1987 Amendment: Near beginning of second sentence, after "court", inserted "other than a justice's court".

1985 Amendment: Near beginning of section, after "85-2-124", inserted "and 85-2-241".

1983 Amendment: Changed depositing of fees and penalties from state general fund to water right appropriation account established in 85-2-318.

85-2-124. Fees for environmental impact statements.

Compiler's Comments

1985 Amendment: In (1) near end of first sentence reduced the threshold for the applicability of this section from 10,000 acre-feet or 15 cubic feet per second to 4,000 acre-feet and 5.5 cubic feet per second.

1983 Amendments: Chapter 277 substituted reference in (2) to state special revenue fund for reference to earmarked revenue fund.

Chapter 448, near end of (1), increased time period department has to notify applicant of requirement for environmental impact statement from 30 to 90 days.

Administrative Rules

ARM 36.2.608 Exceptions.

ARM 36.16.113 Environmental impact statement (EIS).

ARM 36.16.114 Fees and costs.

85-2-125. Recovery of attorney fees by prevailing party.

Compiler's Comments

1995 Amendment: Chapter 487 in temporary version inserted (1) regarding recovery of fees in hearings and decisions involving the Upper Clark Fork basin. Amendment effective April 14, 1995, and terminates June 30, 2005.

Severability: Section 11, Ch. 487, L. 1995, was a severability clause.

Applicability: Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

Case Notes

Previous Judgment Conclusive: After the Supreme Court reversed the District Court order and reinstated the DNRC order, appellants petitioned the District Court for an award of attorney fees in their favor, contending that they, rather than the Monfortons, were the "prevailing party" under 85-2-125 since Monfortons' claim for attorney fees was denied in Mont. Power Co. v. Carey, 211 M 91, 685 P2d 336, 41 St. Rep. 1233 (1984). The Supreme Court affirmed the District Court's denial of appellants' petition, holding that the question regarding attorney fees had been fully considered, determined, and adjudged in the earlier appeal. With that action, every issue, including the question of award of attorney fees, was determined, and that judgment is conclusive. Mont. Power Co. v. Carey, 216 M 275, 700 P2d 989, 42 St. Rep. 803 (1985).

85-2-141. Water leasing program.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) deleted second sentence that read: "Water leases issued under this program must be approved by the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Preamble and Applicability: The preamble to Ch. 573, L. 1985, provided: "WHEREAS, the Select Committee on Water Marketing was commissioned by the 1983 Legislature to undertake a study of the advantages and disadvantages of water marketing; and

WHEREAS, the Select Committee in completing its study determined that Montana needs to address broader questions of water policy in order to secure Montana's interests in allocation and management of state waters; and

WHEREAS, the Select Committee has presented a comprehensive package of recommendations that must be considered as a whole; and

WHEREAS, these recommendations serve to revise Montana's water policy in order to maximize Montana's authority over management of state waters and other natural resources and to conserve water for existing and future beneficial uses by Montanans.

THEREFORE, the Legislature of the State of Montana finds that this legislation and other recommendations of the Select Committee on Water Marketing constitute an appropriate revision of state water policy necessary to secure Montana's interests for present and future benefit to Montanans."

Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

Law Review Articles

Water Use Efficiency: The Value of Water in the West, Getches, 8 Pub. Land L. Rev. 1 (1987).

Commerce Clause Scrutiny of Montana's Water Export Statutes, Eaton, 7 Pub. Land L. Rev. 97 (1986).

Area-of-Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches, MacDonald & Howe, 57 U. Colo. L. Rev. 527 (1986).

85-2-150. Chronically dewatered watercourse — identification.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 543, L. 1991, provided: "A statement of intent is required to provide guidance to the board of natural resources and conservation [functions now transfered to department of natural resources and conservation] in adopting rules to implement the provisions of [this act]. The legislature understands that many Montana watercourses or portions of watercourses suffer chronic dewatering. The legislature further understands that this dewatering severely impairs important beneficial uses of those watercourses, including but not limited to fisheries and agricultural, industrial, municipal, and recreational uses. It is the intent of the legislature, where reasonable and practical, to identify those watercourses or portions of watercourses where chronic dewatering significantly impairs these beneficial uses. It is also the intent of the legislature to require measuring devices on diversions in chronically dewatered watercourses or portions of watercourses to ensure that appropriators withdraw only the amounts they are entitled to withdraw under valid appropriative rights and water use permits."

Administrative Rules

ARM 36.13.107 Notice of deadline or extension.

Part 2
Adjudication of Water Rights

Part Compiler's Comments

Rules of Procedure: The rules of procedure for the Water Courts for the state of Montana are set forth in full under 85-2-231.

Pre-1973 Law Applicable to "Existing Rights": The Montana Water Use Act, Ch. 452, L. 1973, preserves "existing rights", and thus future determinations and adjudications will require reference to sections repealed by the 1973 law. The text of repealed sections 89-121 through 89-123, 89-803, 89-804, 89-808, 89-809, 89-811, 89-814 through 89-816, 89-835 through 89-838, 89-840, 89-841, 89-844, 89-845, 89-850, 89-852, 89-857 through 89-864, 89-2913(a), and 89-2919 through 89-2924 may be found in the bound R.C.M. Volume 6, part 1. The text of repealed sections 89-801, 89-801.1, 89-801.2, 89-802, 89-807, 89-810 through 89-813, 89-829, 89-831, 89-832, 89-834, 89-839, 89-842, 89-847 through 89-849, 89-851, 89-853, 89-854, 89-2912, 89-2913, and 89-2925 of the R.C.M. 1947, which sections pertain specifically to appropriation and adjudication of water rights, is set out below. Immediately following this material are casenotes pertaining to many of the repealed sections.

89-801. What waters may be appropriated. (1) The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be

acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

(2) But the unappropriated waters of the streams and portions of streams hereafter named shall be subject to appropriation by the fish and game commission [now fish, wildlife, and parks commission] of the state of Montana in such amounts only as may be necessary to maintain stream flows necessary for the preservation of fish and wildlife habitat. Such uses shall have a priority of right over other uses until the district court in which lies the major portions of such stream or streams shall determine that such waters are needed for a use determined by said court to be more beneficial to the public. The unappropriated water of other streams and rivers not named herein may be set aside in the future for appropriation by the fish and game commission [now fish, wildlife, and parks commission] upon consideration and recommendation of the water resources board, fish and game commission [now fish, wildlife, and parks commission], state soil conservation committee, the state board of health and approval of the legislature.

(a) Big Spring creek in Fergus county from its mouth in T17N, R16E, Sec. 26 to the state fish hatchery in T14W, R19E, Sec. 5.

(b) Blackfoot river in Missoula and Powell counties from its mouth in T13N, R18W, Sec. 21 to the mouth of its North Fork in T14N, R12W, Sec. 9.

(c) Flathead river in Flathead county from its mouth in T27N, R20W, Sec. 34 to the Canadian border in T37N, R22W, Sec. 4 & 5, including the section commonly known as the North Fork of the Flathead river.

(d) Gallatin river in Gallatin county from its mouth in T2N, R2E, Sec. 9 to the junction of its East Fork in T2N, R3E, Sec. 27.

(e) Gallatin river in Gallatin county (commonly called the West Gallatin) from the Beck & Border ditch intake in T2S, R4E, Sec. 14 to where it leaves the Yellowstone Park boundary in T9S, R5E, Sec. 18.

(f) Madison river in Madison and Gallatin counties from its mouth in T2N, R2E, Sec. 17 to Hebgen dam in T11S, R3E, Sec. 23.

(g) Missouri river in Lewis and Clark, Broadwater and Cascade counties from its junction with the Smith river in T19N, R2E, Sec. 9 to Toston dam in T4N, R3E, Sec. 7.

(h) Rock creek in Granite and Missoula counties from its mouth in T11N, R17W, Sec. 12 to the junction of its East and West Forks in T6N, R15W, Sec. 31.

(i) Smith river in Cascade and Meagher counties from the mouth of Hound creek in T17N, R3E, Sec. 20 to the Fort Logan bridge in T11N, R5E, Sec. 31.

(j) Yellowstone river in Stillwater, Sweetgrass and Park counties from the North-South Carbon-Stillwater county lines in T3S, R21E, Sec. 10 to where it leaves the Yellowstone Park boundary in NT9S, R8E, Sec. 23.

(k) Middle Fork Flathead river in Flathead county from its mouth in T31N, R19W, Sec. 7 to the mouth of Cox creek in T27N, R12W, (a nonsectioned township).

(l) South Fork Flathead river in Flathead and Powell counties from its mouth at Hungry Horse reservoir in T26W, R16W, Sec. (unknown), to its source at the junction of Danaher and Youngs creeks in T20W, R13W, Sec. 36.

History: Ap. p. Sec. 1, p. 130, L. 1885; re-en. Sec. 1250, 5th Div. Comp. Stat. 1887; amd. Sec. 1880, Civ. C. 1895; en. Sec. 1, p. 152, L. 1901; re-en. Sec. 4840, Rev. C. 1907; amd. Sec. 1, Ch. 228, L. 1921; re-en. Sec. 7093, R.C.M. 1921; amd. Sec. 1, Ch. 345, L. 1969. Cal. Civ. C. Sec. 1410.

89-801.1. Established rights of use unaffected. Nothing herein contained shall in any way affect or diminish any rights to the use of the waters of such streams or portions of streams heretofore established nor any legal or statutory rights given in connection with such established uses.

History: En. Sec. 2, Ch. 345, L. 1969.

89-801.2. Notice of appropriation. The appropriation hereby authorized shall be made by filing a written notice of appropriation in the office of the county clerk and recorder of each county through which flows the river on which the appropriation is made, and by filing a copy of such notice with the director of the Montana water resources board. The notice shall state the quantity of water claimed, measured as provided in Title 89, R.C.M. 1947, the purpose for which it is claimed, the name of the appropriator, and the date of appropriation.

History: En. Sec. 3, Ch. 345, L. 1969.

89-802. Appropriation must be for a useful purpose — abandonment. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

History: En. Sec. 2, p. 131, L. 1885; re-en. Sec. 1251, 5th Div. Comp. Stat. 1887; re-en. Sec. 1881, Civ. C. 1895; re-en. Sec. 4841, Rev. C. 1907; re-en. Sec. 7094, R.C.M. 1921. Cal. Civ. C. Sec. 1411.

89-807. First in time, first in right. As between appropriators the one first in time is first in right.

History: En. Sec. 5, p. 131, L. 1885; re-en. Sec. 1254, 5th Div. Comp. Stat. 1887; re-en. Sec. 1885, Civ. C. 1895; re-en. Sec. 4845, Rev. C. 1907; re-en. Sec. 7098, R.C.M. 1921. Cal. Civ. C. Sec. 1414.

89-810. Notice of appropriation. Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply concerning which there has not been an adjudication of the right to use the waters, or some part thereof, must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:

1. The quantity of water claimed, measured as hereinafter provided;
2. The purpose for which it is claimed and place of intended use;
3. The means of diversion, with size of flume, ditch, pipe, or aqueduct, by which he intends to divert it;
4. The date of appropriation;
5. The name of the appropriator.

Within twenty days after the date of appropriation the appropriator shall file with the county clerk of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion of such stream, with reference to some natural object or permanent monument. The notice shall be verified by the affidavit of the appropriator or someone in his behalf, which affidavit must state that the matters and facts contained in the notice are true.

History: En. Sec. 6, p. 131, L. 1885; re-en. Sec. 1255, 5th Div. Comp. Stat. 1887; re-en. Sec. 1886, Civ. C. 1895; re-en. Sec. 4847, Rev. C. 1907; amd. Sec. 3, Ch. 228, L. 1921; re-en. Sec. 7100, R.C.M. 1921. Cal. Civ. C. Sec. 1415.

89-811. Diligence in appropriating. Within forty days after posting such notice, the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this chapter.

History: En. Sec. 7, p. 132, L. 1885; re-en. Sec. 1256, 5th Div. Comp. Stat. 1887; re-en. Sec. 1887, Civ. C. 1895; re-en. Sec. 4848, Rev. C. 1907; re-en. Sec. 7101, R.C.M. 1921. Cal. Civ. C. Sec. 1416.

89-812. Effect of failure. A failure to comply with the provisions of this chapter deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions of this chapter the right to the use of the water shall relate back to the date of posting the notice.

History: En. Sec. 8, p. 132, L. 1885; re-en. Sec. 1257, 5th Div. Comp. Stat. 1887; re-en. Sec. 1888, Civ. C. 1895; re-en. Sec. 4849, Rev. C. 1907; re-en. Sec. 7102, R.C.M. 1921. Cal. Civ. C. Sec. 1419.

89-813. Record of declaration. Persons who have heretofore acquired rights to the use of water shall, within six (6) months after the publication of this chapter, file in the office of the county clerk of the county in which the water right is situated, a declaration in writing, except notice be already given of record as required by this chapter, or a declaration in writing be already filed as required by this section, containing the same facts as required in the notice provided for record in section 89-810 of this chapter, and verified as required in said last-mentioned section, in cases of notice of appropriation of water; provided, that a failure to comply with the requirements of this section shall in nowise work a forfeiture of such heretofore acquired rights, or prevent any such claimant from establishing such rights in the courts. From and after July 1, 1967, the county clerk and recorder shall forward to the water resources board a copy of any instrument of water appropriation or instrument transferring any water appropriation which is filed as provided in this section.

History: En. Sec. 9, p. 132, L. 1885; re-en. Sec. 1258, 5th Div. Comp. Stat. 1887; re-en. Sec. 1889, Civ. C. 1895; re-en. Sec. 4850, Rev. C. 1907; re-en. Sec. 7103, R.C.M. 1921; amd. Sec. 6, Ch. 158, L. 1967.

89-829. Procedure for appropriating waters of adjudicated streams. (1) Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply concerning which there has been an adjudication of rights between appropriators or claimants, as contemplated in section 89-839, shall:

(a) employ a competent engineer to make a survey of the ditch, or aqueduct, whereby the water is to be conveyed from the source of supply, or the dam or other work whereby the water is to be impounded, or both; or

(b) cause to be prepared an aerial photograph with a drawing thereon showing the course of the proposed ditch or aqueduct, or the location of the proposed dam or other work, or both, together with a description of the course of said ditch or the location of said dam attached thereto; and the appropriators shall file with the clerk of the court in the county in which the water is appropriated a petition giving the amount of water sought to be appropriated, a description by name or otherwise of the watercourse or body from which he intends to appropriate the water, and a general description of the ditch or aqueduct, stating its size, length, and capacity, showing the proposed means of appropriation and use of the water, and also the place of use thereof. If the means of appropriation be a reservoir by which the water is to be impounded, the petition shall state the location and size thereof, together with the contemplated manner of its construction and the means of conveying the water to the place of contemplated use, and the contemplated use.

(2) There shall be filed with the petition a map or aerial photograph as hereinbefore provided showing the point of, and means of diversion, and the course of the ditch or aqueduct to its terminus, and if a reservoir, the contour line thereof, the height and width of the dam, the point and means of discharge therefrom, and the spillway. If the appropriator shall intend to mingle the waters appropriated from one stream with another, or shall intend to deposit the waters impounded in a reservoir into a stream, he shall so state.

(3) The appropriator shall declare in his petition that the water rights sought by him shall be subject to, and that in the use thereof he shall be bound by the terms of any decree theretofore rendered by a court of competent jurisdiction adjudicating the waters of such river, stream, ravine, coulee, spring, lake, or other natural source of supply, or, any body of water to which the same may be tributary, provided that water stored in a reservoir pursuant to an appropriation hereunder which is subsequent to an adjudication of waters in a flowing stream when so released from storage shall not be considered as a part of the natural flow of said adjudicated stream.

(4) The appropriator shall, as near as may be, give the names of all appropriators or claimants who have, or appear to have, rights in the source of supply, from which the appropriation is sought, and whose rights may be in anywise affected by the appropriation, and in the petition the petitioner shall be named as plaintiff, and all other parties as defendants.

History: En. Sec. 4, Ch. 228, L. 1921; re-en. Sec. 7119, R.C.M. 1921; amd. Sec. 1, Ch. 179, L. 1957.

89-831. Appearance — default — decree. If any defendant shall not appear within twenty days after the service of summons upon him, it shall be deemed by the court that he has no objection to the court granting the appropriation sought by the plaintiff, and the defendant so failing to appear shall be deemed in default. Any defendant may appear by motion, demurrer, or answer, as in civil action. The procedure in civil actions shall be followed in all proceedings under the terms of this act; provided, that when the pleadings are settled the court shall summarily proceed to try and determine the case. Evidence may be offered by the parties as in civil actions. At the conclusion of the trial, the court may enter an interlocutory or permanent decree allowing the appropriation sought, either in whole or in part, subject to all prior rights as adjudicated, and subject to the terms of all prior decrees, or may make any other order deemed proper in the premises. If no objections are filed the court shall enter such decree as the facts warrant.

History: En. Sec. 6, Ch. 228, L. 1921; re-en. Sec. 7121, R.C.M. 1921.

89-832. Decree subject to prior adjudicated rights. If the defendants, or any of them, do not appear, their adjudicated rights which are prior in time to plaintiff's right shall in nowise be affected by the court's order. The court shall in every case, if an appropriation be awarded plaintiff, provide that the same shall be subject to all adjudicated rights which are prior in time to plaintiff's rights, and the plaintiff shall be bound by the terms of all prior decrees with respect to water rights in the proper order of his priority as if he had been a party to the decree originally.

History: En. Sec. 7, Ch. 228, L. 1921; re-en. Sec. 7122, R.C.M. 1921; amd. Sec. 1, Ch. 38, L. 1927.

89-834. Decree to govern conditions of performance of work. The court may provide by interlocutory decree awarding the appropriation, the condition under which the ditch, aqueduct, dam, or other work, necessary to the complete appropriation, shall be done and the time within which the same shall be completed until the conditions imposed are complied with. Upon a full

compliance with the terms prescribed by the court, it shall enter its order and decree establishing the appropriation and fixing the date thereof, which, if the appropriator shall have been diligent in complying with the court order, shall be the date of the filing of the petition. The court may fix a later date if the facts warrant.

History: En. Sec. 9, Ch. 228, L. 1921; re-en. Sec. 7124, R.C.M. 1921.

89-839. Effect of decree upon subsequent appropriations. Whenever there shall have been an adjudication of the rights between appropriators or claimants to any stream or any other water supply in this state, in any district court of the state, or the United States court, in an action prosecuted in good faith between such appropriators or claimants to determine their respective rights to the use of such waters, and which decree is based upon evidence introduced, and not upon stipulations or admissions of the parties, such adjudication and decree, or certified copies thereof, shall, as against all persons appropriating or diverting any of the waters of the said stream or other water supply, after the date of such decree, in an action relating to such waters, be prima facie evidence of the facts therein found, determined, and decreed, respecting the rights of parties to said action to the use of the waters of said stream or other water supply.

History: En. Sec. 1, Ch. 95, L. 1905; re-en. Sec. 4867, Rev. C. 1907; re-en. Sec. 7128, R.C.M. 1921.

89-842. Appropriations pending litigation subject to decree. At such time as there may be legal proceedings instituted by the owner or owners of any water right or water rights in any stream, spring, creek, canyon, river, or ravine, before any court of competent jurisdiction, all subsequent appropriations made in any such streams, creeks, springs, canyons, rivers, or ravines will be subject to such suit as may be instituted and shall not date prior to the date of the beginning of said suit, and will be subject to the rulings and decisions thereunder.

History: En. Sec. 3, Ch. 185, L. 1907; re-en. Sec. 4870, Rev. C. 1907; re-en. Sec. 7131, R.C.M. 1921.

89-847. Declaration of policy as to adjudication of waters of the state. It is hereby declared to be the policy of this state and necessary for the welfare of the state and its citizens, that the waters of this state and especially interstate streams arising out of the state be investigated and adjudicated as soon as possible in order to protect the rights of water users in this state and negotiate interstate compacts in relation thereto, and that the state water conservation board make investigations to secure necessary information and initiate and carry on actions therefor.

History: En. Sec. 1, Ch. 185, L. 1939; amd. Sec. 6, Ch. 280, L. 1965.

89-848. Water conservation board may bring action to adjudicate waters. The state water conservation board is hereby authorized to bring action to adjudicate the waters of any stream or of any stream and its tributaries in any county traversed by said stream.

History: En. Sec. 2, Ch. 185, L. 1939; amd. Sec. 7, Ch. 280, L. 1965.

89-849. Appointment of referee to take testimony. In said actions the state water conservation board, or in any action pending for the adjudication of a water right, any party thereto, may make application to the court for the appointment of some competent person or persons to act as a referee or referees in said cause and to take testimony therein, and the court may appoint a referee or referees who shall proceed as herein set forth. In said order of reference the court may submit to said referee or referees any or all issues of fact in said cause.

History: En. Sec. 3, Ch. 185, L. 1939; amd. Sec. 8, Ch. 280, L. 1965.

89-851. Duties of water conservation board — scope of examination of streams — surveys, reports, maps and plats may be introduced as evidence. The state water conservation board shall either before or after the bringing of such action do all things, make all surveys, and perform all services required by said board in the securing of all necessary information and making same available to persons who may be interested therein including the courts of this state. The state water conservation board or some qualified employee may proceed to make an examination of any stream or streams as required by said board and the works diverting therefrom, said examination to include the measurement of the discharge of said stream and of the carrying capacity of the various ditches and canals, and examination of the irrigated lands and an approximate measurement of the lands irrigated from the various ditches and canals, and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested, which said observation and measurement shall be reduced to writing and made a matter of record, and it shall be the duty of the state water conservation board to make or cause to be made such maps or plats thereof as deemed necessary or shall be required. Any or all such surveys, reports, maps and plats may be furnished to the judge of said court or the referee or referees mentioned herein and may be introduced as evidence in such proceedings; provided that the costs and expenses incurred in carrying out the provisions of this section shall be paid by the state water conservation board.

History: En. Sec. 5, Ch. 185, L. 1939; amd. Sec. 9, Ch. 280, L. 1965.

89-853. Report of referee — recognition of decreed water rights. The report of the said referee or referees shall contain findings of fact upon the issues submitted but shall not contain conclusions of law. All evidence before said referee shall be transcribed and submitted to the court with the findings of such referees. In proceedings described herein, all vested and decreed water rights shall be herein recognized.

History: En. Sec. 7, Ch. 185, L. 1939.

89-854. District court procedure. After the conclusion of the taking of such testimony the said referee or referees shall file their findings of fact with the clerk of the district court wherein said action is pending which findings of fact shall remain on file and subject to investigation by parties interested therein. The clerk of court shall notify the parties or their attorneys by mail upon the filing of such findings of fact by the referee or referees. The parties shall have thirty days from the mailing of such notices during which time any party to said action may file in said court objections or exceptions to any such findings of fact. As to any findings to which no exceptions are filed, same may be adopted by the court as findings of said court. As to any findings to which objections are filed, the court shall consider such proposed findings together with the evidence in relation thereto and may adopt, reject, or modify such findings. The court may upon request or of its own motion make additional findings in said cause. All conclusions of law shall be determined by the court in the same manner as conclusions of law are determined by the court in any action to be tried before the court.

History: En. Sec. 8, Ch. 185, L. 1939.

89-2912. Rights to use. Rights to surface water where the date of appropriation precedes January 1, 1962, shall take priority over all prior or subsequent ground water rights. The application of ground water to a beneficial use prior to January 1, 1962 is hereby recognized as a water right. Beneficial use shall be the extent and limit of the appropriative right. As to appropriations of ground water completed on and after January 1, 1962, any and all rights must be based upon the filing provisions hereinafter set forth, and as between all appropriators of surface or ground water on and after January 1, 1962, the first in time is first in right. The right to use ground water may be obtained without a well, as by subirrigation and other natural processes, and appropriations by such means are provided for under section 89-2913. Appropriative rights shall relate only to quantities of water for beneficial uses and not to water levels, means of use, or ease of withdrawal; and appropriative rights shall not apply to minimal household use as provided in section 89-2915.

History: En. Sec. 2, Ch. 237, L. 1961.

89-2913. Filing — notice of appropriation — notice of completion. (a) The administrator shall prepare and publish forms for the filing by appropriators with the county clerks. They shall be known as a "notice of appropriation" and a "notice of completion," respectively. The notice of appropriation shall require, and provide space for, answers to such questions as: (1) the name and address of the appropriator; (2) the beneficial use for which the appropriation is made, including a description of the lands to be benefited if for irrigation; (3) the rate of use in gallons per minute of ground water claimed; (4) the annual period (inclusive dates) of intended use; (5) the probable or intended date of first beneficial use; (6) the probable or intended date of commencement and completion of the well or wells; (7) the location, type, size and depth of the well or wells contemplated; (8) the probable or estimated depth of the water table or artesian aquifer; (9) the name, address and license number (if any) of the driller engaged; and (10) such other similar information as may be useful in carrying out the policy of this act.

The notice of completion shall require answers to the same sort of questions as required for the notice of appropriation, except that for the most part it shall inquire as to accomplished facts concerning the well or means of withdrawal, including information as to the static level of water in the casing or the shut-in pressure if the well flows naturally; the capacity of the well in gallons per minute by pumping or by natural flow; the approximate draw down or pumping level of the well; the approximate surface elevation at the well head; the casing record of the well; the drilling log showing the character and thickness of all formations penetrated; the depth to which the well is drilled; and similar information.

For the benefit of persons obtaining (or desiring to obtain) ground water without a well (as by subirrigation and other natural processes) a specially prepared "notice of completion" shall be provided, enabling such persons to describe the means of using ground water and to estimate the amount of water so used, and requiring such other similar information as shall be pertinent to this particular class of user. The administrator shall distribute said forms to the county clerks.

(b) On and after January 1, 1962, any person desiring to appropriate ground water may complete a notice of appropriation and file it with the county clerk of the county in which the appropriation is located.

(c) Upon the filing of a notice of appropriation, the county clerk shall transmit a copy thereof to the administrator, and to the Montana bureau of mines and geology, retaining the original on file locally.

(d) After filing a notice of appropriation, in order to acquire a right based thereon, the person must, within ninety (90) days, commence actual excavation and diligently prosecute construction of a well and, upon its completion, file a notice of completion with the county clerk of the county in which the appropriation is located. The county clerk shall handle and transmit such filed notices as in the case of a filed notice of appropriation.

(e) A failure to file a notice of appropriation deprives the appropriator of his right to relate his date of appropriation back, and results in the dating of his appropriation as of when he files a notice of completion. Until a notice of completion is filed with respect to any use of ground water instituted after January 1, 1962, no right to that use of water shall be recognized. However, in the case of uses instituted prior to January 1, 1962 and diligently prosecuted to completion on or after that date, the date of appropriation shall relate back to the date of commencement of construction, upon the filing of a notice of completion.

(f) Persons required to file well logs and other information under the laws governing the conservation of oil and gas and who do so in compliance therewith, shall be deemed to have complied with all of the filing requirements of this act in so far as it applies to such particular oil and gas wells, salt water disposal wells, and injection wells. The date of appropriation in such cases shall be the date that written notice of intention to drill is given to the oil and gas conservation commission of the state of Montana.

(g) It shall be the responsibility of the driller of each well to fill out the notice of completion for the appropriator, and the latter shall be responsible for its filing.

(h) Persons who had put ground water to a beneficial use, including subirrigation or other natural process, prior to January 1, 1962 had a four (4) year period after January 1, 1962 to file a "declaration of vested ground water rights" in the office of the county clerk of the county in which the claimed right was situated. The right to file a "declaration of vested ground water rights" expired on January 1, 1966; therefore, any person desiring to file on ground water put to beneficial use prior to January 1, 1962, but not filed on by December 31, 1965 may file a "notice of completion." The appropriator's right will commence on the date the notice is filed, except as hereinafter provided.

The county clerk shall transmit copies to the office of the administrator and the bureau of mines and geology. The administrator shall attend to filing copies in any other counties affected by the appropriation.

The "declaration of vested ground water rights" as provided for, to be filed on from January 1, 1962 to January 1, 1966 shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained.

Failure to comply with this requirement shall in no wise work a forfeiture of such rights, or prevent any such claimant from establishing such rights in the courts, but he must maintain the burden of proving such unrecorded rights. Provided, however, that persons who have filed the water well log form, provided for in sections 1 and 2 of chapter 58, session laws of Montana, 1957, shall be deemed to have complied with the requirements of this section. These latter forms may be returned to the county clerks by the administrator for the purpose of correction or for the entry of material facts necessary to fully complete the filing.

History: En. Sec. 3, Ch. 237, L. 1961; amd. Sec. 1, Ch. 21, L. 1965; amd. Sec. 2, Ch. 307, L. 1971.

89-2925. Appropriation must be for a useful purpose — abandonment. The appropriation must be for some beneficial purpose and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact and shall be determined as other questions of fact.

History: En. Sec. 15, Ch. 237, L. 1961.

Part Case Notes

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DECISIONS UNDER CURRENT LAW

No Right of Appeal Except From Final Judgment: There is no right of appeal granted to a water right claimant under the state water rights adjudication process except from a final decree entered under 85-2-234. In re Adjudication of Sage Creek Water Rights, 234 M 243, 763 P2d 644, 45 St. Rep. 1876 (1988).

State Water Court — Jurisdiction to Adjudicate Indian Reserved Water Rights: In an original proceeding to determine jurisdiction over controversies involving federal water rights of the Water Court over Indian tribes and water flowing through state reservations, the Supreme Court held that Article I of the Montana Constitution does not bar state jurisdiction to adjudicate Indian reserved water rights. With the 1952 McCarran amendment, the U.S. Congress diminished the scope of absolute federal jurisdiction over controversies involving federal water rights by allowing state courts concurrent jurisdiction to adjudicate federal water rights. In Colo. River Water Conserv. District v. U.S., 424 US 800 (1976), the U.S. Supreme Court held that the McCarran amendment applied to Indian water rights. The state Legislature's enactment of the Water Use Act (Title 85, ch. 2) pursuant to Art. IX, sec. 3, Mont. Const., constitutes a valid and binding consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

Water Use Act — Adjudication of Federal and Indian Reserved Water Rights:

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate federal reserved water rights. Although federal reserved rights differ from state appropriative rights in origin, determination of priority date, and quantification standards, the Water Use Act recognizes the distinction between federal reserved rights and state-created appropriative rights. As the Act permits each different class of water rights to be treated differently, the Act is adequate to allow for adjudication of federal reserved rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate Indian reserved water rights. Although state appropriative water rights and Indian reserved water rights differ in origin and definition, the Water Use Act, as amended, permits the Water Court to treat Indian reserved water rights differently from state appropriative rights. The Water Use Act does not state explicitly that the Water Court shall apply federal law in adjudicating Indian reserved rights; however, state courts are required to follow federal law with regard to those water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

State Court Jurisdiction Over Federal and Indian Water Rights: The McCarran Amendment, 43 U.S.C. §666, granting state courts jurisdiction over the United States in litigation involving a comprehensive adjudication of water rights, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights in actions brought by the United States on behalf of an Indian tribe as well as in actions brought by an Indian tribe itself. Assuming that the state adjudication procedure is adequate and complies with state law, dismissal of adjudication actions filed in federal District Court out of deference to state adjudication proceedings was proper. Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), reversing N. Cheyenne Tribe v. Adsit, 668 F2d 1080 (9th Cir. 1982); followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

DECISIONS UNDER FORMER SECTION 89-801, R.C.M. 1947
WHAT WATERS MAY BE APPROPRIATED

Water Rights by Prescription — Hostile Use Required: Where the plaintiffs brought an action against the decedent's estate, claiming a prescriptive right to water diverted by the decedent's descendants, the District Court did not err in holding that the requirement of hostile use of the water would be applied to determine whether the water had been acquired by prescription. Without such a requirement, the holder of a water right could be deprived of that right without notice. In the case before the court, use of the water could not be said to be hostile unless the defendants were deprived of the water in question at a time when they actually had need of it. Language in the opinion in Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), appearing to abrogate the requirement of hostile use, is expressly disapproved. Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85, 40 St. Rep. 1585 (1983).

Waters of Tributary: The waters of a tributary belong to the stream into which the tributary flows to the extent of prior appropriations. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

Valid Water Right Not Affected by Release of Surplus to Junior User: Defendants' predecessor in interest began using water in the amount of 110 gallons a minute from Mahle Spring in 1917 for domestic, stock, and irrigation purposes. Mahle Spring flows into Ashley Creek. In 1958, defendants completed construction of a dam whose purpose was to stabilize their water supply only, not to increase the amount of water appropriated. In April 1973, defendants filed notice of completion of ground water appropriation without well, claiming 110 gallons a minute. In 1957, plaintiff's predecessor in interest began using water from Ashley Creek. At times, when Ashley Creek dried up, defendants agreed to release water from the dam. In 1978, plaintiff obtained a water use permit for Ashley Creek. Subsequently, defendants refused to release any water from the dam. Plaintiff filed an action to adjudicate the parties' water rights and to enjoin defendants from interfering with the flow of Ashley Creek. The Montana Supreme Court upheld the District Court's ruling that defendants are entitled to 110 gallons a minute with a priority date of 1917 and that plaintiff is entitled only to the excess over that. The court denied plaintiff's claim that defendants were estopped from asserting a superior claim, reasoning that the release of the water did not cause plaintiff's predecessor in interest to change her position for the worse because the defendants had already established a valid claim to the water and thus the release was either a mere gratuity or a release of surplus water. In the absence of evidence that defendant was not simply releasing surplus water, the court also denied plaintiff's claim of laches. Finally, the court denied plaintiff's claim that the release from the dam was evidence that defendants were not making beneficial use of all the water since the District Court findings indicated that the defendants' total claim was fully justified. Bagnell v. Lemery, 202 M 238, 657 P2d 608, 40 St. Rep. 58 (1983).

Adverse Use — Expansion of Water Right: Plaintiff had title by conveyance to 132/142 part of a water right, with defendant having the remaining part. Because the defendant insisted on and did use one-half of the water right against plaintiff's wishes for 15 years and because plaintiff stated he needed all the water during that time, the defendant established a claim to half of the water through adverse possession. Firestone v. Bradshaw, 157 M 181, 483 P2d 716 (1971).

Adverse Use — Elements — Burden of Proof: In order to acquire a water right by adverse use or by prescription (prior to 1953), the proof must show all the following elements: that the use has been continuous for 10 years, exclusive, open, under a claim of right, hostile, and an invasion of another's rights, which the latter had a chance to prevent. The burden of proving an adverse use rests upon the party alleging it. Smith v. Krutar, 153 M 325, 457 P2d 459 (1969); King v. Schultz,

141 M 94, 375 P2d 108 (1962); Havre Irrigation Co. v. Majerus, 132 M 410, 318 P2d 1076 (1957); Lamping v. Diehl, 126 M 193, 246 P2d 230 (1952); Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

Adverse Use — Not Peaceable and Uninterrupted: During the period of defendant's asserted adverse use, the plaintiff attempted to prevent defendant's use of water by destroying pipes and headgates placed on a ditch by the defendant. Therefore, the defendant's use was not peaceable or uninterrupted as required for a claim of adverse use. Smith v. Krutar, 153 M 325, 457 P2d 459 (1969).

Adverse Use — Prerequisites: There are three basic prerequisites for establishing adverse use: (1) that the claimant use water at a time when plaintiff needs it; (2) that the claimant use water in such a substantial manner as to notify plaintiff that he is being deprived of water to which he is entitled; and (3) that during all of that period, plaintiff could have maintained an action against him for so using the water. Smith v. Krutar, 153 M 325, 457 P2d 459 (1969); King v. Schultz, 141 M 94, 375 P2d 108 (1962); Havre Irrigation Co. v. Majerus, 132 M 410, 318 P2d 1076 (1957).

Adverse Use — Prior Decree as Res Judicata: Because the criteria for the doctrine of res judicata were met, a water right by adverse use could not be established based on a period prior to the entry of a water rights decree. Smith v. Krutar, 153 M 325, 457 P2d 459 (1969).

Adverse Use — Diversion System as Evidence: Evidence of a water line and diversion system on defendant's land to divert water on defendant's land to plaintiff's land amply supported a conclusion that plaintiff was the owner of a water right by reason of title by prescription. O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969).

Appropriation on Private Land:

Without the permission of the defendant, the plaintiff constructed a ditch over land of the defendant. The plaintiff's trespass did not give rise to a right to an easement over the defendant's land or to water from the spring. Jones v. Hanson, 133 M 115, 320 P2d 1007 (1958).

An appropriation of water is not confined to waters flowing in streams upon public land but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

Sections 89-801 through 89-805, 89-807 through 89-828, and 89-839 through 89-844, R.C.M. 1947, do not and cannot authorize a person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. Prentice v. McKay, 38 M 114, 98 P 1081 (1909), explained in Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

The mere fact that water has its source on land owned by a plaintiff does not of itself give him the exclusive right therein so as to prevent others from acquiring rights to it under the laws of the state. Quinlan v. Calvert, 31 M 115, 77 P 428 (1904).

A trespasser on riparian land cannot lawfully exercise any right to water on such land or acquire any right therein by virtue of the provisions of this chapter. Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Adverse Use — Parties to the Action: In order to acquire title to a water right by adverse possession, those claiming to be the legal owners of the water right must be made parties. Forrester v. Rock Island Oil Co., 133 M 333, 323 P2d 597 (1958).

Limitation on Rights: The rights of an appropriator of water are limited to the natural condition of the stream at the time the appropriation is made. Jones v. Hanson, 133 M 115, 320 P2d 1007 (1958).

Adverse Use — Not Adverse: The defendant used water from a stream during periods of spring runoff in years of above average rainfall, believed the water so used would percolate back into the stream, and used the water on isolated land, making discovery of irrigation difficult. Such use was insufficient to establish a water right by adverse possession because it lacked the most vital element, namely, adverse use. Havre Irrigation Co. v. Majerus, 132 M 410, 318 P2d 1076 (1957).

Impounding Floodwater and Wastewater: Where plaintiff had over the years constructed a series of dikes in order to spread water over his land that would flow down a dry gully after the melting of snow or a heavy rainfall, he had a prior right to the extent that his project was finished. He who first diverts the water to a beneficial use has the prior right thereto where the right is based upon the custom and practice of the early settlers and where there was no compliance with the statute. Midkiff v. Kincheloe, 127 M 324, 263 P2d 976 (1953). (See, however, the dissenting opinion in the case in which it was contended that the waters were floodwaters and wastewaters that the defendant had a right to impound in a stock reservoir, 127 M 324, 263 P2d 976 (1953).)

Slough — Natural Watercourse: A slough naturally followed a channel which was cut down in gravel and rock, and was fed by natural springs, seepage, surface drainage and wastewater from a

canal. Such a slough constituted a natural watercourse and was subject to appropriation. Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

Diffused Surface Water Defined — Not Subject to Appropriation: The essential characteristics of diffused surface waters are that their flows are short-lived and that the waters are spread over the ground and not concentrated or confined in flows of legal watercourses or bodies of water conforming to the definition of lakes or ponds. Diffused surface waters in a gulch on land above where a natural channel has developed are not subject to appropriation. Doney v. Beatty, 124 M 41, 220 P2d 77 (1950).

Ownership of Land Where Water Has Source: Seepage water that has its rise along the bed of a stream and forms a natural accretion thereto belongs to that stream as part of its source of supply, and the ownership of land where water has its source does not necessarily give the exclusive right to use such water to the landowner so as to prevent others from acquiring rights therein. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

Seepage and Wastewaters:

Although seepage water that has its rise along the bed of a stream and forms a natural accretion thereto belongs to the stream as a part of its source of supply, the same as do feeder springs, and an appropriator of water on such stream has the right to all such tributary flow even as against the owner of the land, the conducting of water from upper reaches of a tributary to "potholes" and "reservoirs" and then capturing the seepage therefrom in ditches is insufficient proof of creating a new supply for an additional water right. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

Where water seeping from irrigated lands finds its way into a drain ditch and is collected there, it is subject to appropriation. Wills v. Morris, 100 M 514, 50 P2d 862 (1935), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962).

While wastewaters are subject to appropriation, the owner of the land from which such water flows has the right to use his land as he pleases and may therefore change the flow to suit his purpose, provided the changes are not made maliciously or arbitrarily to the detriment of the appropriator in the enjoyment of his right. Newton v. Weiler, 87 M 164, 286 P 133 (1930).

Prior to the amendment of this section (Ch. 228, L. 1921), there was no statutory provision for the appropriation of flood, seepage, and wastewaters and therefore no right could be acquired as to such vagrant or fugitive waters as against the owner who sought to recapture them. But where such waters had passed beyond the control of the owner, they became abandoned personalty that could be taken up and used by the person first in the field. Popham v. Holloron, 84 M 442, 275 P 1099 (1929), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962).

Interference With Prior Rights — Burden: Primary rights to the use of water in a stream are those of appropriators of its natural flow, and the burden is upon a subsequent storage claimant (in the instant case, defendant State Water Conservation Board, precursor to the Department of Natural Resources and Conservation) or upon one who uses a watercourse as part of his distribution system of developed or alien waters to affirmatively disprove interference with prior rights in a suit to enjoin such interference. Allendale Irrigation Co. v. St. Water Conservation Bd., 113 M 436, 127 P2d 227 (1942).

Storage and Use of Floodwater or Wastewater: Under Art. III, sec. 15, 1889 Mont. Const., the sites for reservoirs for collecting and storing water constitute a public use intended to conserve rather than waste water so that the arid lands of the state may be made productive. The appropriation of water in a reservoir to conserve water flowing in an otherwise dry coulee, only at heavy rains or spring runoff, entitles the owner to fill the reservoir to its full capacity to the extent of his appropriation, only once a year. The state laws that apply to acquisition of running water apply to storage and use of floodwater or wastewater—first in time, first in right. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

Adverse Use — Open and Notorious But Not Adverse: Although the defendant used water rightfully subject to the plaintiff's prior right, he failed to tell anyone of his adverse claim or show possession so as to give the plaintiff notice of his adverse claim. Use may be open and notorious yet still not adverse. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

Appropriation on Indian Lands:

Defendant's contention that an appropriation of a water right was made on Indian lands prior to opening for settlement and therefore initiated by trespass and hence void could not be sustained because the provision of the Crow Indian treaty of 1868 that white men should be excluded from Indian lands is directory and not mandatory. Whites could be excluded if inimical to Indian

welfare, it being discretionary with those charged with protecting Indian rights to take action against whites invading without the consent of the tribe. The Indian land became public domain subject to squatter's rights after ratification of agreement for settlement in 1891. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled on other grounds in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

By the treaty of May 7, 1868, between the United States and the Crow Indians, establishing the Crow Indian Reservation, the federal government impliedly reserved to itself the waters thereon for irrigation and other purposes for use by the Indians, hence they were not subject to appropriation by others. The right to use water appurtenant to lands on an Indian reservation and held by Indians under trust patents is property of the United States, and state courts are without jurisdiction to enter a decree affecting such right, but when an Indian becomes seized of a fee simple title after removal of a trust patent, the conveyance of land transfers the right to use the water appurtenant to the land. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

Water Right to Be Personal Property When Considered Independently of Land: While a water right partakes of the nature of real estate, it is not land in any sense, and when considered alone for the purpose of taxation and independently of the land to which it is appurtenant, it is personal property. Brady Irrigation Co. v. Teton County, 107 M 330, 85 P2d 350 (1938); Verwolf v. Low Line Irrigation Co., 70 M 570, 227 P 68 (1924).

Adverse Use — Permissive Use: The claim of adverse use of a water right cannot be initiated until the owner of the superior right is deprived of the benefit of its use in such a substantial manner as to notify him that his rights are being invaded; mere use of the water during the statutory period alone is not sufficient, but it must appear that during such entire period an action could have been maintained against the claimant by the party against whom it is made. Permissive use negates the possibility of adverse use. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

Tributary of Stream: Evidence in a water right suit that water flowed in a creek only in times of flood and that except at such times, the water therein never reached the point where it joined another creek, supported a finding that the former was not a tributary of the latter. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

Right to Use Increased Supply: Where one claims to have increased the flow of water in a stream and therefore claims he is entitled to use such increase, he must show that the increase was occasioned through his exertions and not through any accessions to the stream brought about through the process of nature, as by percolating or seepage waters that would have found their way to the stream in any event. W. Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938).

"Watercourse" Defined:

A "watercourse", within the meaning of the water right laws, from which an appropriation for purposes of irrigation may be made, may consist of a well-defined channel into which water from a slough fed by irrigation of adjoining lands through seepage or through a ditch constructed by the owners of such lands for draining purposes finds its way, and which through years of so flowing has acquired a permanent character as the natural drainage of the particular watershed. W. Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938).

Where waters flowing in a channel with regularity from year to year were made to do so through the instrumentality of man and have through years of so flowing acquired a permanent character as the natural drainage of the watershed, or where they come from springs formed from seepage or percolation, from surface water collecting in a canyon, or from wells accidentally developed while drilling for oil, etc., they constitute a watercourse. Popham v. Holloron, 84 M 442, 275 P 1099 (1929), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962).

Rules and Customs Prior to 1885:

Prior to the adoption of the first water right statutes in 1885, appropriations of water were made pursuant to the rules and customs of the early California settlers, and under them the essential elements of an appropriation made in 1871 were a completed ditch and the application of the water through it to a beneficial use. Missoula Light & Water Co. v. Hughes, 106 M 355, 77 P2d 1041 (1938).

The essential features of an appropriation of water made prior to L. 1885, p. 130, were a completed ditch and the application of water to a beneficial use. Maynard v. Watkins, 55 M 54, 173 P 551 (1918).

Appropriation Made on Public Domain by Settler: A settler on lands that were a part of the public domain could make a valid appropriation of water thereon. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

Appropriator Not Owner of Water — Sale of Water: An appropriator of water does not become the owner of the water but only of the right to use it. He may not sell the water to another to be

used by the purchaser when not in use by the appropriator. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

Conveyance of Right as Appurtenance: When land is conveyed, including the appurtenances, any water rights theretofore enjoyed are transferred. When the grantor later purports to convey the water right only, the latter deed does not constitute severance of the water right, as it adds nothing to the conveyance theretofore made. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Prescription — Adverse Use — Burden of Proof: To establish acquisition of a water right by adverse use or prescription, the claimant has the burden of showing that his use of the water deprived the prior appropriator of water at times when the latter actually needed it. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Property Right — After Perfection: Where a water right has once been fully perfected, i.e., where there was a diversion of the water and its application to a beneficial use, it becomes a property right of which the owner may be divested only in some legal manner. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Rights of Licensee: Where one goes upon land of another with the latter's verbal consent for the purpose of making an appropriation of water, posts his notice of appropriation, diverts the water through the landowner's ditch, and applies it to a beneficial use on his own land, he becomes a licensee, not a trespasser, and revocation of a license to construct a ditch does not necessarily affect the licensee's right to the water carried by the ditch. Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

Water Rights and Ditches Separate Rights: Water rights and ditch rights are separate and distinct property rights, i.e., one may own a water right without a ditch right or a ditch right without a water right. Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

Adverse Use — Irrigation Company's Distribution: For more than 10 years before the commencement of an action an irrigation company asserted that the water right acquired by the plaintiff's deed was not superior to the water right acquired by a holder of the company's capital stock. Upon this theory the irrigation company made a pro rata distribution of available water to its shareholders and the plaintiff, the plaintiff accepting the water distribution with full knowledge of the irrigation company's position. The irrigation company's possession of the water was thereby open, notorious, continuous, exclusive, adverse, and hostile with respect to the plaintiff's claim of right. Verwolf v. Low Line Irrigation Co., 70 M 570, 227 P 68 (1924).

Adverse Use — Payment of Taxes on Land Not Required: One is not required to pay all the taxes for the period of prescription upon the land to which a water right is appurtenant in order to acquire title to a water right by adverse possession. Verwolf v. Low Line Irrigation Co., 70 M 570, 227 P 68 (1924).

Source of Right: An appropriator of water derives his right from the state and not from the national government, the use of waters flowing in natural streams in Montana being subject to state regulation and control. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

Land Qualifications Unnecessary for Appropriation: An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

Method of Procedure: Sections 89-810 and 89-811, R.C.M. 1947 (now repealed), provide all the steps necessary to be taken by one seeking to make an appropriation of water, and one who proceeds under them, instead of under the rules and customs of the early settlers, has a completed appropriation when the work on his ditch or canal is finished and before the water is actually applied to its intended use. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

Public Service Corporation: A public service corporation, organized for the purpose of constructing an irrigation system and selling or renting water to reclaim arid lands, has a completed appropriation of water when its distributing system is finished and when the corporation is ready to deliver water to users upon demand and offers to do so. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

Statute to Apply Only to Public Lands: Sections 89-801 through 89-805, 89-807 through 89-828, and 89-839 through 89-844, R.C.M. 1947 (in part since repealed and in part contained in Title 85, ch. 2), apply only to appropriations made on the public lands of the United States or of the state and to such as are made by individuals who have riparian rights, either as owners of riparian lands or through grants from such owners. Prentice v. McKay, 38 M 114, 98 P 1081 (1909). See Alaska Juneau Gold Min. Co. v. Ebner Gold Min. Co., 239 F 638 (9th Cir. 1917).

Title Obtained by Appropriation: Title cannot be acquired to the corpus of waters flowing in a stream but only to the use thereof. Norman v. Corbley, 32 M 195, 79 P 1059 (1905).

Adverse Use — Contract to Use Water: A controversy between a mill and a mining company over water in a creek was settled by a contract in which the mining company had a right to a specified amount plus a further amount that was over and above that necessary for the mill. The mill went out of business, and the mining company used all the water from the creek. Because the mining company had a right under the contract to the water not used by the mill, it could not be said that the mining company was acting adversely with respect to the mill's water right. Smith v. Hope, 18 M 432, 45 P 632 (1882).

DECISIONS UNDER FORMER SECTION 89-802, R.C.M. 1947
APPROPRIATION FOR USEFUL PURPOSE — ABANDONMENT

Forty Years of Nonuse as Raising Rebuttable Presumption of Intent to Abandon: In litigation to establish plaintiff's and defendant's respective priorities to water appropriated from Big Coulee Creek, the evidence showed that neither had used previously appropriated water for a period of at least 40 years. Thus, the District Court did not err in holding that under section 89-802, R.C.M. 1947 (now repealed), the appropriation rights of both parties had been abandoned for lack of use of the water. While abandonment of a water right is a question of fact, nonuse for a period of at least 40 years raises, in effect, a rebuttable presumption of abandonment. A claim that the predecessors of the parties could not afford to use the water by irrigating their land did not excuse the failure to use the water or rebut the presumption of abandonment since economics could excuse nearly every otherwise abandoned water right. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992), in which nonuse for 23-plus years was sufficient to constitute a presumption of abandonment despite the fact that the water right was carried as an asset on the county's books during the period of nonuse, and In re Adjudication of Existing Rights to Use of All Water, Both Surface & Underground, Within Clark Fork River Drainage Above Blackfoot River, 274 M 340, 908 P2d 1353, 52 St. Rep. 1264 (1995), in which continuous nonuse of water for a mining claim for over 50 years raised a rebuttable presumption of abandonment, despite claimant's contention that the cyclical nature of the mining industry and its uncertain economics were reason enough to explain the long period of nonuse. See also Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

Abandonment by Nonuse: Under section 89-802, R.C.M. 1947 (now repealed), 75 years of nonuse is sufficient to provide "clear evidence" of abandonment of the unused portion of a water right. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

Intent to Abandon — Nonuse of Ditch: Mere nonuse of a ditch appurtenant to a water right is not sufficient to establish abandonment. There must be concurrent intent to abandon. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964), followed in Rieman v. Anderson, 282 M 139, 935 P2d 1122, 54 St. Rep. 286 (1997).

Beneficial Use — Measurement of Water:

For many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used. This may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied. Nor should this fact be interpreted as a right to expand appropriations to the detriment of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1939).

In the absence of a statute regulating the amount of water reasonably necessary for irrigation, the rule has generally been observed by the courts to allow 1 inch an acre in fixing the amount required for economical use, unless the evidence discloses that a greater or lesser amount is required. Further, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard. But an appropriator cannot be compelled to divert the water according to the most scientific method known. Worden v. Alexander, 108 M 208, 90 P2d 160 (1939).

The rights of appropriators of water may not be measured entirely by what they claimed in their notices of appropriation but must be measured by their beneficial use thereof over reasonable periods. Consideration must be given to the extent and manner of their use, the character of the land upon which used, and the general necessities of the case, as well as whether streams were furnished by usual rains or snows, extraordinary rain or snowfall, or by springs or

seepage. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938), followed in 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983).

Neither the appropriator of water nor one to whom a right is decreed owns the corpus of any part of the flow of a stream. He is entitled only to the beneficial use of the amount of water called for by his appropriation or the decree when he has need therefor, provided his distributing system has a sufficient capacity to carry that amount; if incapable of carrying that amount, his right is measured by the capacity of his system of distribution regardless of his needs. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

"Abandonment" Defined: Before it may be said that the owner of a water right has abandoned it, there must be the necessary concurrence of act and intent to abandon. He must have relinquished it because he no longer desired to possess it. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

Beneficial Use — Swimming Pool or Fishpond: Diversion of water to maintain a swimming pool or fishpond may have been for a beneficial use and hence the basis of a valid appropriation. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Abandonment — Essential Elements: Abandonment of a water right is a voluntary act, and to constitute it there must be a concurrence of act and intent. Neither the relinquishment of possession or the intent not to resume it for a beneficial use is alone sufficient to bring about its abandonment. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936); Thomas v. Ball, 66 M 161, 213 P 597 (1923); Tucker v. Jones, 8 M 225, 19 P 571 (1888).

Abandonment — Trespassers: Plaintiff's predecessors in interest for 13 years used a water right acquired by a desert land entryman after the entry had been canceled and thus were trespassers upon the public domain. That fact did not deprive the plaintiff from resuming the use of the water upon acquiring possession, unaffected by any junior rights which came into being in the meantime, since there is no law enforcing abandonment of a vested water right as a penalty for exercising it as a trespasser. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Abandonment — Resumption: Where use of water is abandoned and resumed, use vests from the date of resumption. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); O'Shea v. Doty, 68 M 316, 218 P 658 (1923).

Abandonment — Burden of Proof — Nonuse: One who claims an abandonment of a water right has the burden of proving it by a preponderance of clear and definite evidence. Where the only evidence was nonuse for 7 years, whereupon its use was resumed by the owner and the water right later sold to another, the resumption and sale were evidence that abandonment was not intended. Thomas v. Ball, 66 M 161, 213 P 597 (1923).

Beneficial Use — Irrigation:

Respecting the use of water for purposes of irrigation, the ultimate question in every case is how much will supply the actual needs of the prior claimant under existing conditions. Conrow v. Huffine, 48 M 437, 138 P 1094 (1914).

Where a successor in interest of an appropriator of water greatly increased the amount of grass for pasture by irrigation, such use of the water was a useful and beneficial one within the meaning of this section. Sayre v. Johnson, 33 M 15, 81 P 389 (1905).

Beneficial Use — Immediate Use Unnecessary: While the appropriation must be for some useful or beneficial purposes, the use to which the water is to be applied need not be immediate but may be prospective or contemplated. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

Beneficial Use — Intent of Claimant:

This section requires that, at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900); Power v. Switzer, 21 M 523, 55 P 32 (1898).

As every appropriation must be made for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof. Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

Unused Excess Not Appropriated: The diversion of water for domestic purposes in excess of what is required and allowing such excess to overflow lands without any intention of irrigating and

without any intention of using such excess for any useful purpose does not constitute an appropriation of the excess. Power v. Switzer, 21 M 523, 55 P 32 (1898).

Abandonment of Ditch — No Effect on Water Right: An appropriation was made from a creek, turned into a ditch, and eventually used at placer mines. Years later the appropriator abandoned the ditch, returned the water to the creek, and recaptured it for irrigation use. The abandonment of the ditch was not an abandonment of the entire water right. Meagher v. Hardenbrook, 11 M 385, 28 P 451 (1891).

Abandonment — Insufficient Supply: Defendant's appropriation for placer mining was not abandoned by his failure to use the appropriation for 5 years, as there was not enough water to work the mines during those years. McCauley v. McKeig, 8 M 389, 21 P 22 (1889).

DECISIONS UNDER FORMER SECTION 89-803, R.C.M. 1947
CHANGE OF POINT OF DIVERSION — CHANGE OF USE

Change in Place of Diversion — Water Exchange Prevented: The defendants, upstream subsequent appropriators with respect to the plaintiff, diverted all the waters of a creek. Further downstream but still above the plaintiff, the defendants replenished the creek with water from a canal. The plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants. Thompson v. Harvey, 164 M 133, 519 P2d 963 (1974).

Change in Use — Appurtenant to Land:

After purchasing an adjoining tract of land with an appurtenant water right, a farmer proceeded to irrigate all of his land with the newly purchased water right. This change in use resulted in the water right becoming appurtenant to all of the land. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963).

Neither a change in the place of diversion of water nor a change in its use from mining to agriculture, or vice versa, affects its appropriation. Thomas v. Ball, 66 M 161, 213 P 597 (1923). See also Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933); Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933); Loyning v. Rankin, 118 M 235, 165 P2d 1006 (1946).

Actual diversion of water and its beneficial use existing, prospective, or in contemplation constitute an appropriation, which is not affected by a change in the point of diversion or place of use. Wheat v. Cameron, 64 M 494, 210 P 761 (1922).

Under section 89-803, R.C.M. 1947 (now repealed), the location of a flume maintained over the land of another, as well as the use of the water flowing through it, may be changed, provided the change adds no new burdens to the servient estate or causes additional damage thereto. Pioneer Min. Co. v. Bannack Gold Min. Co., 60 M 254, 198 P 748 (1921).

Burden of Proof of Injury:

For a period of more than 50 years the defendant accumulated water rights and used them wherever and whenever needed to irrigate 34,000 acres of land. The burden was on the plaintiffs to show that they had been injured or prejudiced by such changing use. Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

The party who claims to have been injured by another's change in place of diversion of water right has the burden of alleging and proving the injury. Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933); Lokowich v. Helena, 46 M 575, 129 P 1063 (1913); Hansen v. Larsen, 44 M 350, 120 P 229 (1911).

Change in Place of Use — Decree Not Detailed:

A water rights decree failed to describe the particular acreage to be irrigated and expressed the water rights in terms of flow per unit of time without stating during how many such units of time water could be taken. Adjudicated owners could not expand the use of water to additional lands or in length of time to the injury of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1939), followed in Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

The conclusiveness of a judgment as res judicata in a water right suit between the same parties or their successors in interest in a prior action is not impaired by the alleged fact that in authorizing a change of place of use or point of diversion, the judgment violated the provisions of section 89-803, R.C.M. 1947 (now repealed). Brennan v. Jones, 101 M 550, 55 P2d 697 (1936).

Extent of Use in Terms of Flow Per Unit of Time: The fact that for many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied, or to expand appropriations

to the detriment of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1939).

Change of Use — Sale: Appropriations not originally made for the purpose of sale may have their use changed to that purpose if subsequent appropriators are not thereby injured. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

Change in Use — Outside of Watershed: Pursuant to an earlier water rights decree, the defendant irrigated land outside the watershed of the source. When the defendant brought additional lands outside the watershed under irrigation with this water right, the plaintiffs could not claim they were injured by this change in use. Their lands were either within the watershed of the source or higher than the defendant's irrigated land and would not benefit from percolating waters from his land. Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933).

Change in Use — Sale of Water Not in Use: An appropriator of a water right for placer mining purposes attempted to convey to another a right to use the waters when not being used for mining. Although an appropriator may change the use of his appropriation, he may not sell it in the interim when the water is not being used. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Creek v. Bozeman Water Works Co., 15 M 121, 38 P 459 (1894).

Use of Any of Several Ditches: Where an owner of a water right had several ditches for the irrigation of his lands, he had a right to use any of them at which he had a headgate so long as other users were not injured thereby. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

Change in Place of Diversion or Use — Who May Complain: Only a subsequent appropriator being injured may complain that a prior appropriator's change in place of diversion or use is affecting subsequent rights. Carlson v. Helena, 43 M 1, 114 P 110 (1911).

Change in Place of Diversion and Use — Placer Mining: The successors of an appropriation of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of the water for irrigating purposes. Head v. Hale, 38 M 302, 100 P 222 (1909).

Change in Place of Use — Deprivation of Subsequent Right: After the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes. The defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch. Such change in use was unlawful as it absolutely deprived the plaintiff of his subsequent right. Gassert v. Noyes, 18 M 216, 44 P 959 (1896).

Change in Use — Mining to Irrigation: A water right was abandoned for mining purposes, the water returned to its original channel, and then recaptured by the original owner to be used for irrigation purposes. This change in use was lawful. Meagher v. Hardenbrook, 11 M 385, 28 P 451 (1891).

DECISIONS UNDER FORMER SECTION 89-804, R.C.M. 1947
CHANNELING APPROPRIATED WATER TO ANOTHER STREAM
RECLAIMING WATER

Canal Water Turned Into Slough — Amount That May Be Reclaimed: The defendant permitted waters from a canal and spring to run in a slough and then used the slough as a waterway. The defendant could reclaim from the slough only that amount of water equal to what he put in. Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

Seepage Water Potholed and Recaptured: Since seepage water which has its rise along the bed of a stream and forms a natural accretion thereto belongs to the stream as a part of its source of supply, the same as do feeder springs, and an appropriator of water on such stream has the right to all such tributary flow even as against the owner of the land, the conducting of water from upper reaches of a tributary to "potholes" and "reservoirs" and then capturing the seepage therefrom in ditches is insufficient proof of creating a new supply for an additional water right. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

Percolation From Irrigation on Adjacent Lands: While under section 89-804, R.C.M. 1947 (now repealed), one may employ the natural channel of a stream for the conveyance of water which he has developed and reclaim it if the rights of prior appropriators are not thereby diminished in quantity or deteriorated in quality, the rule has no application where an increase in the flow of the stream results solely by percolation from irrigation on adjacent lands. West Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938); State ex rel. Mungas v. District Court, 102 M 533, 59 P2d 71 (1936); Rock Creek Ditch & Flume Co. v. Miller, 93 M 248, 17 P2d 1074, 89 ALR 200 (1933); Beaverhead Canal Co. v. Dillon Elec. Power & Light Co., 34 M 135, 85 P 880 (1906).

Deterioration in Quality Prohibited: While section 89-804, R.C.M. 1947 (now repealed), authorizes an appropriator to turn water into the channel of a stream other than the one from which he appropriates, he may do so only if the waters in the stream the channel of which he thus uses are not deteriorated in quality to the detriment of a prior appropriator thereof. Missoula Pub. Serv. Co. v. Bitter Root Irrigation District, 80 M 64, 257 P 1038 (1927).

Developed Water Supply — Burden of Proof as to Amount: One who claims to have developed a water supply has the burden of proving the amount developed, especially when it is mingled with a water supply to which another is entitled. Spaulding v. Stone, 46 M 483, 129 P 327 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909).

Drainage Ditch — Interception of Stream's Source: In order to catch seepage water from irrigated land, the defendant constructed a drainage ditch that paralleled and intersected a stream. Because the ditch intercepted seepage water that was a source of supply for the stream, the defendant did not develop a new water supply to which he was entitled. Spaulding v. Stone, 46 M 483, 129 P 327 (1912).

DECISIONS UNDER FORMER SECTION 89-807, R.C.M. 1947
FIRST IN TIME, FIRST IN RIGHT

Priority of Senior Main Stem Water Rights Over Junior Tributary Water Rights: Appellant owns water rights in Clear Creek dating to 1910. Petitioners have water rights in Rock Creek dating to 1896. Clear Creek is a tributary of Rock Creek. In 1970, appellant obtained a court order directing the Rock Creek Water Commissioner to "carry out" the Clear Creek water rights of appellant. Following the District Court order, the Water Commissioner honored in full the requests of appellant for water without regard to any priority in the relationship of the creeks' water rights. As a result, at times of water shortage, senior Rock Creek decreed waters are cut off. In 1977, petitioners filed this action to rescind the 1970 order and to direct the Water Commissioner to subject the Clear Creek water rights to the priorities of Rock Creek water rights. The District Court ruled that the 1970 court order, applied by the Water Commissioner to fulfill junior appropriations ahead of prior decreed rights, was improper. The Supreme Court affirmed the District Court's order and further stated that the order did not violate due process. The Supreme Court reasoned that the only rights affected by the District Court order were the rights of the parties before the court. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

Prior Rights: Where plaintiff had over the years constructed a series of dikes in order to spread over his land the water which would flow down a dry gully after the melting of snow or a heavy rainfall, he had a prior right to the extent that his project was finished. He who first diverts the water to a beneficial use has the prior right thereto where the right is based upon the custom and practice of the early settlers and where there was no compliance with the statutes. Midkiff v. Kincheloe, 127 M 324, 263 P2d 976 (1953). (See, however, the dissenting opinion in the case in which it was contended that the waters were floodwaters and wastewaters which the defendant had a right to impound in a stock reservoir, 127 M 324, 263 P2d 976 (1953).)

Temporary Suspension of Prior Right: When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right in the order of priority may use the water until such time as the prior appropriator's needs justify his demanding that the junior appropriator give way to his superior claim. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled on other grounds in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

Contractual Relation or Privity: The doctrine that where the possessor of a water right claims the right as of the date on which it was initiated by another person, he must show some contractual relation or privity between himself and such other person was not modified to the extent of holding that the possessor of the land may be presumed to be the owner of the right by the decision in Wills v. Morris, 100 M 514, 50 P2d 862 (1935). Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Abandonment — Resumption: Where use of water is abandoned and resumed, use vests from the date of resumption. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); O'Shea v. Doty, 68 M 316, 218 P 658 (1923).

Priority of Appropriation: Priority of appropriation of water confers superiority of right, without reference to the character of the use, whether natural or artificial. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921); Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

DECISIONS UNDER FORMER SECTION 89-808, R.C.M. 1947
APPROPRIATION BY UNITED STATES

Method of Procedure: The United States must proceed, in making appropriations of water from nonnavigable streams of this state, as a corporation or individual. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912). See U.S. v. Burley, 172 F 615 (9th Cir. 1909); Burley v. U.S., 179 F 1 (9th Cir. 1910). See also Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

DECISIONS UNDER FORMER SECTION 89-810, R.C.M. 1947
NOTICE OF APPROPRIATION

Insufficient Notice of Appropriation Not Prima Facie Evidence:
Deeds do not qualify as notices of appropriation under section 89-810, R.C.M. 1947 (now repealed). Even if deeds were to be considered as notices, the deeds in question are fatally defective and inadmissible as evidence of an appropriation because they were executed with unsworn acknowledgments, rather than with verified affidavits as required by section 89-810. The Supreme Court reaffirmed that it has strictly construed the provisions of section 89-814, R.C.M. 1947 (now repealed), and that any nonconformance with section 89-810 renders the notice of appropriation inadmissible as evidence. Olsen v. McQueary, 212 M 173, 687 P2d 712, 41 St. Rep. 1669 (1984).

In enacting section 89-814, R.C.M. 1947 (now repealed), the Legislature established a reward for those parties who comply with section 89-810, R.C.M. 1947 (now repealed), by considering a notice of appropriation as prima facie evidence of a claimed water right. However, the former section is to be construed strictly. If the notice does not comply with section 89-810 it is of no evidentiary value. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). See also Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964); Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937); Peck v. Simon, 101 M 12, 52 P2d 164 (1935).

Extent of Right Measured by Beneficial Use: The rights of the parties are not to be measured entirely by what they claimed in their appropriation notices. They are to be measured by their beneficial use over a reasonable period of time. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980); Irion v. Hyde 107 M 84, 81 P2d 353 (1938).

Defective Notice of Appropriation: Where a notice of appropriation was dated 1886, referred to acts taking place in 1886, and was recorded in 1886, but the notary's certificate was dated 1885, it is obvious from the instrument itself that the date in the notary's certificate was a clerical error, and the notice may be received as prima facie evidence of a right dating from 1886. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964).

Rebuttal of Prima Facie Evidence: A notice of appropriation meeting the requirements of section 89-810, R.C.M. 1947 (now repealed), and filed in 1886 was admissible in evidence and entitled to be treated as prima facie evidence under section 89-814, R.C.M. 1947 (now repealed), but was not sufficient in itself to establish a water right from that date when its efficacy was destroyed by the claimant's own statement that he first used the water in 1961. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964).

Insufficient Notice: When a water rights notice was made 16 years before the enactment of section 89-810, R.C.M. 1947 (now repealed), when the notice stated a point of diversion different from that claimed by the plaintiff and when it failed to state where or when the water was to be used, the notice was insufficient to establish a water right. Stearns v. Benedick, 126 M 272, 247 P2d 656 (1952).

Date of Appropriation Where Statute Not Complied With: When a ditch was not constructed within a reasonable time after the date of the notice of appropriation, the date of appropriation would not relate back to the date of the notice but would date from the time the water was actually used. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

Record of Notice — Prima Facie Evidence: The record of notice of appropriation of water conforming to the provisions of section 89-810, R.C.M. 1947 (now repealed), and filed as provided therein is prima facie evidence of its contents. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938). See Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935).

Compliance With Statute Not Required for Valid Appropriation: A valid appropriation of water may be acquired even where there has been no compliance with the statute regulating appropriations by record, if the water has actually been diverted and applied to a beneficial use. Compliance with section 89-810, R.C.M. 1947 (now repealed), is important only with regard to the doctrine of "relation back". Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935). See also Holmstrom

Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980); Clausen v. Armington, 123 M 1, 212 P2d 440 (1949); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Fixing Date in Decree: There is no valid objection to the fixing of an arbitrary date of appropriation in a decree unless another appropriator can show that his right precedes the date fixed, instead of being subsequent to it as shown by the decree. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935), followed in 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983).

Lack of Recorded Notice — Oral Testimony: To sustain a water right based on oral testimony, as against a recorded notice, the testimony should be clear, unambiguous, and convincing. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935).

Date of Appropriation When Notice Defective: Appropriators of water were denied the right to relate back the life of their appropriation to the date of posting their notice of appropriation because their recorded notice was rendered ineffective by a fatally defective verification. Since the evidence showed that they put water on their land for a beneficial purpose on or about a certain time, their right bore the date as of such time. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

Verification of Notice:

A water right, when acquired by appropriation, amounts to a grant by the United States or the state, and the appropriator is in position of a grantee. The affidavit required by statute to be attached to a notice of appropriation serves the same purpose as and is of equal dignity with an acknowledgment. Where an appropriation was made by a firm composed of two brothers and the affidavit accompanying the notice of appropriation was verified by one of them, a grantee, as notary public, the verification was void and the notice was not entitled to record. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

A notice of location of a water right is fatally defective unless it is verified in conformity with this section. Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Essentials to Complete Appropriation Under Old Rule Prior to Act of 1885: The essential features of an appropriation of water made prior to L. 1885, p. 130, were a completed ditch and the application of water to a beneficial use. Maynard v. Watkins, 55 M 54, 173 P 551 (1918).

Essentials to Complete Appropriation by Statutory Method: To secure a completed appropriation of water under section 89-810, R.C.M. 1947 (now repealed), notice must be posted and filed as herein required; and under section 89-811, R.C.M. 1947 (now repealed), work must be commenced within 40 days after the notice is posted, and it must be prosecuted with reasonable diligence and be actually completed. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

Two Methods of Appropriating Water: Since 1885, two distinct methods of appropriating water are prescribed: one, by complying with the rules and customs of the early settlers; the other, by complying with the terms of the statute. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

Delay in Recording Appropriation: Where an appropriation of the waters of a stream for irrigating purposes was actually made by the plaintiff in the year 1880 and the water used continuously ever since but no record of the appropriation was made until 1891, such water right is superior to the one acquired and recorded by the defendant in 1889. Salazar v. Smart, 12 M 395, 30 P 676 (1892).

DECISIONS UNDER FORMER SECTION 89-811, R.C.M. 1947
DILIGENCE IN APPROPRIATING

Lack of Reasonable Diligence Shown in Three-Year and Three-Month Delay in Diversion: In litigation between the plaintiff and defendant to establish their relative rights to appropriated water, the evidence showed that the defendant's predecessor in interest filed a notice of appropriation for 30 cfs of water on May 30, 1973, but failed to divert the water to a sprinkler irrigation system until 3 years and 3 months later. The District Court did not err in holding that the defendant's predecessor failed to exercise reasonable diligence in diversion of the water. Under the rationale of Dept. of Natural Resources and Conservation v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976), the defendant was required to show there had been an ongoing effort to divert the water. The lack of parts for the sprinkler system notwithstanding, the record showed no ongoing effort to proceed to completion of the sprinkler system and the diversion. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

Diligence in Appropriating Following Notice of Appropriation Under Former Law: The requirement found in section 89-811, R.C.M. 1947, repealed in 1973, that the claimant within 40 days "proceed to prosecute the excavation or construction . . . with reasonable diligence" is not confined to the commencement of actual onsite work, but it requires steady ongoing effort in good

faith to prosecute the construction of the project. Diligence is a question of fact to be determined on a case-by-case basis. In this case, making surveys and geologic investigations, completing plans, entering into cooperative agreements, soil testing, core drilling, land and easement acquisition, obtaining financing, and entering into a contract for construction were sufficient. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). See also Dept. of Natural Resources and Conservation v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976).

Date of Appropriation Where Statute Is Not Complied With: When a ditch was not constructed within a reasonable time after the date of notice of an appropriation, the date of appropriation would not relate back to the date of the notice but rather would date from the time the water was actually used. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

Completion of Appropriation: The steps necessary to be taken to make a completed appropriation of water are: posting notice, filing it with the County Clerk, commencing construction of a ditch within 40 days after posting notice, prosecuting such work with reasonable diligence, and actual completion of the work of construction. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

Completion of Ditch — Reasonable Diligence: An appropriator of water filed a proper notice of appropriation on November 20, 1894, and shortly thereafter commenced construction of a ditch but had to suspend operations because of freezing weather. He did not work continuously on the ditch during the year 1895. Irrigation from the ditch began in the spring of 1896. In view of the length and size of the ditch, a finding that he did not proceed with reasonable diligence was unwarranted. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

DECISIONS UNDER FORMER SECTION 89-812, R.C.M. 1947
EFFECT OF FAILURE TO COMPLY WITH STATUTORY LAW

Date of Appropriation Where Statute Is Not Complied With:

When a ditch was not constructed within a reasonable time after the date of notice of an appropriation, the date of appropriation would not relate back to the date of the notice but rather would date from the time the water was actually used. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

A prior appropriator may acquire a valid water right by a completed ditch, actual diversion of the water, and its application to a beneficial use without complying with the statute. This appropriation is good against everyone except an appropriator who complies with the appropriation statute before the first claimant has applied the water to a beneficial use. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935). See also Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980); Clausen v. Armington, 123 M 1, 212 P2d 440 (1949); Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Appropriators of water were denied the right to relate back the life of their appropriation to the date of posting their notice of appropriation because their recorded notice was rendered ineffective by a fatally defective verification. Since the evidence showed that they put water on their land for a beneficial purpose on or about a certain time, their right bore the date as of such time. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

Of two claimants of water, neither of whom had complied with the statute, he who first completes his ditch and puts it to a beneficial use has the prior right, although he began to build his ditch after the ditch of the other claimant had been commenced. Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Delay in Recording Notice: Notices of appropriation of water not recorded within the time provided in the saving clause found in the original recording act (L. 1885, p. 131), while prima facie evidence of the extent of the rights where the statue was complied with, are of no evidentiary value in proving the amount and date of an appropriation. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

Doctrine of "Relation Back":

Before the doctrine of relation applies, a completed appropriation must have been effected. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

One who complies with the statutes regulating the appropriation of water acquires a right which relates back to the date of the posting of his notice of location. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Under the doctrine of "relation back", as between two persons digging ditches at the same time and prosecuting work thereon with reasonable diligence to completion, the one who first began

work had the prior right, even though the other had completed his first. Wright v. Cruse, 37 M 177, 95 P 370 (1908); but see Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Purpose of Act: The purpose and object of the Legislature was merely to define the conditions upon which the appropriator of water could have the advantage of the doctrine of relation back. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

"Appropriator": The word "appropriator" is not susceptible of any greater or narrower force than the word "claimant", as used in the California Civil Code relating to water rights. Therefore, no distinction can be drawn between the California Water Right Act and that of Montana. Murray v. Tingley, 20 M 260, 50 P 723 (1897).

DECISIONS UNDER FORMER SECTION 89-813, R.C.M. 1947
RECORD OF DECLARATION

Delay in Recording Appropriation: Where an appropriation of the waters of a stream for irrigating purposes was actually made by the plaintiff in the year 1880 and the water used continuously ever since but no record of the appropriation was made until 1891, plaintiff's water right is superior to one acquired and recorded by the defendant in 1889. Salazar v. Smart, 12 M 395, 30 P 676 (1892).

DECISIONS UNDER FORMER SECTION 89-814, R.C.M. 1947
RECORD PRIMA FACIE EVIDENCE

Insufficient Notice of Appropriation Not Prima Facie Evidence:
Deeds do not qualify as notices of appropriation under section 89-810, R.C.M. 1947 (now repealed). Even if deeds were to be considered as notices, the deeds in question are fatally defective and inadmissible as evidence of an appropriation because they were executed with unsworn acknowledgments, rather than with verified affidavits as required by section 89-810. The Supreme Court reaffirmed that it has strictly construed the provisions of section 89-814, R.C.M. 1947 (now repealed), and that any nonconformance with section 89-810 renders the notice of appropriation inadmissible as evidence. Olsen v. McQueary, 212 M 173, 687 P2d 712, 41 St. Rep. 1669 (1984).

In enacting section 89-814, R.C.M. 1947 (now repealed), the Legislature established a reward for those parties who comply with section 89-810, R.C.M. 1947 (now repealed), by considering a notice of appropriation as prima facie evidence of a claimed water right. However, 89-814 is to be construed strictly. If the notice does not comply with section 89-810, it is of no evidentiary value. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). See also Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964); Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937); Peck v. Simon, 101 M 12, 52 P2d 164 (1935).

Additional Burden of Proof Beyond Prima Facie Showing: The defendant's introduction into evidence of three notices of appropriation established a prima facie case but did not completely discharge his burden of proof. The defendant still had the burden of showing that all water claimed had been put to a beneficial use within a reasonable period of time. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

Contents of Record: The record of notice of appropriation of water conforming to the provisions of section 89-810, R.C.M. 1947 (now repealed), and filed as provided in that section, is prima facie evidence of its contents. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938); Wills v. Morris, 100 M 514, 50 P2d 862 (1935).

DECISIONS UNDER FORMER SECTION 89-815, R.C.M. 1947
RIGHTS SETTLED IN ONE ACTION

Sufficiency of Decree: A water rights decree entered by the District Court was not insufficient because it failed to specify the exact acreage to which the water rights were appurtenant, the seasonal and hourly limitations on the water rights, and the exact points of diversion. Designation of the owners of the water rights, their priority dates, the amount of the awards in miner's inches, and the source of the water was sufficient. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

Quieting Title: An action under Montana law to determine relative rights and priorities of parties claiming interests in waters of a stream, while in personam, is in effect one to quiet title to real property. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

Appeal Lying From Part of Judgment: Where two or more parties are awarded a water right under the terms of the decree, each of them recovers a judgment against the other or others; such a judgment is divisible into parts, and therefore an appeal lies from a part thereof. Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

Damages for Wrongful Diversion of Water:

Where several parties have diverted water so as to injure the crops of another, they cannot be held jointly liable for the acts of each other nor can they be sued in one action for the entire damage, with or without an apportionment of the damage. Howell v. Bent, 48 M 268, 137 P 49 (1913).

Section 89-815, R.C.M. 1947 (now repealed), does not apply to an action at law for damages for the wrongful diversion of water, where there is no allegation in the complaint that would authorize the court to grant equitable relief and there is no evidence to show that the plaintiff is entitled to such relief. Miles v. Du Bey, 15 M 340, 39 P 313 (1895). See Howell v. Bent, 48 M 268, 137 P 49 (1913).

Rights of Parties Defendant:

The first provision of section 89-815, R.C.M. 1947 (now repealed), is permissive only. Thus, there was no presumption that the respective interests of joint owners in an undivided water right had been adjudicated among themselves in a suit in which their predecessors were codefendants, in the absence of a showing to that effect upon the face of the decree or the judgment roll. Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

The Legislature, in enacting section 89-815, R.C.M. 1947 (now repealed), did not state that it intended to compel parties, made defendants to a water right suit pursuant to its provisions, to litigate their respective titles as between themselves. Further, it is doubtful that the Legislature has the power to coerce them to do so. Sloan v. Byers, 37 M 503, 97 P 855 (1908). See Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

Equitable Actions: Section 89-815, R.C.M. 1947 (now repealed), contemplates equitable actions only, in which relative priorities and conflicting rights of all parties may be settled and where the damages claimed are a mere incident. Howell v. Bent, 48 M 268, 137 P 49 (1913); Miles v. Du Bey, 15 M 340, 39 P 313 (1895).

Pleadings:

The District Court may settle the relative priorities and rights of all the parties to a water right suit in one judgment only when pleadings have been framed so as to justify such settlement. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

The provision of section 89-815, R.C.M. 1947 (now repealed), is permissive and not mandatory. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

All Parties Antagonists: In an action to settle the relative priorities and rights of the parties to the use of the waters of a stream, every party to the suit is an antagonist of every other party. McNinch v. Crawford, 30 M 297, 76 P 698 (1904). See Sloan v. Byers, 37 M 503, 97 P 855 (1908); Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

Injunction: Property owners having the right to divert the waters of a creek for irrigation purposes may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled. Beach v. Spokane Ranch & Water Co., 25 M 379, 65 P 111 (1901).

DECISIONS UNDER FORMER SECTION 89-829, R.C.M. 1947 PROCEDURE FOR APPROPRIATING WATERS OF ADJUDICATED STREAMS

Exclusive Method: The method prescribed by sections 89-829 through 89-838, R.C.M. 1947 (now repealed), for making an appropriation of the waters of an adjudicated stream is exclusive as to appropriations made after the passage of that act. Hanson v. So. Side Canal Users Assoc., 167 M 210, 537 P2d 325 (1975); Donich v. Johnson, 77 M 229, 250 P 963 (1926); Anaconda Nat'l Bank v. Johnson, 75 M 401, 244 P 141 (1926).

Filing of Petition — "Existing Right": On November 30, 1972, the plaintiff filed a petition to appropriate water from an adjudicated stream pursuant to section 89-829, R.C.M. 1947 (now repealed). This filing was the first step leading to "use" and was thereby preserved under Art. IX, sec. 3, 1972 Mont. Const., as an "existing right". Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

Diversion Into Fishpond Without Outlet Constituting Unauthorized New Appropriation: After the appointment of a Water Commissioner, there never was more than enough water in an

adjudicated stream to supply the needs of the parties under their adjudicated rights. Thus, a diversion of water from the stream by one of them into a fishpond that had no outlet constituted an attempted new appropriation under this section. In the absence of a decree establishing a new use, the diversion was unauthorized and therefore properly prohibited by an order of court in a proceeding under section 89-1015, R.C.M. 1947 (85-5-301). Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

Extent of Rights:

When a water right is allowed under the provisions of section 89-829, R.C.M. 1947 (now repealed), and sections 89-830 through 89-838, R.C.M. 1947 (now repealed), it is governed by all the provisions of the decree by which the waters in the stream were adjudicated, just as if the new appropriator had been a party to that decree. The new appropriator has the right to use the waters in the order of his juniority and divert them as of the date of his appropriation when he does not interfere with the superior rights of others. Quigley v. McIntosh, 88 M 103, 290 P 266 (1940).

Where there is an appropriator of water from an adjudicated stream who is simply a junior appropriator who may use the water subject to the superior rights of others, the decree should contain provisions respecting the use of the water as between senior and junior appropriators consistent with those contained in the original decree. The decree should also contain restrictions, such as that the new appropriator should cease to divert water when the volume of water flowing in the stream is equal to or less than that of the prior decreed rights. Quigley v. McIntosh, 88 M 103, 290 P 266 (1940).

Purpose: One seeking to appropriate water from an adjudicated stream under section 89-829, R.C.M. 1947 (now repealed), and sections 89-830 through 89-838, R.C.M. 1947 (now repealed), may do so upon compliance with the conditions prescribed without regard to whether the water sought to be appropriated is a part of the normal flow or excess or surplus water, i.e., water flowing in the stream in addition to adjudicated waters. The purpose of the act is to provide security for those whose rights have theretofore been adjudicated and to compel the new appropriator to take his water right subject to the prior rights fixed, after litigation, by the decree of a competent court. Quigley v. McIntosh, 88 M 103, 290 P 266 (1940).

DECISIONS UNDER FORMER SECTION 89-835, R.C.M. 1947 ADJUDICATING RIGHTS OF PERSONS NOT PARTY TO DECREE

"May" Not Mandatory: The provision of section 89-835, R.C.M. 1947 (now repealed), declaring that a claimant may petition the District Court for an order making him a party to the decree and establishing his right thereunder, is not mandatory in the sense that if such party fails to take advantage of the permission granted, he will be barred from thereafter complaining. State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

Trial Court Ignoring Predecessor's Claim: In a water right suit plaintiff relied upon the decree entered in a former action involving the same right as res judicata, in which defendants' predecessor had appeared and answered making claim to a certain right. However, the trial court had failed to make disposition of the claim and apparently ignored it. Thus, defendants were not barred by the former decree from having their right adjudicated. Missoula Light & Water Co. v. Hughes, 106 M 355, 77 P2d 1041 (1938).

DECISIONS UNDER FORMER SECTION 89-839, R.C.M. 1947 EFFECT OF DECREE UPON SUBSEQUENT APPROPRIATIONS

Stipulation of Parties:

This section could not relate to water rights acquired prior to its passage and approval and does not attempt to make decrees binding upon subsequent appropriators but merely makes them "prima facie evidence of the facts therein found". It is applicable only to decrees in actions "prosecuted in good faith" and "based upon evidence introduced and not upon stipulations or admissions of the parties". State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

Under this section the court in water right suits is not bound by a stipulation of the parties as to the general character and quality of the soil of their respective lands or the amount of water required for their successful and economical irrigation. Allen v. Petrick, 69 M 373, 222 P 451 (1924).

Decrees Showing Anticipation of Future Needs: When the intention is made manifest, the court must take into consideration prospective or future needs in entering a water right decree, and mere description of lands does not justify the extended use of water in the absence of recitals in the pleadings and decree and proof in the record that appropriation is made in anticipation of future

needs. In reviewing the acts of the Water Commissioner in distributing water, in a proceeding under section 89-1015, R.C.M. 1947 (85-5-301), reasonable diligence must be shown to have been exercised since entry of the decree in developing such needs. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

Inapplicable in Contempt Proceeding to Enforce Original Decree: A plaintiff instituted a contempt proceeding to enforce a 1914 water rights decree against a successor in interest of a party to the decree. As the contempt proceeding was not being brought against persons appropriating water subsequent to the decree, this section was inapplicable. Delmoe v. District Court, 100 M 131, 46 P2d 39 (1935).

DECISIONS UNDER FORMER SECTION 89-840, R.C.M. 1947
APPROPRIATIONS OF WATER SUBJECT TO PRIOR DECREES
ADJUDICATING RIGHTS

Appropriations From Adjudicated Streams: This section, regulating the method by which appropriations of water from adjudicated streams could be made, was not exclusive, but sections 89-829 through 89-838, R.C.M. 1947 (now repealed), amendatory thereof, were exclusive. Donich v. Johnson, 77 M 229, 250 P 963 (1926).

DECISIONS UNDER FORMER SECTION 89-844, R.C.M. 1947
EFFECT OF DECREE

Presumption of Correctness When Relied Upon: Where, in a suit for damage to crops resulting from wrongful diversion of water, the judgment in a former suit between the same parties was relied on in aid of the plea of res judicata, the disputable presumption is that the proceedings in the previous suit were regular under section 93-1301-7, R.C.M. 1947 (26-1-602). Cocanougher v. Mont. Life Ins. Co., 103 M 536, 64 P2d 845 (1936).

Part Law Review Articles

A New Rule of Law for the Abandonment of Water Rights, Hightower, 45 Mont. L. Rev. 167 (1984).

Changing the Balance in Western Water Law?, Montana's Reservation System, McNally & Matthews, 35 Nat. Resources J. 671 (1995).

Conflicting Directives: Water Quality and Appropriative Water Rights in the West, Viscusi, 20 Wm. & Mary Envtl. L. & Pol'y Rev. 121 (1995).

The Evolution of Water Rights, Scott & Coustalin, 35 Nat. Resources J. 821 (1995).

Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems and Solutions, Krogh, 30 Land & Water L. Rev. 9 (1995).

Water Rights and Water Quality: Recent Developments, Laitos, 23 Colo. Law 2343 (1994).

Part Collateral References

Appropriation of water generally, 78 Am. Jur. 2d Waters §§341 through 366.

Diversion or extraction of water and use thereof generally, 78 Am. Jur. 2d Waters §§48 through 76.

Diversion or extraction of water and use thereof — adjudication and enforcement of rights, generally, 78 Am. Jur. 2d Waters §§67, 73 through 79.

Diversion or extraction of water and use thereof — amount or quantity of water, 78 Am. Jur. 2d Waters §56.

Diversion or extraction of water and use thereof — apportionment and judicial control, 78 Am. Jur. 2d Waters §59.

Appropriation of water as creating right, as against subsequent appropriator, to continue method or means of diversion. 121 ALR 1044.

Right of appropriator of water to recapture water which has escaped or is otherwise no longer within his immediate possession. 89 ALR 210.

Water Rights Adjudication/Stream Access for Recreational Use, State Bar of Mont. (1984).

85-2-212. Order by supreme court.

Compiler's Comments

Water Rights Order and Extension: Pursuant to Montana Supreme Court Order No. 14833 (July 13, 1979), every person asserting a claim to an existing right for the use of water prior to July 1, 1973, was ordered to file a statement of claim for the right with the Department of Natural Resources and Conservation no later than January 1, 1982. Failure to file a claim will result in a conclusive presumption that the water right or claimed water right has been abandoned. See In re

Water Rights Order, 36 St. Rep. 1228 (1979) (apparently not reported in Montana Reports). The filing deadline was extended to April 30, 1982, with the court stating that no more extensions would be granted. See Supreme Court Order 14833 (Dec. 7, 1981).

Case Notes

Post-1973 Evidence Unpersuasive as to Adjudication of Existing Water Right: The purpose of statewide water rights adjudication is to adjudicate those rights as they existed on July 1, 1973, the effective date of the Montana Water Use Act. Therefore, the Water Court did not err in refusing to consider evidence pertaining to a water right claimant's actions taken after 1973 as showing a lack of intent to abandon the water right. In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992).

85-2-213. Notice of order.

Compiler's Comments

1999 Amendment: Chapter 389 deleted former (1)(c) that read: "(c) It shall provide a sufficient number of copies of the order to the county treasurers before October 15, 1979, 1980, 1981, and 1982, and the county treasurers shall enclose a copy of the order with each statement of property taxes mailed in 1979, 1980, 1981, and 1982. In the implementation of this subsection, the department shall provide reimbursement to each county treasurer for the reasonable additional costs incurred by the treasurer arising from the inclusion of the order required by this section. The department shall be reimbursed for such costs from the water right adjudication account created by 85-2-241"; deleted former (2) and (3) that read: "(2) (a) To ensure that all persons who failed to file a claim of existing right under 85-2-221(1) are provided notice of the opportunity to file a claim on or before July 1, 1996, as provided in 85-2-221(3), the department shall provide notice as follows:

(i) It shall, in October 1993, April and October 1994, April and October 1995, and April 1996, cause a notice of the right to file a claim in accordance with 85-2-221(3) to be published in all daily newspapers in the state and in at least one newspaper in each county in the state.

(ii) It shall, in October 1993, April and October 1994, April and October 1995, and April 1996, provide copies of the notice, in writing, to the press services with offices located in Helena.

(iii) It shall, by October 1993, provide copies of the notice to the United States attorney general and to all Indian tribes in Montana.

(iv) It shall cause copies of the notice to be posted in a conspicuous location in each county courthouse and department field office in the state and to be maintained in that location through July 1, 1996.

(v) It may also, in its discretion, provide notice in any other manner that will effectuate the purposes of 85-2-221(3).

(b) The water court shall include notice of 85-2-221(3) in all notices, decrees, or orders issued pursuant to 85-2-231 or 85-2-232 after July 1, 1993, until July 1, 1996.

(3) Notice given in accordance with subsection (2) must at a minimum indicate that any claim of existing right not filed with the department before April 30, 1982, may be filed by physically filing it with the department on or before July 1, 1996, or sending it by United States mail, postmarked on or before July 1, 1996. Additionally, the notice must indicate that under 85-2-226, a failure to file or mail the claim results in the forfeiture for all time of any existing rights to the use of water that are not claimed in accordance with the provisions of 85-2-221"; and made minor changes in style. Amendment effective July 1, 1999.

1993 Amendment: Chapter 629 inserted (2) and (3) regarding notice requirements applicable to additional filing period. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that

the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under Rule 11, Montana Rules of Civil Procedure; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

Saving Clause: Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

Severability — Partial Nonseverability: Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

85-2-215. Consolidation of matters.

Case Notes

"May" Not Mandatory: The provision of section 89-835, R.C.M. 1947 (now repealed), declaring that a claimant may petition the District Court for an order making him a party to the decree and establishing his right thereunder, is not mandatory in the sense that if such party fails to take advantage of the permission granted, he will be barred thereafter from complaining. State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

Trial Court Ignoring Predecessor's Claim: The plaintiff relied, in a water right suit, upon the decree entered in a former action involving the same right as res judicata, in which defendants' predecessor had appeared and answered making claim to a certain right. However, the trial court had failed to make disposition of the claim and apparently had ignored it. Thus, defendants were not barred by the former decree from having their right adjudicated. Missoula Light & Water Co. v. Hughes, 106 M 355, 77 P2d 1041 (1938).

Quieting Title: Action under section 89-815, R.C.M. 1947 (now repealed), to determine relative rights and priorities of parties claiming interests in waters of a stream, while in personam, is in effect one to quiet title to real property. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

Appeal From Part of Judgment: Under section 89-815, R.C.M. 1947 (now repealed), where two or more parties are awarded a water right under the terms of the decree, each of them recovers a judgment against the other or others; such a judgment is divisible into parts, and therefore an appeal lies from a part thereof. Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

Damages for Wrongful Diversion of Water:

Under section 89-815, R.C.M. 1947 (now repealed), where several parties have diverted water so as to injure the crops of another, they cannot be held jointly liable for the acts of each other nor can they be sued in one action for the entire damage, with or without an apportionment of the damage. Howell v. Bent, 48 M 268, 137 P 49 (1913).

Section 89-815, R.C.M. 1947 (now repealed), did not apply to an action at law for damages for the wrongful diversion of water where there is no allegation in the complaint that would authorize the court to grant equitable relief and where there is no evidence to show that the plaintiff is entitled to such relief. Miles v. Du Bey, 15 M 340, 39 P 313 (1895). See Howell v. Bent, 48 M 268, 137 P 49 (1913).

Equitable Actions: Section 89-815, R.C.M. 1947 (now repealed), contemplates equitable actions only, in which relative priorities and conflicting rights of all parties may be settled and where the damages claimed are a mere incident. Howell v. Bent, 48 M 268, 137 P 49 (1913); Miles v. Du Bey, 15 M 340, 39 P 313 (1895).

Rights of Parties Defendant:

The first provision of section 89-815, R.C.M. 1947 (now repealed), is permissive only. Thus, there was no presumption that the respective interests of joint owners in an undivided water right had been adjudicated among themselves in a suit in which their predecessors were codefendants, in the absence of a showing to that effect upon the face of the decree or the judgment roll. Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

The Legislature, in enacting section 89-815, R.C.M. 1947 (now repealed), did not state that it intended to compel parties, made defendants to a water right suit pursuant to its provisions, to litigate their respective titles as between themselves. Further, it is doubtful that the Legislature has the power to coerce them to do so. Sloan v. Byers, 37 M 503, 97 P 855 (1908), followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

Pleadings:

Under section 89-815, R.C.M. 1947 (now repealed), the District Court may settle the relative priorities and rights of all the parties to a water right suit in one judgment only when pleadings have been framed so as to justify such settlement. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

The provision of section 89-815, R.C.M. 1947 (now repealed), is permissive and not mandatory. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

All Parties Antagonists: Under section 89-815, R.C.M. 1947 (now repealed), every party in an action to settle the relative priorities and rights of the parties to the use of the waters of a stream is an antagonist to every other party. McNinch v. Crawford, 30 M 297, 76 P 698 (1904). See Sloan v. Byers, 37 M 503, 97 P 855 (1908); Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

Injunction: Under section 89-815, R.C.M. 1947 (now repealed), property owners having the right to divert the waters of a creek for irrigation purposes may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled. Beach v. Spokane Ranch & Water Co., 25 M 379, 65 P 111 (1901).

85-2-217. Suspension of adjudication.

Compiler's Comments

1997 Amendments: Chapter 44 in third sentence, in two places, substituted "July 1, 2005" for "July 1, 1999"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 497 in second and sixth sentences, near middle, inserted "federal non-Indian and Indian"; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1991 Amendment: In two places substituted July 1, 1999, for July 1, 1993; and made minor change in style. Amendment effective May 17, 1991.

1987 Amendment: Extended suspension period by substituting "1993" for "1987" in two places.

1985 Amendment: Changed 1985 to 1987 in two places.

Select Committee Bill: Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See Committee report published December 1984 by the Montana Legislative Council.

1981 Amendment: Deleted "From the time of filing the petition required in 85-2-211 until July 1, 1982, and" from the beginning of the section; substituted "proceedings" for "actions" before "to generally adjudicate" in the first sentence; substituted "and federal reserved water rights of those tribes and federal agencies which are negotiating" for "from a source of water in question under this part" in the first sentence; deleted "unless an action is commenced or is pending by or on behalf of an Indian tribe to adjudicate water from that source other than as provided for in Title 85, chapter 2. In such case, the suspension is maintained only if the action is dismissed or if the parties to the action stipulate to the suspension during compact negotiations of all further proceedings in the action except the determination of jurisdictional issues and an order is so issued" after "are suspended" in the first sentence; added the last five sentences describing procedures to terminate suspension of state water rights adjudication proceedings if no compact on reserved water rights is approved by the state and tribes or federal agencies by July 1, 1985.

Case Notes

Supreme Court Jurisdiction Over Water Court — Not Barred by Suspension Provision: After the U.S. Supreme Court decision in Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), that the McCarran amendment, 43 U.S.C. §666, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights, the state requested that the Montana Supreme Court exercise its powers of supervisory control over the state Water Court concerning the adjudication of federal reserved water rights. In assuming jurisdiction, the Supreme Court ruled that the request for supervisory control is not barred by the suspension provisions of this section, as the present proceeding will not generally adjudicate any Indian reserved water rights or any federal reserved water rights. This proceeding will consider the following issues: (1) is the state Water Court prohibited from exercising jurisdiction over Indian reserved water rights based on the disclaimer clause of Art. I of the Montana Constitution or otherwise; (2) is the Montana Water Use Act, Title 85, ch. 2, adequate to adjudicate Indian reserved water rights; and (3) is the Montana Water Use Act adequate to adjudicate federal reserved water rights held, on its own behalf, by the United States or any of its agencies. State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833, 41 St. Rep. 2373 (1984).

State Court Jurisdiction Over Federal and Indian Water Rights: The McCarran amendment, 43 U.S.C. §666, granting state courts jurisdiction over the United States in litigation involving a comprehensive adjudication of water rights, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights in actions brought by the United States on behalf of an Indian tribe as well as in actions brought by an Indian tribe itself. Assuming that the state adjudication procedure is adequate and complies with state law, dismissal of adjudication actions filed in federal District Court out of deference to state adjudication proceedings was proper. Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), reversing N. Cheyenne Tribe v. Adsit, 668 F2d 1080 (9th Cir. 1982); followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

85-2-218. Process and criteria for designating priority basins or subbasins.

Compiler's Comments

1987 Statement of Intent: The statement of intent attached to Ch. 651, L. 1987, provided: "A statement of intent is provided for this bill because the legislature desires to indicate to the Montana water courts and the department of natural resources and conservation the basins that should receive priority adjudication efforts.

The legislature finds and determines the basins described in I through IX below to be priority basins. The basins are selected according to the criteria in section 10 [85-2-218] of this bill and the priority provided for the Milk River basin in 85-2-321. They are listed by geographical areas because it is assumed priority basins are needed in each area to ensure efficient use of water court and department staff. The legislature recognizes that deviations from the order of priority provided may be necessary to ensure efficiency in the adjudication process, that the water judge may vary efforts from area to area based on available resources, and that additional priority basins may be added upon petition to and determination by the water judge.

I. Basins in the Billings area:

Yellowstone River from Bridger Creek to the Clark's Fork of the Yellowstone River (43QJ)

Yellowstone River above and including Bridger Creek (43B)
Sweet Grass Creek (43BV)
Stillwater River (43C)
Boulder River tributary of Yellowstone River (43BJ)
Clark's Fork of the Yellowstone River (43D)
Yellowstone River between the Clark's Fork of the Yellowstone River and the Bighorn River (43Q)
II. Basins in the Bozeman area:
Madison River (41F)
Gallatin River (41H)
Shields River (43A)
Ruby River (41C)
Beaverhead River (41B)
Red Rock River (41A)
Big Hole River (41D)
III. Basins in the Glasgow area:
Rock Creek tributary of the Milk River (40N)
Frenchman Creek (40L)
Milk River below Whitewater Creek including Porcupine Creek (40O)
Beaver Creek tributary of the Milk River (40M)
Whitewater Creek (40K)
Dry Creek (40D)
Missouri River between the Musselshell River and Fort Peck Dam (40E)
IV. Basins in the Havre area:
Sage Creek (40G)
Milk River between Fresno Reservoir and Whitewater Creek (40J)
Peoples Creek (40I)
Willow Creek (41N)
Teton River (41O)
Sun River (41K)
V. Basins in the Helena area:
Dearborn River (41U)
Clark Fork above the Blackfoot River (76G)
Boulder River tributary of the Jefferson River (41E)
Jefferson River (41G)
Missouri River above Holter Dam (41I)
VI. Basins in the Kalispell area:
Milk River above Fresno Reservoir (40F)
Big Sandy Creek (40H)
Yaak River (76B)
Fisher River (76C)
Kootenai River (76D)
Clark Fork below Flathead Lake (76N)
South Fork of the Flathead River (76J)
Middle Fork of the Flathead River (76I)
Swan River (76K)
Flathead River above Flathead Lake (76LJ)
VII. Basins in the Lewistown area:
Milk River between Fresno Reservoir and Whitewater Creek (40J)
Judith River (41S)
Musselshell River above Roundup (40A)
Musselshell River below Roundup (40C)
Flatwillow Creek including Box Elder Creek (40B)
VIII. Basins in the Miles City area:
Beaver Creek tributary of the Little Missouri River (39G)
Yellowstone River between the Tongue River and the Powder River (42K)
Little Missouri River above Little Beaver Creek (39F)
Rosebud Creek (42A)
Little Beaver Creek (39FJ)
Box Elder Creek (39E)
Yellowstone River below Powder River (42M)

IX. Basins in the Missoula area:
Rock Creek tributary of the Clark Fork River (76E)
Flint Creek (76GJ)
Clark Fork between the Blackfoot River and the Flathead River (76M)
Bitterroot River (76H)
Blackfoot River (76F)

The legislature intends by the amendment to 85-2-243 in section 8 of this bill that it be interpreted to restrict the department to utilize funds that have been appropriated for the adjudication program. The department's funding level in adjudicating water claims for the 1987-89 biennium is as specifically set forth in House Bill No. 2."

85-2-221. Filing of claim of existing water right — filing late claim.

Compiler's Comments

1993 Amendment: Chapter 629 inserted (3) and (4) establishing a procedure for filing of late claims. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under Rule 11, Montana Rules of Civil Procedure; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

Late Claim Interim Study — Water Policy Committee: Section 10, Ch. 629, L. 1993, provided: "(1) The water policy committee, in coordination with the department of justice, the department of natural resources and conservation, and the reserved water rights compact commission, shall conduct an interim study analyzing the need for and desirability and impacts of allowing the remission of forfeited water rights in addition to the remissions authorized under the provisions of [this act] [Ch. 629, L. 1993]. The study must analyze the impacts of additional forfeiture remission on:

(a) the general stream adjudication process, including but not limited to the issues of adequacy and Montana's and the federal government's concurrent water rights adjudication jurisdiction;

(b) the federal government and Indian tribes regarding existing and future negotiated water rights compacts, including but not limited to the issues of equal protection;

(c) timely claimants' water use;

(d) timely claimants' legal rights, including but not limited to constitutional requirements regarding the taking of property;

(e) the potential reduction in agricultural production resulting from not granting additional forfeiture remissions and the associated social and economic impacts;

(f) the issue of fairness to both late and timely claimants;

(g) the potential increased costs to the state and to late and timely claimants;

(h) potential losses in revenue to the state resulting from the state's failure to file claims to existing water rights on or before April 30, 1982;

(i) implications involving the state's trust responsibilities;

(j) potential litigation against the state by private parties; and

(k) impacts on municipal and county governments resulting from late claims.

(2) The study must include an analysis of the potential for identifying individuals or classes of individuals whose additional forfeiture remission could be authorized in a manner that would have an acceptable impact on those issues identified under subsection (1). The classes of late claimants include but are not limited to previously decreed water rights holders and classes established according to filing date.

(3) The study must be completed in consultation with other relevant state and federal agencies, relevant groups and organizations, and other interested and affected citizens.

(4) The water policy committee shall report the results of the study to the 54th legislature by October 1, 1994. The report must include any legislative or other policy options recommended by the water policy committee."

Saving Clause: Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

Severability — Partial Nonseverability: Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

Water Rights Order and Extension: Pursuant to Montana Supreme Court Order No. 14833 (July 13, 1979), every person asserting a claim to an existing right for the use of water prior to July 1, 1973, was ordered to file a statement of claim for the right with the Department of Natural Resources and Conservation no later than January 1, 1982. Failure to file a claim will result in a conclusive presumption that the water right or claimed water right has been abandoned. See In re Water Rights Order, 36 St. Rep. 1228 (1979) (apparently not reported in Montana Reports). The filing deadline was extended to April 30, 1982, with the court stating that no more extensions would be granted. See Supreme Court Order 14833 (Dec. 7, 1981).

85-2-222. Exemptions.

Case Notes

Water Right Held Through Pre-1973 Mesne Conveyances — Summary Judgment Incorrectly Granted — Abandonment of Right Factually Dependent: Duncan, who lived on a tract of land in Madison County, used water from a spring located on property (the large parcel) now owned separately from the parcel (the small parcel) lived on by Duncan. In 1950, Duncan conveyed all the

property in what is now the large and small parcels to Baker. In 1951, Baker divided the property, conveying the large parcel and all appurtenances to Halse and reserving the small parcel for herself. Baker made no express reservation of water rights with the reserved property, and the deed to Halse conveying the large parcel made no express grant of water rights. For the next 10 years, Baker made no use of the house located on the small parcel. In 1961, Baker conveyed the small parcel to the Hunts, expressly conveying water rights on the property. In 1963, Halse filed a declaration of vested ground water rights for the "total flow of all springs" located on the large parcel. Fosseco, who acquired the large parcel from Halse, conveyed it, through mesne conveyances, to M.S. Consulting. The Hunts conveyed the small parcel, through mesne conveyances, to the Axtells. All uses of the water were for livestock and domestic use. In 1993, the Axtells filed a notice of water rights with the Department of Natural Resources and Conservation. M.S. Consulting subsequently served the Axtells with notice that their water rights would be cut off in 45 days, and the Axtells brought an action to enjoin the discontinuance of their water supply. The District Court granted summary judgment for the Axtells, and M.S. Consulting appealed. The Supreme Court reviewed the background of the prior appropriation law in Montana, noting that because the current statutes recognize existing water rights, the law before the 1973 statutes were enacted is still the law with regard to water rights acquired before 1973. The Supreme Court reviewed the pre-1973 law and concluded that the water rights appurtenant to all the property passed to Baker but that there was a factual issue whether, as a result of Baker's nonuse of the property and its water rights for over 10 years, Baker had abandoned the water rights conveyed to her by Duncan. If the abandonment occurred, there was no reservation of conveyance and no right to use of the water after that period of nonuse. The issue of abandonment, the Supreme Court noted, depended in turn upon several other issues, such as whether Baker intended to abandon her water right. The Supreme Court also agreed with M.S. Consulting that several other issues of fact raised by the company may also exist, although it noted that these other issues were only material if the District Court ruled a particular way on the question of abandonment. Because there were genuine issues of material fact, the Supreme Court held that the District Court erred in granting summary judgment to the Axtells. Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

85-2-223. Public recreational uses.

Case Notes

State's Claim Asserted in Good Faith — Attorney Fees Not Allowed: Under the American rule that a party in a civil action is generally not entitled to attorney fees absent a specific contractual or statutory provision, the party who prevailed against the state in a case involving the public's recreational water use rights is not entitled to such fees. The Montana Water Use Act provides that the adjudication process is adversarial in nature and does not determine that the prevailing party in an ordinary water dispute is entitled to attorney fees. Dept. of Fish, Wildlife, and Parks v. Mont. Stockgrowers Ass'n, Inc., 240 M 39, 782 P2d 898, 46 St. Rep. 1925 (1989). The American rule was applied in First Nat'l Bank of Glasgow v. First Sec. Bank of Mont., 260 M 38, 857 P2d 726, 50 St. Rep. 931 (1993).

State's Right to a Pre-1973 Appropriation Use Right to Bean Lake for Recreation, Fish, and Wildlife: As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. The Department had stocked the lake, maintained the fishery resource, made studies of lake surface levels and fish population, and enforced rules relating to motor boats, and the public had made general use of the lake. The Department had been involved with the lake since 1933 and in 1964 obtained a warranty deed to 16.33 acres abutting the lake. The Department's use of the lake was beneficial within the meaning of the appropriation doctrine, but the Water Court correctly denied the claim because of a lack of diversion, intent, and notice. It is clear that under Montana law before 1973, no appropriation right was recognized for recreation, fish, and wildlife purposes, except through a Murphy right statute. The prevailing legal theory was that some form of diversion or capture of water was necessary for an appropriation, though some forms of nondiversionary water rights were given appropriation status. Since the law recognized no appropriation, the Department and public could not have intended one and adverse appropriators could not have had notice of a claim. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988).

Use Right of State in Bean Lake — Standing of Stockgrowers Association to Enter Suit — General Test for Any Association: As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right

appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. The Montana Stockgrowers Association was a proper party in the case. The Water Court required statewide notice and invitation for others to appear. The Association stated that its members could be affected, and the two other potential appropriators in Bean Lake were members of the Association. The Supreme Court adopted the following as the test to determine the standing of an association to appear as a party on behalf of its members: (1) its members would otherwise have standing in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the suit. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988).

Water Right of State in Bean Lake — Drainage Adjudication Process — Appealability of State's Claim Under Finality of Decision Rules: As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. In recent consolidated cases relating to drainage areas, the Supreme Court dismissed appeals because a certificate had not been obtained under Rule 54(b), M.R.Civ.P. (Title 25, ch. 20). In effect, the court held that the causes were not final for purposes of appeal. In this case, the court accepted jurisdiction under its power of general supervisory control over the Water Courts. The Department had filed 15 to 17 similar claims in various drainages, the same issues would recur, and a decision in the present case would help speed the water adjudication process. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988).

Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens: In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (functions now transfered to Department of Natural Resources and Conservation) and the Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

85-2-224. Statement of claim.

Compiler's Comments

1985 Amendment: In introduction of (1) inserted "arising under the laws of the state and for each right reserved under the laws of the United States which has been actually put to use"; in (2) substituted "Any claimant filing a statement of claim under subsection (1)" for "The claimant"; and inserted (3) listing requirements for filing a statement of claims for future federal reserved water rights.

Case Notes

Judicial Notice of Maps and Descriptions on Appeal: In a dispute over control of an irrigation district's headgate, the Supreme Court permitted submission on appeal of government survey descriptions and maps that had not been introduced as evidence at trial. The court reasoned: first, that the commission comments to Rule 201, Montana Rules of Evidence, indicate that published maps or charts are included within the Rule's scope; and second, that maps and descriptions are acceptable articles of evidence by which to show a water right in the adjudication process. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985), distinguished in Frank v. Harding, 1998 MT 215, 290 M 448, 965 P2d 254, 55 St. Rep. 903 (1998).

85-2-225. Filing fee — processing fee for remitted claims.

Compiler's Comments

1999 Amendment: Chapter 389 in (3)(a) at end substituted "general fund" for "water rights adjudication account for the examination of late claims by the department and for the publication of notices by the department as required under 85-2-213(2)"; at end of (3)(b) substituted "general fund" for "water rights adjudication account"; deleted (3)(c) that read: "(c) For a statement of claim that was filed after April 30, 1982, but prior to July 1, 1993, or for a statement of claim filed by a state agency, the processing fee provided for in subsection (3)(a) must be paid on or before a date to be established by the department by rule, but no later than July 1, 1999"; and made minor changes in style. Amendment effective July 1, 1999.

1993 Amendment: Chapter 629 inserted (3) assessing and providing for disposition of a processing fee; and made minor changes in style. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under Rule 11, Montana Rules of Civil Procedure; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

Saving Clause: Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

Severability — Partial Nonseverability: Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

1981 Amendments: Chapter 253 deleted "certified" before "copy" in (1)(b) and "or verified as otherwise ordered by the court" at the end of (1)(b).

Chapter 268 inserted "or 85-2-222" after "85-2-221" and substituted "must" for "shall" in (1); and added (2) establishing a $40 filing fee for exempt but voluntarily filed existing water rights claims.

Administrative Rules

ARM 36.12.1101 Payment date for filing of late claims.

85-2-226. Abandonment by failure to file claim.

Compiler's Comments

1993 Amendment: Chapter 629 near middle inserted reference to subsection (1) of 85-2-221. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under Rule 11, Montana Rules of Civil Procedure; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

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(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

Case Notes

Constitutional Validity of Conclusive Presumption of Water Right Abandonment: The legislative definition of water right abandonment set out in this section, based on failure to file a timely claim of an existing right, does not require any individualized determinations but rather applies to all persons who filed after the deadline. Water Court hearings were available to make the individual determination as to whether the deadline was met. As established in U.S. v. Locke, 471 US 84, 85 L Ed 2d 64, 105 S Ct 1785 (1985), a Legislature can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment. The legislative choice to make the presumption of abandonment conclusive rather than rebuttable is constitutionally permissible. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992), distinguishing Vlandis v. Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230 (1973).

Duty to File Water Rights — Due Process Satisfied: The objective of the Legislature in enacting this section was to meet the mandate of Art. IX, sec. 3, Mont. Const., to establish a system of centralized records for the administration of water rights. Before water rights could be adjudicated statewide, it was essential that existing rights be firmly established. This section provides a reasonable means of compelling comprehensive participation, extinguishing duplicative and exaggerated rights, and ridding local records of stale, unused water claims. The filing duty was not burdensome, unreasonable, or unrelated to the legitimate and proper legislative objective. Procedural due process considerations were sufficiently addressed through: (1) ample published and personal notice over a 4-year period; (2) an expanded opportunity to file a claim through an extension of the filing deadline; (3) an adequate opportunity for each claimant to show that he did not intend to abandon or forfeit water rights; and (4) an opportunity for all late claimants to request an evidentiary hearing with the Water Court to determine whether the deadline had in fact been missed. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

Forfeiture of Water Rights Not Considered Unjust Taking Without Compensation: Former water rights holders who forfeited their rights through failure to meet the filing deadline contended that this section was an unconstitutional taking without just compensation under state and federal laws because invalidating existing water rights for failure to file extended beyond what was reasonably necessary to preserve the public welfare. However, the deprivation occurred only as the result of the appropriators' neglect or the neglect of their predecessors and not as the result of excessive or unreasonable state action. This section does not result in taking property without just compensation because the state is not required to compensate the owner for the consequences of the owner's own neglect. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992). See also Texaco, Inc. v. Short, 454 US 516, 70 L Ed 2d 738, 102 S Ct 781 (1982).

Forfeiture of Water Rights Not Impairment of Contracts: Former water rights holders who forfeited their rights through failure to meet the filing deadline contended that this section constituted an impairment of contracts by rendering invalid water rights upon which substantial contractual relationships were based. However, failure to demonstrate the existence of any specific contract, let alone its impairment, was fatal to the impairment of contracts claim under either the state or federal constitution. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

Forfeiture of Water Rights Not Violative of Equal Protection: Former water rights holders who forfeited their rights through failure to meet the filing deadline contended that this section violated constitutional equal protection guarantees by imposing an arbitrary deadline that unreasonably divided water claimants into two classes: one class of persons who retained their rights and another, late claimants, who lost their rights without opportunity to show good cause for the late filing. This classification was alleged to have resulted in discrimination against late filers who in good faith attempted to meet the statutory filing deadline. The Supreme Court found that this section does not create different classes and that all claimants were treated equally, provided equal notice, and given equal time to file by the given deadline. Any alleged classification was created by the late filers' own negligence, and the equal protection challenge failed. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

No Constitutional Protection for Pre-1973 Water Rights: Appellants who forfeited their water rights for failing to file a timely claim pursuant to this section contended that Art. IX, sec. 3, subsection (1), Mont. Const., provided a guarantee of existing water rights and that while the Legislature may constitutionally affirm and protect existing water rights, those rights may not be

statutorily forfeited or extinguished. The Supreme Court held that that subsection does not establish immunity from sovereign powers for pre-1973 water rights. Water rights, like other property rights, are protected against unreasonable state action but do not have indefeasible status. The Legislature may enact constitutionally sound regulations, including the requirement for property owners to take affirmative actions to maintain their water rights. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

85-2-227. Claim to constitute prima facie evidence — relevant evidence — abandonment — criteria for presumption of municipal nonabandonment.

Compiler's Comments

1999 Amendment: Chapter 213 in (3) at beginning inserted "Subject to the provisions of subsection (4)"; and inserted (4) making a legislative finding, in regard to a determination of abandonment under subsection (3), that a water right claimed for municipal use to water classified as A-Closed is a unique water suited to municipal water use and the claim is presumed to not be abandoned if any part of the water right has been used and there is evidence that there is a filtration waiver under federal law, of diversion or conveyance structures for future use of the water right, of a study including an assessment that using the water right is feasible and the amount of the water right is reasonable for future needs, or of facilities connected to the municipal water supply system to apply the water right to an emergency or supplemental municipal water supply. Amendment effective March 30, 1999.

Preamble: The preamble attached to Ch. 213, L. 1999, provided: "WHEREAS, waters classified A-Closed pursuant to ARM 17.30.621 represent the highest quality waters in Montana; and

WHEREAS, almost all A-Closed drainages originate in remote, largely inaccessible, alpine settings that afford maximum natural protection for water quality; and

WHEREAS, there is either no habitation or development or extremely limited habitation or development in A-Closed drainages; and

WHEREAS, the existing municipal water rights in each of those drainages have been used for municipal supply purposes and will be needed in many of the drainages; and

WHEREAS, the high elevation alpine settings of A-Closed drainages provide gravity flowing systems that reduce the need for pumping facilities and related energy costs for Montana citizens; and

WHEREAS, the superior mineral, radiological, and microbiological quality of A-Closed waters renders them especially suitable as a raw source of municipal drinking water; and

WHEREAS, there are few gravity flow alternative sources for high quality municipal water, and therefore the loss of the right to use these high quality waters would result in the loss of a unique and irreplaceable natural resource.

THEREFORE, the 56th Legislature of the State of Montana finds that it is appropriate to enact legislation to establish a limited presumption of nonabandonment for municipal water rights situated in A-Closed basins."

Severability: Section 2, Ch. 213, L. 1999, was a severability clause.

1997 Amendment: Chapter 174 inserted (2) allowing consideration of all relevant evidence in determining existing water rights; inserted (3) allowing admissibility of evidence of abandonment; and made minor changes in style. Amendment effective March 28, 1997.

Saving Clause: Section 7, Ch. 174, L. 1997, was a saving clause.

1989 Amendment: At beginning inserted "For purposes of adjudicating rights pursuant to this part"; after "85-2-221" inserted "or an amended claim of existing right"; and inserted second sentence providing that modified preliminary decree supersedes claim of existing right until issuance of final decree. Amendment effective April 21, 1989.

Saving Clause: Section 9, Ch. 604, L. 1989, was a saving clause.

Severability: Section 10, Ch. 604, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

Case Notes

Water Right Held Through Pre-1973 Mesne Conveyances — Summary Judgment Incorrectly Granted — Abandonment of Right Factually Dependent: Duncan, who lived on a tract of land in

Madison County, used water from a spring located on property (the large parcel) now owned separately from the parcel (the small parcel) lived on by Duncan. In 1950, Duncan conveyed all the property in what is now the large and small parcels to Baker. In 1951, Baker divided the property, conveying the large parcel and all appurtenances to Halse and reserving the small parcel for herself. Baker made no express reservation of water rights with the reserved property, and the deed to Halse conveying the large parcel made no express grant of water rights. For the next 10 years, Baker made no use of the house located on the small parcel. In 1961, Baker conveyed the small parcel to the Hunts, expressly conveying water rights on the property. In 1963, Halse filed a declaration of vested ground water rights for the "total flow of all springs" located on the large parcel. Fosseco, who acquired the large parcel from Halse, conveyed it, through mesne conveyances, to M.S. Consulting. The Hunts conveyed the small parcel, through mesne conveyances, to the Axtells. All uses of the water were for livestock and domestic use. In 1993, the Axtells filed a notice of water rights with the Department of Natural Resources and Conservation. M.S. Consulting subsequently served the Axtells with notice that their water rights would be cut off in 45 days, and the Axtells brought an action to enjoin the discontinuance of their water supply. The District Court granted summary judgment for the Axtells, and M.S. Consulting appealed. The Supreme Court reviewed the background of the prior appropriation law in Montana, noting that because the current statutes recognize existing water rights, the law before the 1973 statutes were enacted is still the law with regard to water rights acquired before 1973. The Supreme Court reviewed the pre-1973 law and concluded that the water rights appurtenant to all the property passed to Baker but that there was a factual issue whether, as a result of Baker's nonuse of the property and its water rights for over 10 years, Baker had abandoned the water rights conveyed to her by Duncan. If the abandonment occurred, there was no reservation of conveyance and no right to use of the water after that period of nonuse. The issue of abandonment, the Supreme Court noted, depended in turn upon several other issues, such as whether Baker intended to abandon her water right. The Supreme Court also agreed with M.S. Consulting that several other issues of fact raised by the company may also exist, although it noted that these other issues were only material if the District Court ruled a particular way on the question of abandonment. Because there were genuine issues of material fact, the Supreme Court held that the District Court erred in granting summary judgment to the Axtells. Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

Additional Burden of Proof Beyond Prima Facie Showing: The defendant's introduction into evidence of three notices of appropriation established a prima facie case but did not completely discharge his burden of proof. The defendant still had the burden of showing that all water claimed had been put to a beneficial use within a reasonable period of time. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

Insufficient Notice of Appropriation Not Prima Facie Evidence: In enacting section 89-814, R.C.M. 1947 (now repealed), the Legislature established a reward for those parties who comply with section 89-810, R.C.M. 1947 (now repealed), by considering a notice of appropriation as prima facie evidence of a claimed water right. However, the former section is to be construed strictly. If the notice does not comply with section 89-810, it is of no evidentiary value. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). See also Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964); Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937); Peck v. Simon, 101 M 12, 52 P2d 164 (1935).

Contents of Record of Notice: The record of notice of appropriation of water conforming to the provisions of section 89-810, R.C.M. 1947 (now repealed), and filed as provided therein is prima facie evidence of its contents. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938); Wills v. Morris, 100 M 514, 50 P2d 862 (1935). See Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935).

Delay in Recording Notice: Notices of appropriation of water not recorded within the time provided in the saving clause found in the original recording act (L. 1885, p. 131) are of no evidentiary value in proving the amount and date of an appropriation in case of noncompliance. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

Verification of Notice:

A water right, when acquired by appropriation, amounts to a grant by the United States or the state, and the appropriator is in position of a grantee. The affidavit required by statute to be attached to a notice of appropriation serves the same purpose as and is of equal dignity with an acknowledgment. Where an appropriation was made by a firm composed of two brothers and the affidavit accompanying the notice of appropriation was verified by one of them, a grantee, as

notary public, the verification was void and the notice was not entitled to record. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

A notice of location of a water right is fatally defective unless it is verified in conformity with section 89-810, R.C.M. 1947 (now repealed). Murray v. Tingley, 20 M 260, 50 P 723 (1897).

85-2-228. Federal reserved water rights with priority date of July 1, 1973, or later — process and adjudication — purpose.

Compiler's Comments

1997 Amendment: Chapter 497 in (4), near end before "reserved water right", inserted "federal"; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

Effective Date: Section 4, Ch. 343, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 4, 1991.

85-2-231. Temporary preliminary and preliminary decree.

Compiler's Comments

1997 Amendment: Chapter 174 substituted (2)(c) regarding issuance of an interlocutory decree for former language that read: "This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree, pursuant to 85-2-321 or as provided in subsection (1) of this section, or if such a decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree"; in (3), at beginning, inserted "temporary", near middle, after "supply of water", inserted "or any claim or group of claims", near end, before "preliminary", inserted "temporary", and at end deleted "or portions of the same decree"; in (4), at beginning, inserted "temporary preliminary decree" and deleted second sentence that read: "The water judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency"; in (5), near middle of first sentence after "preliminary decree", deleted "set forth in subsections (1) and (3)"; deleted (6) that read: "(6) In issuing a subsequent preliminary decree, the water judge shall incorporate the temporary preliminary decree for the basin as modified by objections and hearings. The temporary preliminary decree or preliminary decree, as modified after objections and hearings, is enforceable and administrable according to its terms among parties ordered under 85-2-406. The preliminary decree, as modified after objections and hearings, shall upon issuance supersede and replace the temporary preliminary decree"; and made minor changes in style. Amendment effective March 28, 1997.

Saving Clause: Section 7, Ch. 174, L. 1997, was a saving clause.

1989 Amendment: Inserted (1) authorizing Water Judge to issue temporary preliminary decree if necessary for orderly adjudication or administration of water rights; in (1)(c) inserted "or as provided in subsection (1) of this section"; inserted (6) requiring Water Judge in issuing preliminary decree to incorporate temporary preliminary decree, as modified, after objections and hearings and providing that preliminary decree, as modified, supersedes and replaces temporary preliminary decree; and made minor changes in form. Amendment effective April 21, 1989.

Severability: Section 6, Ch. 605, L. 1989, was a severability clause.

Applicability: Section 8, Ch. 605, L. 1989, provided: "[This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act]." Effective April 21, 1989.

1985 Amendments: Chapter 394 in (1)(d) near end after "temporary decree", inserted "pursuant to 85-2-321 or", and after "decree is", inserted "otherwise".

Chapter 667 near end of (3) after "agency", deleted "whether or not it has been ratified by congress".

Select Committee Bill: Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See Committee report published December 1984 by the Montana Legislative Council.

1981 Amendment: Deleted "Within a reasonable time after the close of the filing period" at the beginning of (1); inserted (1)(c) requiring water judge to consider the contents of an approved compact or filings for federal and Indian reserved rights when issuing a preliminary decree; added the material beginning with "The preliminary decree shall be issued . . ." in (1)(d); inserted (2) authorizing water judge to issue a preliminary decree for a hydrologically interrelated portion of a water division at a time different from the issuance of other preliminary decrees or portions of the same decree; substituted "approved by the legislature and the tribe or federal agency" for "agreed upon by the parties to the compact" in (3).

Code Commissioner Correction: Because of rearrangement of sec. 27, Ch. 697, L. 1979, the Code Commissioner, 1979, added the words "negotiated under the provisions of part 7" to the last sentence of (2).

Rules of Procedure: Rules of procedure (including Rules 1 through 9 of the following) for the Water Courts for the state of Montana were approved by Supreme Court order on October 29, 1981, became effective on March 1, 1982, and apply to all proceedings in the Water Courts on or after that date. Rule 10 was approved and became effective on February 9, 1984. The complete text of the rules follows:

RULES OF THE WATER COURTS
FOR THE STATE OF MONTANA

"". . . to expedite and facilitate the adjudication of existing water rights," is the mandate of the Legislature to the Water Courts of Montana and is the governing principle of these Rules of Practice.

The Montana Rules of Civil Procedure (M.R.Civ.P.), the Montana Rules of Evidence (M.R.E.), and Supreme Court of Montana Uniform Court Rules for local District Courts govern the practice of the Water Courts.

The special Rules of Practice of the Water Courts prevail where there is a conflict. The Water Courts must and will insist on the carrying out of the mandate of the Legislature.

These Rules shall be cited Water Court Rules (WCR).

RULE 1

Right to trial by jury does not exist in adjudication of water rights.

RULE 2

Investigative reports and other data submitted by the Department of Natural Resources and Conservation to the Water Courts before the issuance of a preliminary decree, and during the course of the hearings on the preliminary decree, shall be admissible for consideration by the Water Courts; this material is not excluded by the hearsay rule.

RULE 3

To assure prompt hearings before the Water Courts, these Rules shall be followed at the pleading and preliminary stage:

A. Prehearings shall be held on the request of the party or the Water Court's own motion. Prehearings shall be the rule rather than the exception.

B. Discovery. We adopt the M.R.Civ.P. rule on discovery with the right of the Water Courts to shorten time, control procedures and eliminate discovery methods used to delay.

C. The Water Courts will use consolidation either on motion of parties or its own motion to expedite adjudication.

D. When a Water Court deems it necessary, it may order the Department of Natural Resources and Conservation to become a party to any preliminary hearing and may request it to conduct a field investigation, provide data and testify at hearings on matters before the Water Court.

E. Any claimant who has filed an objection and requested a preliminary hearing, or has filed a notice to appear at the preliminary hearing and makes any further pleading or other motion with the Water Courts in regard to a particular hearing, must serve a copy only upon those claimants of record who have filed the objection or notice to appear, or who have otherwise become a party to the hearing.

F. Request for continuance must be made in writing to the Water Courts.

A request for continuance must be filed not less than five days before the hearing and in the discretion of the Water Judge or Water Master will only be granted upon a substantial showing of good cause.

RULE 4

Clerical errors in the preliminary and final decrees may be corrected by the Water Courts at any time.

RULE 5

A party does not have a right to substitution of a Water Judge or Water Master. Any substitution is at the discretion of the Water Judge of the division or the Chief Water Judge.

RULE 6

Procedure for Filing Objections to the Preliminary Decree

1. A person named in a preliminary decree, or other person for good cause shown, may object to the preliminary decree and request a hearing before the Water Courts. For purposes of filing an objection, "good cause shown" shall include:

A showing that one has a substantial reason for objecting, which means that the party has an interest that has been affected by the preliminary decree and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting.

An objection and a request for hearing must be filed on the forms provided by the Water Courts and received by the Court on the date set in the notice of availability.

2. The objection must be filed on a form provided by the Water Courts.

The objector shall also attach to the prescribed form:

a. A precise statement of any of the findings to which the objector disagrees, including a statement of what the objector contends those findings should be;

b. A statement of the specific grounds and evidence upon which the objection is based.

RULE 7

Procedure for Obtaining Extension of Time for Filing Objections

1. An extension of the period for filing objections, not to exceed ninety days, may be granted by the Water Judge for good cause shown. Application for an extension must be filed on a form supplied by the Water Courts. The application for extension must be made within ninety days after the entrance of notice of a preliminary decree. Requests for extension must be on the prescribed Water Court form.

The party requesting the extension shall also attach to the form:

a. A statement of the party's rights or interest that could adversely be affected; and

b. A precise statement of the reasons why the objection could not be completed within the ninety days prescribed above.

2. For the purposes of requesting an extension for the objection period, "good cause shown" shall include:

a. A precise statement of the party's rights or interest that could be adversely affected;

b. A showing of one of the following:

i. newly discovered facts or evidence giving rise to the objection which was not discovered by due diligence and the development of the evidence will necessitate more than the remaining time allowed for objections;

ii. any other reason where failure to extend the ninety day objection period would result in an injustice.

The Water Courts are reluctant to grant extensions and the time limits of an extension will be limited.

RULE 8

Notice of Request for Hearing and Intent to Appear

Pursuant to 85-2-233 MCA 1978, the Water Court shall send notice to each party named in a preliminary decree in a water basin, sub-basin or drainage that a hearing has been requested. The notice shall also be published once in at least one paper of general circulation in the area where the basin, sub-basin or drainage is located. That notice shall set forth a statement advising persons where a copy of the objections can be reviewed. It shall set a day when all parties who wish to participate further in any hearings shall file in writing with the Water Courts a notice of intent to appear and participate in any future hearing.

Any party intending to appear and participate in further proceedings must file a notice of appearance on the forms prescribed and furnished by the Court.

The party shall also attach to the prescribed form:

a. A concise statement of the appearing party's legal rights that may be affected by the preliminary hearing and the purposes for which further participation is sought.

All notices of intent to appear and participate in future hearings must be received by the Water Courts on the day fixed by the Courts for submission of an intent to appear. The Court shall notice those parties who filed an objection or who filed a notice to appear, of all future proceedings in regard to the relevant hearing.

RULE 9

Notice of entry of a final decree shall be sent to those parties of record in the basin, sub-basin or drainage. It shall also be published once in a paper of general circulation in the area where the basin, sub-basin or drainage is located. Appeals to the Supreme Court of the State of Montana shall be made within the time frame allowed in Rule 5 of the Montana Rules of Appellate Civil Procedure [now Montana Rules of Appellate Procedure].

The content of a Notice of Appeal shall be in the form prescribed by Rule 4(c) of the Montana Rules of Appellate Civil Procedure [now Montana Rules of Appellate Procedure]. A Notice of Appeal from a judgment of the Water Courts must also include a specific listing of all water right numbers for which appeal is taken.

RULE 10

Statutory procedures and Water Court Rules for notice, objections, extensions and hearings and all other matters pertaining to a Preliminary Decree shall apply as well to a Preliminary Decree with allowances for compacts, compact negotiating and federal reservations."

85-2-232. Availability of temporary preliminary or preliminary decree.

Compiler's Comments

1999 Amendment: Chapter 389 in (4) inserted second sentence requiring fee to be deposited in state general fund. Amendment effective July 1, 1999.

1995 Amendment: Chapter 197 in (1)(c) and (1)(d) inserted language requiring Water Judge to serve by mail a notice of availability of the temporary preliminary decree or preliminary decree; at end of (1)(b), (1)(d), and (1)(e) inserted language providing for notice of availability of decrees to be sent to successors of the original owners of water rights; and made minor changes in style. Amendment effective March 23, 1995.

1989 Amendment: In four places, before "preliminary decree", inserted "temporary preliminary decree or"; in three places inserted "within the decreed basin"; in (1), after "decree", inserted "issued for a basin" and in third sentence, before "permit", deleted "beneficial water use" and after "permit" inserted "to beneficially use water within the decreed basin"; inserted (2) requiring publication of a notice of availability of preliminary decree in three newspapers where basin is located for 3 consecutive weeks before final decree is issued; and made minor changes in phraseology. Amendment effective April 21, 1989.

Severability: Section 6, Ch. 605, L. 1989, was a severability clause.

Applicability: Section 8, Ch. 605, L. 1989, provided: "[This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act]." Effective April 21, 1989.

1983 Amendment: In first sentence of (1), after "existing right" inserted "and to the purchaser under contract for deed, as defined in 70-20-115, of property in connection with which a claim of existing right has been filed".

85-2-233. Hearing on temporary preliminary decree or preliminary decree — procedure.

Compiler's Comments

1997 Amendment: Chapter 174 in (1)(a), in introductory clause, substituted "subsection (9)" for "subsection (7)"; in (1)(c), at end of first sentence, inserted "issued before March 28, 1997"; inserted (1)(d) setting out allowable reasons for objecting or counterobjecting to a matter contained in a prior decree; in (2), at beginning, substituted "Objections" for "If a hearing is requested, the request"; inserted(3) regarding notification of parties whose claim received an objection; in (4), at beginning, substituted "Objections and counterobjections" for "The request for a hearing"; in (5)(a), in first sentence after "filing", substituted "counterobjections under subsection (3)" for "objections and upon timely receipt of a request for a hearing" and after "preliminary decree" substituted "or that person's successor as documented in the department records that objections and counterobjections have been filed" for "that a hearing has been requested" and in fifth sentence, after "conducted", inserted "in the same manner"; inserted (5)(b) allowing the parties to participate in settlement conferences or mediation; inserted (6) regarding public notice provisions; in (10) substituted "subsection (9)" for "subsection (7)"; and made minor changes in style. Amendment effective March 28, 1997.

Saving Clause: Section 7, Ch. 174, L. 1997, was a saving clause.

Rule Reference: If the proposed amendment to Rule 53, M.R.Civ.P., is adopted, the reference to Rule 53(e) in this section will become Rule 53(a)(5). See proposed amendment comment to Rule 53 for text of proposed amendment.

1995 Amendment: Chapter 421 in (1)(a) inserted "and subject to the provisions of subsection (7)"; inserted (1)(b) defining good cause shown; in (3), after "must", deleted "contain a precise statement of the findings and conclusions in the temporary preliminary decree or preliminary decree with which the department or person requesting the hearing disagrees"; inserted (7) concerning dismissal of objection pertaining to previously decreed element; inserted (8) concerning applicability of subsection (7); and made minor changes in style. Amendment effective April 13, 1995.

1989 Amendment: At beginning of (1)(a) substituted language requiring a hearing, upon showing of good cause, on objection to temporary preliminary or preliminary decree for "Upon objection to the"; in (1)(a)(ii) inserted "temporary preliminary decree or"; in (1)(a)(iii) substituted "within the basin entitled to receive notice under 85-2-232(1)" for language entitling person showing good cause to a hearing before judge; inserted (1)(a)(iv) requiring hearing, upon showing of good cause, on objection to decree by any person claiming use of water from sources in other basins hydrologically connected to sources in decreed basin and who is entitled to statutory notice; inserted (1)(b) providing that a person does not waive right to preliminary decree by failing to object to temporary preliminary decree and outlining under what circumstances a person who was a party when an objection was previously litigated and resolved in a temporary preliminary decree may subsequently raise an objection in a preliminary decree; in first sentence of (2) increased filing time from "90 days" to "180 days", before "entry" deleted "notice of" and inserted "temporary preliminary decree or" and in second sentence, after "limit", substituted "up to two" for "an", substituted "90-day periods" for "90 days", and after "made" substituted "prior to expiration of the original 180-day period or any extension of it" for "within 90 days after notice of entry of the preliminary decree"; in (3) and (4), before "preliminary decree", inserted "temporary preliminary decree or"; and made minor changes in phraseology. Amendment effective April 21, 1989.

Severability: Section 6, Ch. 605, L. 1989, was a severability clause.

Applicability: Section 8, Ch. 605, L. 1989, provided: "[This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act]." Effective April 21, 1989.

1985 Amendment: Inserted (5) barring a subsequent cause of action upon failure to object to a preliminary decree in a compact negotiated and ratified with an Indian tribe or the federal government; and inserted (6) describing procedures following invalidation of a compact with an Indian tribe or federal agency.

1981 Amendment: Increased the additional time extension from 30 to 90 days in (2).

Case Notes

DECISIONS UNDER FORMER LAW

Standing to Challenge Award of Water Right: A party has standing to challenge a water right only if it conflicts with those granted to him. Thus, he has no standing to challenge a right to water from a source in which he has no water right. However, he may challenge a water right from a source from which he has a water right whether the challenged right is prior or subsequent to his own. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

85-2-234. Final decree.

Compiler's Comments

1993 Amendment: Chapter 629 near beginning of (3), after "persons", substituted "who have filed a claim in accordance with 85-2-221" for "required by 85-2-221 to file a claim for an existing right"; and made minor changes in style. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under Rule 11, Montana Rules of Civil Procedure; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

Saving Clause: Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

Severability — Partial Nonseverability: Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

1989 Amendment: Inserted (4) relating to tabulation of water rights and their priorities in final decree; and inserted (8) relating to correction of clerical mistakes in final decree.

Severability: Section 2, Ch. 426, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 3, Ch. 426, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all final decrees that have been issued by the Montana water courts and prospectively to all final decrees issued on or after [the effective date of this act]." Effective October 1, 1989.

1987 Amendment: In (5)(b), after "water", deleted "rate, and volume" and after "right" inserted "as follows"; and inserted (5)(b)(i) through (5)(b)(iii) requiring final water decree to state amount of water by flow rate for direct flow rights, by volume for rights not susceptible to flow rate measurement, or by flow rate and volume for rights determined by Water Judge to require both. Amendment applies retroactively to decrees issued by a Water Judge under Title 85, ch. 2. part 2, after April 30, 1982.

1987 Statement of Intent: The statement of intent attached to Ch. 438, L. 1987, provided: "The legislature intends that water rights should not be quantified in a temporary preliminary,

preliminary, or final decree except as historically defined in Montana and except where a water judge determines that quantification of both volume and flow rate are required to adequately administer the right. For example, most irrigation water rights have been defined in Montana only by flow rate, reservoir rights have been commonly defined by volume, and hydropower rights have been defined by both flow rate and volume. The courts retain discretionary power to quantify water rights in terms of their historic definitions. It is the intent of the legislature that the water judges exercise their discretionary power on all existing and future decrees to reduce, to the extent possible, objections to water rights that have not historically been defined by volume."

Applicability: Section 2, Ch. 438, L. 1987, provided: "This act applies retroactively, within the meaning of 1-2-109, to all decrees issued by a water judge under Title 85, chapter 2, part 2, after April 30, 1982."

1985 Amendment: Inserted (2) requiring terms of compact to be included in the final decree; in (3) inserted "and of any federal agency or Indian tribe possessing water rights arising under federal law, required by 85-2-702 to file claims"; in (4) inserted "federal agency, and Indian tribe"; in (5) inserted "arising under the laws of the state of Montana"; and inserted (6) listing requirements for a final decree for a person, tribe, or federal agency possessing federal water rights.

Select Committee Bill: Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). The Legislature did not adopt the exact version proposed by the Committee. See Committee report published December 1984 by the Montana Legislative Council.

Compiler's Note: The reader is referred to the compiler's note under 85-2-231 for a description of the adoption of the rules of procedure for the Water Courts for the state of Montana and for the text of the rules.

Case Notes

DECISIONS UNDER CURRENT LAW

District Court Error in Restraining Use of Contracted Irrigation Water: Micks contracted to purchase the right to 775 acre feet of water from the Deadman"s Basin Water Users Association, to be appropriated from the Deadman's Basin Reservoir, in order to irrigate a hay crop. In April 2000, the District Court appointed two Water Commissioners to distribute the reservoir water pursuant to a rotation plan. In August 2000, the District Court, on its own motion, found that the water level in the reservoir had reached a critical level, that the remaining water was necessary to maintain domestic, municipal, stock, and wildlife usage, and that the irrigation of crops from the river was prohibited as long as the reservoir level remained critically low. Micks determined that he had used only 431 acre feet of his contracted 775 acre feet, and based on his limited usage and other reasons, he presumed that the District Court prohibition did not apply to him, so he continued to irrigate his hay crop. Micks' continued irrigation was discovered, and he was ordered by the District Court to show cause why he should not be held in contempt for failure to comply with the prohibition order. Micks requested that the District Court reconsider its order, but the request was denied, so Micks appealed. The Supreme Court noted that under Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the jurisdiction to interpret and determine existing water rights rests exclusively with the Water Courts and that although the District Court has the authority to supervise the distribution of previously adjudicated water or to enforce an existing water decree and may in certain cases fill in a pre-1973 decree with further delineations, such as time or season of use and acreage of application, in this case, the District Court made a priority determination regarding domestic and irrigation water consumption based on the court's own inclinations, exceeding its authority to simply fill in a water decree with further delineations. Micks' contract unambiguously required a pro rata reduction in water distribution when an inadequate amount existed to satisfy outstanding water purchase contracts. Therefore, the District Court erred as a matter of law when it employed a first come, first served policy in contravention of the water contract. Denial of Micks' motion to reconsider the prohibition order was reversible error, and his motion to restrain the Water Commissioners from interfering with use of Deadman's Basin Reservoir irrigation water to which he was entitled should have been granted. In re Petition of Deadman's Basin Water Users Ass'n to Appoint Water Comm'r to Distribute Stored Water, 2002 MT 15, 308 M 168, 40 P3d 387 (2002).

Jurisdiction of District Court to "Update" Old Water Rights Decree — Statute Governing Complaints by Dissatisfied Users Inapplicable: Pursuant to a previous writ of supervisory control, a remand to the District Court, and findings entered by the Senior Water Master, the Supreme

Court found that the Order Authorizing Updated Decree, entered by the judges of the Fourth Judicial District in January of 1989, was beyond the jurisdiction of the District Court. The order was intended to deal with the problem of a 1902 water rights decree by a District Court, in which the judge adjudicated 27 water rights on Carlton Creek, that had become so brittle with age and damaged by time that the decree could not be readily handled. In the process of updating and reissuing the 1902 order, the Supreme Court found that the Fourth Judicial District Judges had actually made a de facto adjudication of water rights in an overly appropriated drainage and that that adjudication had been undertaken without notice and hearing to the holders of certain of those water rights. Citing Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the Supreme Court held that under subsection (6) of this section, it is within the sole jurisdiction of the Water Court to determine such things as priority dates, flow rates, place of use, and means of diversion with respect to a water right. The Supreme Court also held that the matters adjudicated by the decree were not within the scope of matters cognizable under 85-5-301 because that section concerns the correct administration of a water rights decree while the Updated Decree attempts to change the terms of the decree itself. For these reasons, the Supreme Court vacated the 1989 Updated Decree. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

No Right of Appeal Except From Final Judgment: There is no right of appeal granted to a water right claimant under the state water rights adjudication process except from a final decree entered under this section. In re Adjudication of Sage Creek Water Rights, 234 M 243, 763 P2d 644, 45 St. Rep. 1876 (1988).

"Beneficial Use": No matter how a water right is expressed in the decrees of the Water Court, that expression of amount is not the final determining factor. Beneficial use is the basis, the measure, and the limit of all rights to the use of water. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Expression of Water Rights in Volume Rather than Flow Rate — Not Unconstitutional: Even though almost every irrigation water right prior to the 1973 water use law was expressed in flow rate, the requirement of 85-2-234(5)(b) that the final decree state "the amount of water, rate, and volume, included in the right" is not unconstitutional under Article IX, sec. 3(1) of the Montana Constitution. The amount, rate, and volume are at all times subject to the requirement of beneficial use. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Supreme Court Original Jurisdiction Over Declaratory Action Concerning Statewide Water Adjudication: The Supreme Court had power to determine an action for declaratory judgment involving the constitutionality of the requirement in 85-2-234 that final water decrees state "the amount of water, rate, and volume, included in the right". The issue affects all rights in the statewide adjudication process. Determination of the issue by the Supreme Court: (1) will provide guidance to the water court; (2) is in the interests of judicial economy; and (3) would serve the public policy of the state by expediting the determination of existing water rights. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Appeal of Water Court Order Regarding Two Parties Before Final Decree — Rule 54(b) Certification of Tort Issues: A Water Court order awarding priorities between two parties is a final and appealable order even though the basin-wide adjudication has not been completed. It is necessary that the parties' respective irrigation water allowances be determined without their having to wait for the basin-wide decree before appealing to the Supreme Court. The fact that trespass and damage claims have not yet been decided does not deprive the Supreme Court of jurisdiction to hear the appeal. The Water Court properly entered a Rule 54(b) certification. The determination of these claims is beyond the jurisdiction of the Water Court, but they cannot be decided until the water rights are resolved. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

"All Existing Rights": The right to acquire water rights is a valuable right, and its value often depends on its priority. Hence, to deprive plaintiff of his priority by dismissal because the petition was filed under former law is to deprive him of an existing and valuable water right. Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

DECISIONS UNDER FORMER LAW

Amount of Water Appropriated — Lack of Capacity at Diversion Point: An appropriator could not acquire a right to more water than his ditch would carry, if the ditch could not carry more than the headgate capacity. Because of lack of capacity at the diversion point, the Supreme Court rejected as inherently improbable evidence of a greater appropriation and reduced the award on

the basis of its independent review of the transcript. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

Sufficiency of Decree: Under section 89-815, R.C.M. 1947 (now repealed), a decree is sufficiently definite if it designates the owners of the various water rights, their priority dates, the amount of the awards in miner's inches, and the source of the water. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

Collateral Attack: A decree giving an appropriator the right to use water on certain named land outside the drainage area where appropriated could not be attacked in a later proceeding on the ground that appropriator had never applied water to that land. McIntosh v. Graveley, 159 M 72, 495 P2d 186 (1972).

Date of Appropriation Where Statute Is Not Complied With:

Where a ditch was not constructed within a reasonable time after date of notice of appropriation, the date of appropriation would not relate back to the date of such notice but would date from the time the water was actually used. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

A prior appropriator may acquire a valid water right by a completed ditch, actual diversion of the water, and its application to a beneficial use without complying with the statute and have a right which is good against everyone, except against an appropriator who complies with the statute before the first claimant has applied the water to a beneficial use. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935); Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Of two claimants of water, neither of whom had complied with the statute, he who first completes his ditch and puts it to a beneficial use has the prior right, although he began to build his ditch after the ditch of the other claimant had been commenced. Murray v. Tingley, 20 M 260, 50 P 723 (1897), but see Wright v. Cruse, 37 M 177, 95 P 370 (1908).

Extent of Use in Terms of Flow Per Unit of Time: The fact that for many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied, or to expand appropriations to the detriment of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

Beneficial Use — Measurement of Water:

The rights of appropriators of water may not be measured entirely by what they claimed in their notices of appropriation but must be measured by their beneficial use thereof over reasonable periods; consideration must be given to the extent and manner of their use, the character of the land upon which used, and the general necessities of the case, as well as whether the stream is furnished by usual rains or snows, extraordinary rain or snowfall, or by springs or seepage. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

Neither the appropriator of water nor one to whom a right is decreed owns the corpus of any part of the flow of a stream. He is entitled only to the beneficial use of the amount of water called for by his appropriation or the decree when he has need for it, provided his distributing system has a sufficient capacity to carry that amount. If it is incapable of carrying that amount, his right is measured by the capacity of his system of distribution regardless of his needs. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

Quieting Title: An action under Montana law to determine relative rights and priorities of parties claiming interests in waters of a stream, while in personam, is in effect one to quiet title to real property. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

Fixing Date in Decree: There is no valid objection to the fixing of an arbitrary date of appropriation in a decree unless another appropriator can show that his right antedates the date fixed, instead of being subsequent thereto as shown by the decree. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935).

Appeal Lying From Part of Judgment: Where two or more parties are awarded a water right under the terms of the decree, each of them recovers a judgment against the other or others; such a judgment is divisible into parts and therefore an appeal lies from a part thereof. Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

Date of Appropriation When Notice Is Defective: Appropriators of water were denied the right to relate back the life of their appropriation to the date of posting their notice of appropriation

because their recorded notice was rendered ineffective by a fatally defective verification. Because the evidence showed that they put water on their land for a beneficial purpose on or about a certain time, their right bore the date as of that time. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

Water Necessary Per Acre: The question as to what amount of water is necessary per acre for irrigation is one of fact and never one of law, notwithstanding the adoption of the rule generally in this state to allow an inch to the acre, in the absence of evidence warranting a greater or lesser award. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

Beneficial Use — Irrigation: Respecting the use of water for purposes of irrigation, the ultimate question in every case is how much will supply the actual needs of the prior claimant under existing conditions. Conrow v. Huffine, 48 M 437, 138 P 1094 (1914).

Land Qualifications Unnecessary for Appropriation:

An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

The right to the use of water may be owned without regard to the title to lands on which the water is to be used. Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

Beneficial Use — Intent of Claimant: As every appropriation must be made for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof. Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

Rights of Parties Defendant: The Legislature, in enacting section 89-815, R.C.M. 1947 (now repealed), did not state that it intended to compel parties, made defendants to a water right suit pursuant to its provisions, to litigate their respective titles as between themselves. Further, it is doubtful that the Legislature has the power to coerce them to do so. Sloan v. Byers, 37 M 503, 97 P 855 (1908), followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

Law Review Articles

Montana Water Rights—A New Opportunity, Stone, 34 Mont. L. Rev. 1 (1973).

Collateral References

Montana Water Law Handbook, Doney, State Bar of Mont. (1981), pp. 120 through 134.

85-2-235. Appeals.

Compiler's Comments

1995 Amendment: Chapter 421 inserted (2) concerning appeal of interlocutory decree; and made minor changes in style. Amendment effective April 13, 1995.

1989 Amendment: In (1) and (2) inserted reference to temporary preliminary decree; and in (2), after "rights", inserted "or priorities", substituted "affected" for "altered", and substituted "an objection filed" for "a hearing requested". Amendment effective April 21, 1989.

Severability: Section 6, Ch. 605, L. 1989, was a severability clause.

Applicability: Section 8, Ch. 605, L. 1989, provided: "[This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act]." Effective April 21, 1989.

Case Notes

DECISIONS UNDER CURRENT LAW

Determination of Final Water Rights Judgment Under Rule — Appeal From Water Court: Rule 54(b), M.R.Civ.P. (Title 25, ch. 20), provides for and allows a water right claimant to seek and procure from the Water Court an express direction for the entry of a final judgment as to his claim upon the express determination of the Water Court that there is no just reason for delay. Such action under Rule 54(b) constitutes a final judgment within the meaning of this section, which provides for appeals from the Water Court. In re Adjudication of Sage Creek Water Rights, 234 M 243, 763 P2d 644, 45 St. Rep. 1876 (1988).

Appeal of Water Court Order Regarding Two Parties Before Final Decree — Rule 54(b) Certification of Tort Issues: A Water Court order awarding priorities between two parties is a final and appealable order even though the basin-wide adjudication has not been completed. It is necessary that the parties' respective irrigation water allowances be determined without their having to wait for the basin-wide decree before appealing to the Supreme Court. The fact that

trespass and damage claims have not yet been decided does not deprive the Supreme Court of jurisdiction to hear the appeal. The Water Court properly entered a Rule 54(b) certification. The determination of these claims is beyond the jurisdiction of the Water Court, but they cannot be decided until the water rights are resolved. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

DECISIONS UNDER FORMER LAW

Standing to Challenge Award of Water Right: A party has standing to challenge a water right only if it conflicts with those granted to him. Thus, he has no standing to challenge a right to water from a source in which he no water right. However, he may challenge a water right from a source from which he has a water right whether the challenged right is prior or subsequent to his own. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

85-2-236. Certificate of water right.

Compiler's Comments

1991 Amendment: Deleted (2) that read: "(2) The department shall provide to the county clerk and recorder of the county wherein the point of diversion or place of use is located quarterly reports and an annual summary report of all certificates of water right issued by the department within the county". Amendment effective July 1, 1991.

1987 Amendment: In (1), at beginning of second sentence, inserted exception clause.

1983 Amendment: In (1), after "sent to the" substituted "person to whom the right is decreed" for "county clerk and recorder of the county where the point of diversion or place of use is located for recordation"; deleted last sentence of (1), which read: "After recordation, the clerk and recorder shall send the certificate to the person to whom the right is decreed."; and inserted (2) requiring Department to provide the County Clerk and Recorder where the diversion is located a quarterly and annual summary report of certificates of water rights issued in the county.

85-2-237. Reopening and review of decrees.

Compiler's Comments

Rule Reference: If the proposed amendment to Rule 53, M.R.Civ.P., is adopted, the reference to Rule 53(e) in this section will become Rule 53(a)(5). See proposed amendment comment to Rule 53 for text of proposed amendment.

1993 Amendment: Chapter 629 at beginning of (1) inserted "After July 1, 1996"; in (1)(a), after "issued", deleted "by the water courts"; inserted (1)(b) that read: "(b) for basins for which claims have been filed under 85-2-221(3)"; and made minor changes in style. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having

filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under Rule 11, Montana Rules of Civil Procedure; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

Saving Clause: Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

Severability — Partial Nonseverability: Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

Retroactive Applicability: Section 4, Ch. 586, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-209 [sic, 1-2-109], to all preliminary decrees and final decrees that have been issued by the Montana water courts prior to [the effective date of this act]." Effective April 21, 1989.

Severability: Section 3, Ch. 586, L. 1989, was a severability clause.

Effective Date: Section 5, Ch. 586, L. 1989, provided: "[This act] is effective on the latest date on which any of the following occur:

(1) passage and approval of [this act] [approved April 20, 1989], [Senate Bill No. 169 (LC 683)] [Chapter 605, approved April 21, 1989] or [Senate Bill No. 166 (LC 684)] [Chapter 604, approved April 21, 1989]; or

(2) a final determination of failure to receive passage and approval of [Senate Bill No. 169 (LC 683)] or [Senate Bill No. 166 (LC 684)]."

85-2-243. Department assistance to water judges.

Compiler's Comments

1987 Amendment: At end of (1), after "shall", deleted "without cost to the judicial districts wholly or partly within his water division"; and inserted (2) requiring Department to assist Water Judge without cost to judicial districts within water division.

1987 Statement of Intent: The statement of intent attached to Ch. 651, L. 1987, provided in part: "The legislature intends by the amendment to 85-2-243 in section 8 of this bill that it be interpreted to restrict the department to utilize funds that have been appropriated for the adjudication program. The department's funding level in adjudicating water claims for the 1987-89 biennium is as specifically set forth in House Bill No. 2."

Water Rights Claims Examination Rules: In response to In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987), the Supreme Court approved an order July 7, 1987, adopting water rights claims examination rules. The rules are available at the Montana State Law Library.

Case Notes

No Departmental Rulemaking Authority Regarding Water Claims — Jurisdiction in Water Courts — Rulemaking Reserved to Supreme Court: Legislation in 1979 placed the procedure for adjudication of water claims in the Water Courts and reserved the power of rulemaking with respect to pending judicial proceedings to the Supreme Court. Lacking express legislative authority, neither the Board (functions now transferred to Department of Natural Resources and Conservation) nor Department of Natural Resources and Conservation has any rulemaking authority with respect to procedures in the adjudication of water rights before the Water Courts, and the Montana Administrative Procedure Act does not supply such authority. Functions of the Department respecting water claims are limited to rendering assistance to the Water Judges as set out in 85-2-243. In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987).

Part 3
Appropriations, Permits, and Certificates of Water Rights

Part Administrative Rules

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau, Montana Water Use Act.

Title 36, chapter 12, subchapter 2, ARM Procedural rules for water right contested case hearings.

Title 36, chapter 16, subchapter 1, ARM Water reservations.

Part Case Notes

Department Authorized to Condition Permits: The Department of Natural Resources and Conservation has authority to grant conditional use permits under 85-2-312 when restrictions are necessary to protect the rights of prior appropriators or are used to impose time limits to perfect a water right under the permit. Mont. Power Co. v. Carey, 211 M 91, 685 P2d 336, 41 St. Rep. 1233 (1984).

1899 Appropriation — Testimony of Persons on Land Showing Beneficial Use: Where the plaintiffs filed a water rights action, seeking a decree that they were entitled to the use of 500 miner's inches of water a year, the District Court did not err in finding that that amount was reasonably required for irrigation purposes. While that amount of water, as specified in the statement of appropriation filed by the plaintiffs' predecessor in interest, cannot be dispositive of the issue, under the rationale of Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), the Supreme Court could not say that the evidence produced at trial did not support the District Court's decree. That evidence consisted primarily of testimony of men who worked and knew the land in question, and that testimony, under the rationale of Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941), constituted substantial evidence. Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85, 40 St. Rep. 1585 (1983).

Water Rights by Prescription — Hostile Use Required: Where the plaintiffs brought an action against the decedent's estate, claiming a prescriptive right to water diverted by the decedent's descendants, the District Court did not err in holding that proof of hostile use of the water is a required element of acquisition of water rights by prescription. Without such a requirement, the holder of a water right could be deprived of that right without notice. In the case before the court, use of the water could not be said to be hostile unless the defendants were deprived of the water in question at a time when they actually had need of it. Language in the opinion in Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), appearing to abrogate the requirement of hostile use, is expressly disapproved. Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85, 40 St. Rep. 1585 (1983).

Findings and Conclusions as to Water Rights Held Inadequate — Judgment Vacated and Remanded: When a midstream and downstream water user filed suit against the upstream user to have the District Court declare the relative water rights of the parties, the findings of fact and conclusions of law entered by the District Court were so bare and inadequate as to provide no basis for meaningful appellate review. Because it could not be determined from the District Court's bare conclusions (i.e., that the parties had failed to prove their case by a preponderance of the evidence and had abandoned their rights) what the factual or evidentiary basis for the District Court's decision was, the Supreme Court vacated the judgment as to all of the three parties, remanded the case to the District Court, and directed it to enter findings and conclusions reflective of the evidence presented at trial and the legal contentions of the parties. 79 Ranch, Inc. v. Pitsch, 193 M 229, 631 P2d 690, 38 St. Rep. 1048 (1981).

Part Law Review Articles

The Future of Prior Appropriation in the New West, Tarlock, 41 Nat. Resources J. 769 (2001).

Prior Appropriation and the Property Clause: A Dialogue of Accommodation, Goble, 71 Or. L. Rev. 381 (1992).

The Public Trust Doctrine and Appropriative Water Rights: Fifth Amendment Implications, Kishel, 6 Adelphia L.J. 115 (1990).

Part Collateral References

Final Report of the Select Committee on Water Marketing, Environmental Quality Council (1985).

85-2-301. Right to appropriate — recognition and confirmation of permits issued after July 1, 1973.

Compiler's Comments

1997 Amendment: Chapter 497 inserted (4) concerning permitting actions of Department after July 1, 1973; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1985 Amendment: Inserted (2) listing instances under which only the Department may appropriate water by permit.

Administrative Rules

ARM 36.16.102 Definitions.

Case Notes

DECISIONS UNDER CURRENT LAW

School Trust Land Water Rights Owned by State: In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee shall be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

No Prescriptive Use of Water Found: The Water Court was correct in holding that Merrimac did not prove its claim of prescriptive use to the waters of Martin Creek and Davis Creek from the 1800s through 1980. Merrimac did not acquire adverse possession through 1973 since the water use was based on an accommodation between the parties. In 1973, the Water Use Act eliminated the right to acquire a water-use right by prescription. Merrimac was not entitled to a fractional share of water on the ground that Merrimac had always used one-third of the waters of Martin Creek and Davis Creek since Merrimac never deprived Hill of his water supply. There was no adverse taking. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

Water Use Act Exclusive Procedure for Acquisition: Where the defendant in litigation to establish priority in appropriations was held to have abandoned his claim to a water right because of the lack of his predecessor's reasonable diligence in applying the water to a beneficial use, the District Court erred in holding that the defendant nevertheless had a "use" right as of 1976. The Water Use Act of 1973 contains the exclusive procedure for acquisition of water rights after 1973. Nothing in the record shows the defendant complied with the statutory procedures. No right to any use of any water is therefore to be recognized in the defendant. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

Yellowstone River Compact Filings — In Wyoming — Priority Date: The Yellowstone River Compact, signed by Montana, North Dakota, and Wyoming and ratified by Congress, has the status of a treaty, and Montana water law statutes are subordinate to it. Utah International, Inc. (Utah) filed a Wyoming application to appropriate water, as required by the Compact because Wyoming was the state of diversion (Montana being the state of ultimate use of the water). Utah then filed the same information in Montana, and Montana assigned the date of the Wyoming filing as the priority date in conformity with Wyoming law. Intake Water Company did not attack the Wyoming filing but claimed mandamus should issue requiring Montana to assign the Montana filing date as the priority date. Montana correctly assigned the Wyoming filing date as the priority

date, as required by the Compact, and mandamus would not issue, since there was no clear legal duty for Montana to assign the Montana filing date as the priority date. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

DECISIONS UNDER FORMER LAW

Ownership of Land Where Water Has Source: Seepage water which has its rise along the bed of a stream and forms a natural accretion thereto belongs to that stream as part of its source of supply, and the ownership of land where water has its source does not necessarily give the exclusive right to use such water to the landowner so as to prevent others from acquiring rights therein. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

Beneficial Use — Measurement of Water:

The rights of appropriators of water may not be measured entirely by what they claimed in their notices of appropriation but must be measured by their beneficial use thereof over reasonable periods; consideration must be given to the extent and manner of their use, the character of the land upon which used, and the general necessities of the case, as well as whether the stream is furnished by usual rains or snows, extraordinary rain or snowfall, or by springs or seepage. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

Neither the appropriator of water nor one to whom a right is decreed owns the corpus of any part of the flow of a stream. Each is entitled only to the beneficial use of the amount of water called for by his appropriation or the decree when he has need for water, provided his distributing system has a sufficient capacity to carry that amount. If the distribution system is incapable of carrying that amount, his right is measured by the capacity of his system of distribution regardless of his needs. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926). (Annotator's note: For additional cases pertaining to courts' interpretation of beneficial use, see the annotations under 85-2-102.)

Appropriator Not Owner of Water — Sale of Water: An appropriator of water does not become the owner thereof but only of the right to use it; he may not sell the water to another to be used by the purchaser when not in use by the appropriator. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

Appropriation on Private Land:

An appropriation of water is not confined to waters flowing in streams upon public land but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

Sections 89-801 through 89-805, 89-807 through 89-828, and 89-839 through 89-844, R.C.M. 1947, do not and cannot authorize a person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. Prentice v. McKay, 38 M 114, 98 P 1081 (1909), explained in Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

The mere fact that water has its source on land owned by a plaintiff does not of itself give him the exclusive right therein so as to prevent others from acquiring rights to it under the laws of the state. Quinlan v. Calvert, 31 M 115, 77 P 428 (1904).

Source of Right: An appropriator of water derives his right from the state and not from the national government, the use of waters flowing in natural streams in Montana being subject to state regulation and control. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

Land Qualifications Unnecessary for Appropriations:

An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

The right to the use of water may be owned without regard to the title to lands on which the water is to be used. Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

Law Review Articles

Area-of-Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches, MacDonald & Howe, 57 U. Colo. L. Rev. 527 (1986).

Collateral References

Montana Water Law Handbook, Doney, State Bar of Mont. (1981), pp. 85 through 110.

85-2-302. Application for permit.

Compiler's Comments

2001 Amendment: Chapter 78 in first sentence substituted "85-2-306" for "85-2-306(1) through (3)" and at end of third sentence after "offices" deleted "and the offices of the county clerk and recorders"; and made minor changes in style. Amendment effective March 20, 2001.

1999 Amendment: Chapter 422 in first sentence after "withdrawal, or" inserted "related"; after fourth sentence substituted fifth, sixth, seventh, and eighth sentences relating to correction in defects in an application for "The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 3 months shall be terminated"; and made minor changes in style. Amendment effective April 23, 1999.

Severability: Section 6, Ch. 422, L. 1999, was a severability clause.

1993 Amendment: Chapter 370 in (1) inserted fourth sentence that read: "The applicant shall submit a correct and complete application." Amendment effective April 16, 1993.

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

Retroactive Applicability: Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

1991 Amendment: Inserted (2) imposing a fee of $1 per acre-foot of ground water appropriated for deposit in the ground water assessment account. Amendment effective July 1, 1991, and terminates July 1, 1993.

1983 Amendment: Near beginning of first sentence changed reference from (1) and (2) to (1) through (3) of 85-2-306; in last sentence changed correction period for application to 3 months from 18 months.

Administrative Rules

ARM 36.15.603 Permits for water diversions.

ARM 36.16.102 Definitions.

Case Notes

Defective Filing — Yellowstone River Compact Filing — Priority Date: Corporation filed application in Wyoming, as required by the Yellowstone River Compact signed by Montana and Wyoming, to appropriate water in Wyoming for use in Montana. Montana notified corporation that it should also file the same information on Montana forms and that if it did so the corporation would retain the priority date of the date it filed in Wyoming. The corporation filed in Montana within 18 months of its Wyoming filing. This section gives Montana discretion to allow the applicant up to 18 months for a correction of a defective filing without losing the original filing date as the priority date. Thus, the corporation was entitled to have Montana, in its discretion, assign as a priority date the date of the Wyoming filing. Montana had no clear legal duty to do otherwise and was not subject to a mandate that it assign as the priority date the date of the Montana filing. (Annotator's note: Chapter 448, L. 1983, reduced the correction period from 18 months to 3 months (now 90 days).) State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

Law Review Articles

Commerce Clause Scrutiny of Montana's Water Export Statutes, Eaton, 7 Pub. Land L. Rev. 97 (1986).

85-2-303. Permit for conversion of nonproductive oil or gas well.

Compiler's Comments

1983 Amendment: After "water well" deleted "may do so immediately but"; and after "maximum" substituted "appropriation" for "yield".

85-2-304. Appropriation by state board of land commissioners.

Compiler's Comments

1995 Amendment: Chapter 418 in first sentence, after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-2-306. Exceptions to permit requirements.

Compiler's Comments

2001 Amendment: Chapter 78 in (1) inserted fourth sentence providing that the written notification does not create an easement, at end of sixth sentence after "department" substituted "through its offices" for "at its offices and at the offices of the county clerk and recorders", and in eighth sentence after "30 days" inserted "of notification of defects"; and made minor changes in style. Amendment effective March 20, 2001.

1999 Amendment: Chapter 250 inserted second and third sentences in (1) requiring person developing ground water source on another person's land to provide 30 days' written notice of proposed development and appropriation and at end of ninth sentence inserted "including proof of landowner notification as necessary under this subsection"; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 in (4) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 629 near beginning of second sentence of (2), after "claim", deleted "of existing water right"; and made minor changes in style. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under Rule 11, Montana Rules of Civil Procedure; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of

water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

Saving Clause: Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

Severability — Partial Nonseverability: Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

1991 Amendments: Chapter 769 in (1), at end of third sentence, inserted "and pay a filing fee"; and inserted (5) assessing a $10 filing fee for filing notice of completion and directing deposit of the fee in the ground water assessment account. Amendment effective July 1, 1991, and terminates July 1, 1993.

Chapter 805 in (1) and (2) substituted "35 gallons per minute or less, not to exceed 10 acre-feet per year" for "less than 100 gallons per minute". Amendment effective July 1, 1991.

1989 Amendment: In (1), after "person who has", deleted "either", inserted clause relating to a possessory interest, and after "or" inserted clause relating to another's rights in ground water development works. Amendment effective April 4, 1989.

1987 Amendment: In (1), in second sentence, inserted exception relating to combined appropriation, near end substituted "appropriator" for "county clerk and recorder in the county where the point of diversion or place of use is located for recordation", and deleted sentence that read: "After recordation, the clerk and recorder shall send the certificate to the appropriator"; and in (2) inserted last sentence concerning certificate issuance.

1985 Amendment: In (1) inserted first sentence limiting the appropriation of ground water to a person who has either exclusive property rights in the ground water development works or written consent of the person with those property rights.

1983 Amendment: Inserted second sentence of (2), dealing with existing water right under 85-2-221; in third sentence of (2) after "section" inserted "or the date of the filing of the claim of existing water right"; in (3) after "the appropriation is" inserted "less than 30 acre-feet per year and is".

1981 Amendments: Chapter 30 inserted "and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger" in the middle of (3).

Chapter 160 substituted "within 60 days after" for "before" in the third sentence of (3); inserted the fourth sentence in (3) requiring the Department to automatically issue a provisional permit upon receipt of a correct and complete stockwater provisional permit application; substituted "after a hearing" for "after processing the application" in the last sentence of (3); substituted "it may revoke the permit or require the permittee to modify the impoundment or pit and may then make" for "it may require the applicant to modify the construction of the impoundment or pit and issue" in the last sentence of (3).

Chapter 357 inserted "or developed spring" after "well" in two places in (1); substituted "maximum appropriation of less than 100 gallons per minute" for "maximum yield of less than 100 gallons a minute" in the first sentence of (1); inserted "with the department" after "notice of completion" in the second sentence of (1); substituted "the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it" for "the department shall automatically issue a certificate of water rights" in the third sentence of (1); inserted the fourth, fifth, and sixth sentences in (1) relating to procedures when notice of ground water appropriation is defective; and inserted (2) describing procedures for issuance of a certificate of water right for a person who appropriates ground water by means of a well or developed spring, put to beneficial use between January 1, 1962, and July 1, 1973, and who did not file a required notice of completion.

Applicability: Section 2, Ch. 30, L. 1981, provided: "This act applies to applications pending with the department on the effective date of this act, as well as applications filed with the department after the effective date of this act."

Subsection (1), sec. 7, Ch. 357, L. 1981, provided: "Subsection (2) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306] applies to all notices of completion filed with the department after July 1, 1973."

Subsection (2), sec. 7, Ch. 357, L. 1981, provided: "Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 357, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981."

85-2-307. Notice of application.

Compiler's Comments

1993 Amendment: Chapter 370 at beginning of (1)(a) substituted "correct and complete application" for "proper application". Amendment effective April 16, 1993.

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

Retroactive Applicability: Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

1987 Amendment: In (1) deleted requirement for publication for 2 consecutive weeks; and in (1)(b) and (2) deleted "last" before "date of publication".

1983 Amendments: Chapter 448, in (1)(a), reduced notice from 3 to 2 weeks; and in (2) reduced time of first filing from 30 to 15 days after notice.

Chapter 526, at end of (1)(b)(i), deleted "A notice shall also be served upon"; and inserted (1)(b)(ii) requiring the Department to serve by first-class mail timely notice of an application upon any purchaser under contract for deed of property that may be affected by the proposed appropriation.

1981 Amendment: Substituted "first-class" for "certified" before "mail" in the second sentence of (1).

85-2-308. Objections.

Compiler's Comments

1999 Amendment: Chapter 422 in (1)(b), (2), and (4) substituted "indicating" for "tending to show"; in (5) in first sentence after "under this chapter shall" deleted "timely" and at end inserted "within the time period stated on the public notice associated with the application" and inserted last two sentences relating to defects and corrections of an objection; inserted (6) relating to when an objection is valid; and made minor changes in style. Amendment effective April 23, 1999.

Severability: Section 6, Ch. 422, L. 1999, was a severability clause.

1993 Amendment: Chapter 370 inserted (5) requiring objector to timely file correct and complete objection on form prescribed by Department. Amendment effective April 16, 1993.

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

Retroactive Applicability: Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

1991 Amendment: In (1)(a), after "application", inserted "for a permit"; in (1)(b), after "objection", inserted "to an application for a permit" and after "that" substituted "one or more of the criteria in 85-2-311 are not met" for "there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation, that the proposed use of water is not a beneficial use, or that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved"; inserted (2) requiring that in an application for change in appropriation rights, an objection must state name and address of objector and state that criteria in 85-2-402 are not met; inserted (3) providing that person has standing to file objection if property, water rights, or interests would be adversely affected by proposed appropriation; inserted (4) requiring that in an application for water reservation, an objection must state name and address of objector and state that criteria in 85-2-316 are not met; and made minor changes in style. Amendment effective July 1, 1991.

1983 Amendment: Substituted (2) (see 1983 Session Law) for former text, which read: "The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are

inadequate, that the property, rights, or interests of the objector would be adversely affected by the proposed appropriation, or the objector may state any other objections to the proposed appropriation he considers pertinent."

Case Notes

DECISIONS UNDER FORMER LAW

Standing to Challenge Award of Water Right: A party has standing to challenge a water right only if it conflicts with those granted to him. Thus, he has no standing to challenge a right to water from a source in which he has no water right. However, he may challenge a water right from a source from which he has a water right whether the challenged right is prior or subsequent to his own. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). (See 1991 amendment.)

85-2-309. Hearings on objections — jurisdiction.

Compiler's Comments

1999 Amendment: Chapter 422 in (1) in first sentence substituted "hold a contested case hearing, pursuant to Title 2, chapter 4, part 6" for "hold a public hearing" and substituted reference to service by first-class mail for reference to service by certified mail; and made minor changes in style. Amendment effective April 23, 1999.

Severability: Section 6, Ch. 422, L. 1999, was a severability clause.

1997 Amendment: Chapter 497 in (2)(a) inserted second sentence concerning priority of certified controversies; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1985 Amendment: In (1), in first sentence, after "permit", inserted "or change approval under 85-2-402" and after "valid objection", deleted "to the issuance of the permit" and at end of first sentence inserted final clause concerning certification to District Court; and inserted (2) and (3) relating to Department's authority to certify to the District Court at any time prior to commencement or before conclusion of a hearing on objections to an application for a permit or change in appropriation right approval all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing.

Applicability: Section 7, Ch. 596, L. 1985, provided: "This act applies to all permit applications and changes in appropriation right applications filed and pending with the department on the effective date of this act [April 17, 1985] and upon which a proposal for a decision has not been issued by the department."

Case Notes

Failure to Participate in Water Court Hearing — Attorney Fees Assessed as Sanction for Defense of Unreasonable Appeal: Despite warnings from the Water Court of the consequences, plaintiffs chose not to participate in a Water Court hearing, thereby creating no record of their issues and preserving none of their arguments for appeal. They appealed anyway, contending that the Water Court's findings were in error. The Supreme Court first found that the findings and conclusions were correct, then sanctioned plaintiffs pursuant to Rule 32, M.R.App.P. (Title 25, ch. 21), finding that defendant was entitled to attorney fees incurred in defending an appeal that was taken without any substantial or reasonable grounds, that delayed the case, and that wasted the resources of defendant and the Supreme Court. Swinger v. Collins, 1999 MT 202, 295 M 447, 984 P2d 151, 56 St. Rep. 787 (1999).

85-2-310. Action on application.

Compiler's Comments

1999 Amendment: Chapter 422 in (1) and (2) substituted references to service by first-class mail for references to service by certified mail; and made minor changes in style. Amendment effective April 23, 1999.

Severability: Section 6, Ch. 422, L. 1999, was a severability clause.

1991 Amendment: In (4)(c)(iii), in second sentence after "a reasonable time line", deleted "not to exceed 10 years from the time of issuance of a permit". Amendment effective July 1, 1991.

1987 Amendment: In (4)(a)(iii), in first sentence after "project plan", deleted "including, but not limited to, a reasonable time line for the completion of the project and the actual application of

the water to a beneficial use, which may not exceed 10 years from the date of application, detailing", inserted "describing", and inserted last sentence concerning time line.

1985 Amendment — Applicability: Inserted (4) listing criteria under which the Department must find that an application filed after July 1, 1973, lacks good faith or shows no bona fide intent to appropriate water for a beneficial use.

Section 3, Ch. 399, L. 1985, read: "This act applies retroactively, within the meaning of 1-2-109, to all applications filed after July 1, 1973."

Statement of Intent: The statement of intent attached to Ch. 399, L. 1985, provided: "A statement of intent is desirable for this bill because it authorizes the board of natural resources and conservation [functions now transferred to department of natural resources and conservation] to make rules on the new material enacted in the bill. The rules would implement section 1 [85-2-310(4)] of the bill, which establishes criteria for the department of natural resources and conservation to reject an application for a beneficial water use permit that is not in good faith or does not show a bona fide intent to appropriate water.

The intent is to adopt those rules necessary to implement the criteria listed in section 1 [85-2-310(4)]. Because the criteria are specific, the rulemaking authority would be limited to adopting rules:

(1) defining a proposed place of use;

(2) prescribing the contents of a detailed project plan and of a general project plan;

(3) defining reasonable time lines, not to exceed 10 years, for completion of projects; and

(4) prescribing the detailed information to implement criteria relative to applications for water use above that amount of water which will be used solely by the applicant."

1985 Applicability: Section 3, Ch. 399, L. 1985, read: "This act applies retroactively, within the meaning of 1-2-109, to all applications filed after July 1, 1973."

1981 Amendment: Substituted "objections have been received" for "hearing is held" after "if no" in the first sentence of (1); inserted "or objections have been received" after "if a hearing is held" at the end of the first sentence of (1).

1981 Applicability: Subsection (2), sec. 7, Ch. 357, L. 1981, provided: "Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 357, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981."

85-2-311. Criteria for issuance of permit.

Compiler's Comments

1997 Amendment: Chapter 497 in (1) inserted first, second, and third sentences concerning issuance of permit before adjudication of source of supply, lack of presumption that applicant cannot meet criteria, and alteration of terms and conditions of existing right; in (1)(a)(i) substituted "is water physically available" for "are unappropriated waters in the source of supply"; deleted former (1)(a)(i) that read: "(i) at times when the water can be put to the use proposed by the applicant"; deleted (1)(a)(iii) that read: "(iii) during the period in which the applicant seeks to appropriate, in the amount requested and that is reasonably available"; inserted (1)(a)(ii) concerning legal availability of water; in (1)(b) inserted "under an existing water right, a certificate, a permit, or a state water reservation" and inserted "In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied"; deleted former (1)(e) that read: "(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved"; deleted former (3)(b) that read: "(b) the rights of a prior appropriator will not be adversely affected"; in (4)(a), near middle of first sentence, inserted "federal non-Indian and Indian"; adjusted subsection references; and made minor changes in style. Amendment effective May 1, 1997.

1997 Statement of Intent: The statement of intent attached to Ch. 497, L. 1997, provided: "The legislature intends that the Montana Supreme Court's decision in In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti, 64988-g76L, Starner; and Application for Change of Appropriation Water Right No. G15152-s761, Pope, 53 St. Rep. 777 at 784, 923 P.2d 1073, be negated by the passage and approval of this bill. The legislature further intends that the portion of the district court decision in United States v. DNRC (1st Judicial District, Montana, June 15, 1987), No. 50612, (see also the concurring opinion in the Montana Supreme Court's decision in In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L

Ciotti, 64988-g76L, Starner; and Application for Change of Appropriation Water Right No. G15152-s761, Pope, 53 St. Rep. 777 at 784, 923 P.2d 1073), determining that in the absence of a quantification of existing water rights, the department of natural resources and conservation does not have the authority to issue a permit for a new water application when questions of senior conflicting claims are raised, be negated by the passage and approval of this bill, specifically by the passage and approval of the amendments to 85-2-311. A statement of intent is desired for this bill in order to provide guidance to the department under 85-2-311 concerning implementation and interpretation of the physical availability of water and reasonable legal availability of water criteria. To find that water is available for the issuance of a permit, the department shall require a three-step analysis involving the following factors: identify physical water availability, identify existing legal demands on the source of supply, and compare and analyze the physical water supply at the proposed point of diversion with the existing legal demands on the source of supply."

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1995 Amendment: Chapter 418 in (2), in third sentence, substituted "department of environmental quality" for "department of health and environmental sciences"; in (5) substituted "U.S. natural resources conservation service" for "U.S. soil conservation service"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendments: Chapter 370 near beginning of (1) and (5) substituted "preponderance of evidence" for "substantial credible evidence"; and in (5), near beginning after "applicant", inserted "in addition to other evidence demonstrating that the criteria of subsection (1) have been met", before "hydrologic" deleted "independent", after "including" inserted "but not limited to", after "information developed by the" inserted "applicant, the", and at end, after "studies", deleted "demonstrating that the criteria are met". Amendment effective April 16, 1993.

Chapter 460 in (1), near beginning, substituted "subsections (3) and (4)" for "subsections (2) and (3)" and substituted "preponderance of evidence" for "substantial credible evidence"; inserted (1)(g) concerning water quality, (1)(h) concerning classification of water, and (1)(i) concerning effluent limitations; inserted (2) requiring that a valid objection be made before an applicant needs to prove that the permit criteria have been met; in (4), near end, substituted "subsection (4)" for "subsection (3)"; in (4)(b)(i) substituted "subsection (1) or (3)" for "subsection (1) or (2)"; in (4)(c) substituted "subsections (4)(b)(ii) and (4)(b)(iii)" for "subsections (3)(b)(ii) and (3)(b)(iii)"; near beginning of (5) substituted "preponderance of evidence" for "substantial credible evidence"; inserted (7) allowing the Department to adopt rules; and made minor changes in style. Amendment effective April 21, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 460, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of natural resources and conservation authority to adopt administrative rules. The bill adds statutory criteria for the department to consider in the processing of an application for a permit, change authorization, controlled ground water area, or basin closure. In adopting rules implementing this bill and in interpreting the new statutory language, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] should assess the magnitude, character, duration, and geographical extent of the projected effects on the uses of water as classified and utilize this assessment in a practical manner."

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

Section 7, Ch. 460, L. 1993, was a severability clause.

Retroactive Applicability: Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

Section 8, Ch. 460, L. 1993, provided: "[Sections 1 and 3] [85-2-311 and 85-2-402] apply retroactively, within the meaning of 1-2-109, to all applications for a permit or change in appropriation right that the department has not noticed out for objection as of [the effective date of this act]." Effective April 21, 1993.

1989 Amendments: Chapter 432 at end of (1)(a) inserted "at the proposed point of diversion"; near end of (1)(a)(iii), before "available", inserted "reasonably"; inserted (1)(f) relating to possessory interest; and made minor changes in phraseology. Amendment effective April 4, 1989.

Chapter 495 in (1) substituted "subsections (2) and (3)" for "subsections (2) through (4)"; inserted (4) relating to evidence necessary to meet the substantial credible evidence standard; and made minor changes in phraseology. Amendment effective April 11, 1989.

1985 Amendment: In (1) near beginning, after "(2)", changed "and (3)" to "through (4)"; in (2) reduced the threshold for issuance of a permit under this subsection from 10,000 acre-feet or 15 cubic feet per second to 4,000 acre-feet and 5.5 cubic feet per second and substituted "the applicant proves by clear and convincing evidence that" for "it affirmatively finds"; in (2)(b) at beginning, deleted "the applicant has proven by clear and convincing evidence that"; after (2)(c)(ii), deleted former (2)(a)(iii)(C) that read: "the economic feasibility of the project"; in (2)(c)(iii) after "quality", deleted "and potability"; inserted (2)(c)(iv) prohibiting the Department from issuing a permit for an appropriation of 4,000 or more acre-feet of water per year and 5.5 or more cubic feet per second of water unless the applicant proves that, based on the effects on the quantity and quality of water for existing beneficial uses in the supply source, the proposed appropriation is a reasonable use; deleted former (2)(b) that read: "A permit for an appropriation for a diversion for a consumptive use of 10,000 or more acre-feet of water a year or 15 or more cubic feet per second of water under this subsection may not be issued unless the department petitions the legislature and the legislature affirms the findings of the department"; inserted (3) establishing criteria to allow the out-of-state transportation and use of public water; and in (4) inserted "use" after "impoundment" three times and after "impound" once, and in first sentence at end, changed "null and void" to "invalid".

1985 Applicability: Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

1983 Amendments: Chapter 448, in (1)(b) after "the" inserted "water".

Chapter 706 made the following changes: at beginning of (1), inserted "Except as provided in subsections (2) and (3)"; at end of (1), after "if" inserted "the applicant proves by substantial credible evidence that the following criteria are met"; deleted former (6) and (7), which read: "(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5)."; and inserted (2) and (3) requiring the Department to issue a permit to appropriate water if the rights of a prior appropriator will not be adversely affected and the proposed means of diversion, construction, and operation of the appropriation works are adequate.

Temporary Changes Made Permanent: Section 7, Ch. 706, L. 1983, provided that the amendments made by Ch. 706 were to terminate on July 1, 1985. Section 23, Ch. 573, L. 1985, amended sec. 7, Ch. 706, L. 1983, to provide that only one section (Ch. 706, sec. 4), that established the Select Committee on Water Marketing, would terminate on July 1, 1985. Thus, the amendments to this section made by Ch. 706, L. 1983 (set forth below in the 1983 amendment note), are now permanent, except insofar as the section was further amended in 1985.

1981 Amendment: Substituted "diversion, construction, and operation of the appropriation works" for "diversion or construction" in (3); substituted "and" for "or" after "a year or more" in (6); added (7) relating to required burden of proof.

1981 Applicability: Subsection (2), sec. 7, Ch. 357, L. 1981, provided: "Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 357, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981."

Administrative Rules

ARM 36.12.104 Issuance of interim permits.
ARM 36.12.208 Default.
ARM 36.16.102 Definitions.

Case Notes

DECISIONS UNDER CURRENT LAW

Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional: In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50,

923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by this section. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under 85-2-702 or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

State May Not Grant Water Use Permits on Indian Lands When Reserved Tribal Rights Not Quantified: The Confederated Salish and Kootenai Tribes of the Flathead Reservation objected to the Department of Natural Resources and Conservation (DNRC) issuing new water use permits to nontribal members owning land in fee on the reservation. The tribes argued that this section clearly states that an applicant for a water use permit has to demonstrate that the proposed use will not unreasonably interfere with a planned use for which the water has been reserved and that such a showing cannot be made by an applicant until the tribes reserved rights are quantified by a compact negotiated with the state pursuant to 85-2-702. The Supreme Court held that this section does include Indian reserved water rights and that an applicant cannot show that there will be no adverse impact on tribal rights until those rights have been quantified by a negotiated compact with the state. Therefore, DNRC does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights. (See 1997 amendment.) In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), followed in Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985).

Beneficial Impoundment: Counterclaim against petition of irrigation district for additional appropriation of water was properly denied where evidence was uncontradicted that water was going to waste and that impoundment would be beneficial. Sunset Irrigation District v. Ailport, 166 M 11, 531 P2d 1349 (1974).

DECISIONS UNDER FORMER LAW

(Annotator's Note: For decisions under former law pertaining to the appropriation doctrine, see the annotations under Title 85, ch. 2, part 2.)

Law Review Articles

Commerce Clause Scrutiny of Montana's Water Export Statutes, Eaton, 7 Pub. Land L. Rev. 97 (1986).

85-2-312. Terms of permit.

Compiler's Comments

1999 Amendment: Chapter 422 in (3) deleted next to last sentence that read: "The department may not accept a request for extension of time that is filed less than 30 days prior to the time limit specified in the permit"; and made minor changes in style. Amendment effective April 23, 1999.

Severability: Section 6, Ch. 422, L. 1999, was a severability clause.

1993 Amendment: Chapter 370 substituted language in (3) providing requirement that Department establish process for extension of time limits for commencing appropriation works, for completion of construction, and for application of water to proposed use, prohibiting acceptance by Department of request for time extension if filed less than 30 days prior to time limit in permit, and specifying that permits not completed within time limit or extension are void upon lapse of time limit for former text that read: "The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party. The department may grant the extension of time in the absence of a hearing if no requests for a hearing are received and the extension of time is granted as requested, or the department may grant the extension of time in a modified form by following the process established in 85-2-310(2). Subsequent extensions of time may be made in the same manner." Amendment effective April 16, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 370, L. 1993, provided: "A statement of intent is required for this bill because 85-2-312 grants the department of natural resources and conservation rulemaking authority to establish a procedure for extending time limits for completing work under a water use permit. The legislature intends that the department provide necessary procedural and substantive safeguards to protect existing water users and permitholders from adverse impacts that may be caused by extending time limits for perfecting new water uses."

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

1991 Amendment: Deleted (5) that read: "(5) The department shall provide to the county clerk and recorder of the county wherein the point of diversion or place of use is located quarterly reports and an annual summary report of all water right permits, certificates, and change approvals issued by the department within the county". Amendment effective July 1, 1991.

1987 Amendment: In (2), at beginning, substituted "The department shall specify in the permit or in any authorized extension of time provided in subsection (3), the time limits" for "The department may limit the time", deleted last sentence that read: "For good cause shown by the permittee, the department may in its discretion reasonably extend time limits", and inserted last sentence concerning required Department considerations in issuing permit or authorized extension of time; and inserted (3) relating to grant of extension of time for commencement of appropriation works.

1985 Amendment: In (1) in third sentence, at beginning changed "It" to "The department" and after "necessary", substituted "to satisfy the criteria listed in 85-2-311" for "to protect the rights of other appropriators".

1983 Amendment: In (3), after "sent to the" substituted "permittee" for "county clerk and recorder in the county where the point of diversion or place of use is located for recordation"; deleted last sentence of (3), which read: "After recordation, the clerk and recorder shall send the permit to the permittee."; and inserted (4) requiring that the Department provide to the County Clerk and Recorder of a county where the diversion point or place of use is located quarterly and annual reports of all water rights permits, certificates, and change approvals issued by the Department within the county.

Administrative Rules

ARM 36.12.103 Application and special fees.
ARM 36.16.102 Definitions.

Case Notes

Department Authorized to Condition Permits: The Department of Natural Resources and Conservation has authority to grant conditional use permits under 85-2-312 when restrictions are necessary to protect the rights of prior appropriators or are used to impose time limits to perfect a water right under the permit. Mont. Power Co. v. Carey, 211 M 91, 685 P2d 336, 41 St. Rep. 1233 (1984). (Annotator's note: Chapter 573, L. 1985, amended this section to provide that the Department may restrict permits when necessary to satisfy the criteria in 85-2-311).

Permit Conditions Supported by Substantial Credible Evidence: In a proceeding for a permit, the Department of Natural Resources and Conservation granted the permit but reduced both the quantity of water to be appropriated and the time period during which the water could be appropriated. The Supreme Court upheld these restrictions based on a review of substantial expert testimony which indicated that the water supply was inadequate to sustain the proposed appropriations, along with existing senior rights, without the restrictions imposed by the Department. Mont. Power Co. v. Carey, 211 M 91, 685 P2d 336, 41 St. Rep. 1233 (1984).

Collateral References

Final Report of the Select Committee on Water Marketing, Environmental Quality Council (1985).

85-2-313. Provisional permit.

Compiler's Comments

1997 Amendment: Chapter 497 in second sentence, at beginning, inserted "Upon petition", inserted "or revoked by the department following a show cause hearing", and substituted "in which it is determined that reduction, modification, or revocation is" for "where" and inserted third sentence concerning determination of legal availability on consideration of final decree; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

Administrative Rules

ARM 36.12.104 Issuance of interim permits.
ARM 36.16.102 Definitions.

85-2-314. Revocation or modification of permit.

Compiler's Comments

1983 Amendment: Near end of section after "should not be" inserted "modified or"; after "may" inserted "modify or".

Administrative Rules

ARM 36.12.104 Issuance of interim permits.

Case Notes

Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional: In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by 85-2-311. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal

law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under 85-2-702 or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

85-2-315. Certificate of water right.

Compiler's Comments

1993 Amendment: Chapter 370 in first sentence, at end before "completed", deleted "properly", in second sentence, at end, substituted "was completed" for "has been properly completed in substantial accordance with the terms and conditions of the permit" and in third sentence, near beginning after "department", inserted "shall review the certified statement and"; and made minor changes in style. Amendment effective April 16, 1993.

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

1991 Amendment: Inserted second sentence requiring notification to contain certified statement by person with experience in design, construction, or operation of appropriation works that appropriation has been properly completed in accordance with permit; and deleted (2) that read: "(2) The department shall provide to the county clerk and recorder of the county wherein the point of diversion or place of use is located quarterly reports and an annual summary report of all certificates of water right issued by the department within the county". Amendment effective July 1, 1991.

Applicability: Section 14, Ch. 805, L. 1991, provided: "[Sections 7 and 8] [85-2-315 and 85-2-317], concerning certification by a person with experience in the design, construction, or operation of appropriation works, apply to all permits and change approvals issued after [the effective date of this act] [effective July 1, 1991]."

1983 Amendment: In (1), after "sent to the" substituted "permittee" for "county clerk and recorder in the county wherein the point of diversion or place of use is located for recordation"; deleted last sentence of (1), which read: "After recordation, the clerk and recorder shall send the certificate to the appropriator."; substituted (2) (see 1983 Session Law) for former text, which read: "Except as provided in 85-2-313, a certificate of water right in a particular source may not be issued prior to a general determination under part 2 of this chapter of existing rights in that source."

85-2-316. State reservation of waters.

Compiler's Comments

1997 Amendments: Chapter 330 in (9)(d), after "permit", inserted "or a certificate for ground water development"; in (9)(d)(i), after "application", inserted "or the notice of completion of ground water development"; in (9)(d)(ii), after "permits", inserted "or certificates for ground water development"; inserted (9)(d)(iii) relating to consent to subordination of ground water development; and made minor changes in style. Amendment effective April 21, 1997.

Chapter 497 throughout section, in 16 places before reference to reservation, inserted "state water" and in 7 places, before "water reservation", inserted "state"; in (1), near middle, substituted "acquire a state water reservation" for "reserve waters"; in (11), in second sentence near beginning after "Reallocation of", deleted "reserved" and after "water" inserted "reserved pursuant to a state water reservation"; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1995 Amendment: Chapter 418 in (1), in two places, (3), (4)(a), in two places, (4)(b), (4)(c), (5), (6), in two places, (8)(a), (9)(c), (9)(d), (9)(e), (10), in two places, (11), in four places, (13), and (14)

substituted "department" for "board"; in (7), after "may", deleted "with the approval of the board"; in (12), in second sentence after "change", deleted "the board, upon notification by" and after "department" deleted "of its approval"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 370 at beginning of (3) substituted "a correct and complete application" for "an application"; in (4)(a) and (5), after "board", inserted "by a preponderance of evidence"; and at end of second sentence in (8)(b), after "agricultural purposes", substituted "describing how the reserved water was put to use" for "that the reserved water has been put to use in substantial accordance with the terms and conditions of the authorization to use reserved water". Amendment effective April 16, 1993.

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

Retroactive Applicability: Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

1991 Amendment: In (8)(a), at end of first sentence after "approved use", inserted "and issue the applicant an authorization for the use"; inserted (8)(b) relating to notification of use of water and inspection for compliance with authorization; in (10) inserted last sentence relating to appropriation of undeveloped water; inserted (12) relating to approval of changes in reservations of water; and inserted (13) relating to transfers of water reservations. Amendment effective April 20, 1991.

Retroactive Applicability: Section 2, Ch. 515, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all reservations of waters granted pursuant to 85-2-316."

1989 Amendment: Substituted (9) relating to determination of priority of appropriation of a water reservation and relative priority of the reservation to permits with a later priority for former (9) that read: "(9) A reservation under this section shall date from the date the order reserving the water is adopted by the board and shall not adversely affect any rights in existence at that time"; and made minor changes in phraseology and punctuation.

1989 Statement of Intent: The statement of intent attached to Ch. 389, L. 1989, provided: "A statement of intent is required for this bill to guide the board of natural resources and conservation [functions now transferred to department of natural resources and conservation] in the subordination of water reservations to junior water use permits. The legislature intends that the board amend the rules governing water reservations to clarify the procedure by which subordination, if necessary, will be undertaken and to ensure that any subordination occurs in a manner that results in a clear order of priority among all permits and reservations for use in the administration of water rights associated with the specific water source.

In amending the rules, the board should make clear that the matter of subordination may be considered only after a final decision has been made on all applications for water reservations from a specific water source. If the board determines that subordination should be considered, it may request that the department of natural resources and conservation prepare an analysis concerning the potential for subordination to interfere with the purpose of the reservation and the level at which substantial interference with the reservation would occur. Once the department's analysis is completed, all affected reservants, permitholders, and other interests are to be provided legal notice and the opportunity to appear before the board to present testimony and other evidence concerning subordination. Any board decision on the matter of subordination should be written as an order that includes findings of fact and conclusions of law.

After determining the level at which substantial interference with the purpose of a reservation would occur, the board may subordinate a reservation only to permits that in cumulative effect and in order of priority would not exceed the established level of interference. The board should consider priority dates in deciding which reservations are to be subordinated to which permits in order to avoid confusion about the priority of right to water among permits, between permits and reservations, and among reservations. For example, a reservation with a July 1, 1985, priority date should not be subordinated to a permit with a July 1, 1988, priority date without the reservation also being subordinated to a permit with a June 30, 1987, priority date. Also, a senior water reservation should not be subordinated to a permit without all junior reservations affected also being subordinated to the permit."

Applicability: Section 3, Ch. 389, L. 1989, provided: "[This act] does not apply to existing water reservations or to water reservation applications filed with the department of natural resources and conservation before October 1, 1989."

1987 Amendment: In (2)(a), at end of introductory clause, substituted "basin where it is reserved, as described by the following basins" for "following river basins"; and inserted (2)(b) relating to water reservation outside a basin of diversion.

1985 Amendment: Inserted (2) listing river basins in which water may be reserved only for existing or future beneficial uses; inserted (4)(b) through (4)(d) establishing criteria for reservation of water for withdrawal and transport for use outside the state; inserted (13) requiring the Department to develop an education program on the benefits and procedures for water reservation and provide technical assistance to agencies or political subdivisions applying for water reservation; and inserted (14) exempting reserved water from the state leasing program.

1985 Applicability: Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

1981 Amendments: Chapter 186 in (7) inserted "when requested by the districts" before "for rendering technical and administrative assistance", inserted "preparation and" before "processing of such applications", and added last two sentences requiring the Department to complete requested feasibility study and the Board to extend to a conservation district the time allowed to develop plan identifying projects utilizing water reservation.

Chapter 357 added the last sentence of (2) requiring an applicant to pay a reasonable proportion of the Department's cost of preparing environmental impact statement unless payment is waived by the Department.

1981 Applicability: Subsection (3), sec. 7, Ch. 357, L. 1981, provided: "Section 6 [sec. 6, Ch. 357, L. 1981, amending 85-2-316] applies to applications pending before the board on April 14, 1981, as well as applications filed with the board after April 14, 1981."

Administrative Rules

Title 36, chapter 16, subchapter 1, ARM Water reservation rules — application content — completion plan.

Law Review Articles

Commerce Clause Scrutiny of Montana's Water Export Statutes, Eaton, 7 Pub. Land L. Rev. 97 (1986).

85-2-317. Limitation on appropriation of ground water.

Compiler's Comments

1991 Amendment: Substituted (1) providing that after July 1, 1991, Department may not approve a permit to appropriate ground water in excess of 3,000 acre-feet per year unless criteria in 85-2-311 are met and Legislature affirms decision after public hearings for former (1) that read: "(1) After May 7, 1979, no application for a permit to appropriate ground water in excess of 3,000 acre-feet per year may be granted, except pursuant to an act of the legislature permitting the specific appropriation". Amendment effective July 1, 1991.

Applicability: Section 14, Ch. 805, L. 1991, provided: "[Sections 7 and 8] [85-2-315 and 85-2-317], concerning certification by a person with experience in the design, construction, or operation of appropriation works, apply to all permits and change approvals issued after [the effective date of this act] [effective July 1, 1991]."

Preamble: The preamble to Ch. 524, L. 1989, provided: "WHEREAS, agricultural and stockwater users in Musselshell County are experiencing water shortages during periods of low flow in the Musselshell River; and

WHEREAS, alternatives for additional water supplies, such as off-stream reservoir storage, would be very costly; and

WHEREAS, abandoned coal mines near Roundup could provide substantial supplemental water; and

WHEREAS, the 50th Montana Legislature authorized the Department of Natural Resources and Conservation to issue an interim permit to the Deadman Basin Water Users Association to appropriate ground water in the mines; and

WHEREAS, the Department of Natural Resources and Conservation is preparing to issue an interim permit to the Deadman Basin Water Users Association for a small test withdrawal, after a thorough review of the project for any environmental effects; and

WHEREAS, the best interests of people in the Roundup area will be served by a credible and technically sound evaluation of whether the coal mines can provide significant supplemental water supplies without significant adverse environmental effects and without harm to other existing appropriators; and

WHEREAS, test appropriations proposed during the summers of 1990 and 1991 will require an interim permit for an amount exceeding 3,000 acre-feet per year, thereby requiring legislative approval pursuant to section 85-2-317, MCA."

Authorization to Issue Interim Permit to Appropriate Ground Water: Section 1, Ch. 524, L. 1989, provided: "Pursuant to 85-2-317(1), the department of natural resources and conservation may authorize an interim permit for a period ending no later than September 30, 1991, to the Deadman Basin water users association to appropriate ground water up to 6,000 acre-feet per year from abandoned coal mines in Musselshell County. The application and interim permit are subject to the remaining provisions of Title 85, chapter 2, part 3."

1987 Permits: Section 1, Ch. 138, L. 1987, authorized the Department to issue two permits to appropriate ground water exceeding 3,000 acre-feet per year according to application numbers 54092-g43D and 54124-g43D.

Preamble: The preamble to Ch. 138, L. 1987, provided: "WHEREAS, hydropower is a beneficial use of water that provides benefits to many Montana citizens; and

WHEREAS, applicants propose to use ground water from an existing well and from a new well located in Carbon County for generating hydropower; and

WHEREAS, the source of water for the wells is the Tensleep formation, a major aquifer with commonly reported flows in excess of 8 cubic feet per second; and

WHEREAS, the applicants and the Department of Fish, Wildlife, and Parks have agreed to a provisional permit under conditions that ensure adequate flows for the nearby Bluewater Fish Hatchery; and

WHEREAS, the Department of Natural Resources and Conservation has reviewed the applications and recommends approval of the application; and

WHEREAS, the ground water applied for exceeds 3,000 acre-feet per year for each well and therefore requires legislative approvals pursuant to section 85-2-317, MCA.

THEREFORE, the Legislature of the State of Montana finds it appropriate to authorize the Department of Natural Resources and Conservation to issue two permits to the applicants for ground water appropriations in excess of 3,000 acre-fee per year."

Certain Abandoned Mine Workings — Authorization to Issue Permit to Appropriate Ground Water: Chapter 414, L. 1987, read: "WHEREAS, agricultural and stockwater users in Musselshell County are experiencing water shortages during periods of low flow in the Musselshell River; and

WHEREAS, alternatives for additional water supplies, such as off-stream reservoir storage, would be very costly; and

WHEREAS, abandoned coal mines near Roundup could provide substantial supplemental water; and

WHEREAS, the Deadman Basin Water Users Association has applied to the Department of Natural Resources and Conservation for a permit to appropriate approximately 13,000 acre-feet annually; and

WHEREAS, the use of this water would exceed 3,000 acre-feet per year and therefore requires legislative approval pursuant to 85-2-317, MCA.

THEREFORE, The Legislature of the State of Montana finds it appropriate to authorize the Department of Natural Resources and Conservation to issue a permit to appropriate ground water to the Deadman Basin Water Users Association.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Authorization to issue permit to appropriate ground water. Pursuant to 85-2-317(1), the department of natural resources and conservation may issue an interim permit for a period ending September 30, 1989, to appropriate ground water in excess of 3,000 acre-feet per year to the Deadman Basin water users association according to application number 61478-g40C for the purpose of conducting and evaluating a project to pump ground water from abandoned mine workings along the lower Musselshell River. The application is subject to the remaining provisions of Title 85, chapter 2, part 3.

Section 2. Coordination instruction. If House Bill No. 642, including the section of that bill repealing 85-2-317, is passed and approved, this act is void.

Section 3. Effective date. This act is effective July 1, 1987."

House Bill No. 642 was passed and approved as Ch. 535, L. 1987. As enacted, Ch. 535 did not repeal 85-2-317. Thus, this chapter is not void.

85-2-318. Water right appropriation account.

Compiler's Comments

1987 Amendment: After "administering" inserted "and enforcing" and inserted reference to Title 37, chapter 43.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

85-2-319. Permit action in highly appropriated basins or subbasins.

Compiler's Comments

1995 Amendment: Chapter 418 in (2), near end of first sentence, and in (2)(d) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 460 at end of first sentence of (2), after "subbasin", inserted "or upon petition of the department of health and environmental sciences alleging facts under subsection (2)(d)"; inserted (2)(d) clarifying facts that must be alleged in the case of a petition filed by the Department of Health and Environmental Sciences; inserted (5) allowing the Department to adopt rules; and made minor changes in style. Amendment effective April 21, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 460, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of natural resources and conservation authority to adopt administrative rules. The bill adds statutory criteria for the department to consider in the processing of an application for a permit, change authorization, controlled ground water area, or basin closure. In adopting rules implementing this bill and in interpreting the new statutory language, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] should assess the magnitude, character, duration, and geographical extent of the projected effects on the uses of water as classified and utilize this assessment in a practical manner."

Severability: Section 7, Ch. 460, L. 1993, was a severability clause.

1983 Statement of Intent: The statement of intent attached to SB 370 (Ch. 448, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Department of Natural Resources and Conservation in sections 1 and 17.

The intent is to provide the Department with the authority to adopt rules necessary to reject, modify, or condition water use permit applications in highly appropriated basins or subbasins. A rule may only be adopted under this section upon a petition signed by a certain percentage of water users in the source of supply or by direction of the Legislature. The petition must allege certain facts showing the need for the adoption of a rule. The Department must act on the petition within 60 days by: denying the petition and providing reasons to the petitioners; informing the petitioners that additional study of the allegations is necessary before denying or proceeding with the petition; or initiating the rulemaking proceeding. The rulemaking procedure must follow the notice requirements of the Montana Administrative Procedure Act, and in addition the Department must publish notice of the rulemaking hearing once a week for three successive weeks in a newspaper of general circulation in which the source is located and also serve an individual copy of the notice on any known water right holder in the source of supply according to the Department's records.

This bill also delegates rulemaking authority to the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] in section 2.

The intent is to provide the Board with the authority to adopt, through rules, fees to be paid by applicants, petitioners, and others for services provided. Fees could be adopted for: rulemaking hearings to reject, modify, or condition water use permit applications in highly appropriated basins or subbasins; administrative hearings conducted by the Department to settle objections to permit or change applications; costs incurred during the field investigation of a complaint against a permittee and related revocation proceedings; and for costs incurred in the field verification of issued and completed permits and change approvals."

Administrative Rules

ARM 36.12.1010 Definitions.

ARM 36.12.1011 Grant Creek Basin closure.

ARM 36.12.1013 Rock Creek Basin closure.
ARM 36.12.1014 Walker Creek Basin closure.
ARM 36.12.1015 Towhead Gulch Basin closure.
ARM 36.12.1016 Musselshell River closure.
ARM 36.12.1017 Sharrott Creek Basin closure.
ARM 36.12.1018 Willow Creek Basin closure.
ARM 36.12.1019 Truman Creek Basin closure.
ARM 36.12.1020 Sixmile Creek Basin closure.
ARM 36.12.1021 Houle Creek Basin closure.

85-2-321. Milk River basin — suspension of action on permits — proposal — priority in adjudication process.

Compiler's Comments

1997 Amendment: Chapter 497 in (1)(c)(i)(B), near end, inserted "pursuant to this part". Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1985 Amendment: Inserted (2) requiring that after April 8, 1985, the Chief Water Judge make the issuance of a temporary preliminary decree in the Milk River Basin the highest priority in the adjudication of existing water rights.

1985 Preamble: The preamble to Ch. 394, L. 1985, read: "WHEREAS, there has long been in the Milk River Basin a scarcity of water available to meet the needs of all water users; and

WHEREAS, the precipitation in the Milk River Basin during the past 2 years has been even lower than usual; and

WHEREAS, in 1981, the 47th Legislature recognized the growing problem of protection of existing water rights in the Milk River Basin, in view of continuing applications for new water rights, by enacting a law authorizing the Department of Natural Resources and Conservation to suspend action on new permits in the Basin; and

WHEREAS, tension has arisen among certain water users in the Milk River Basin because of uncertainty on the amounts and priorities of individual rights to the scarce water resources; and

WHEREAS, neither a preliminary nor temporary preliminary decree has been issued to date in the Milk River Basin in the Montana Water Court's adjudication of existing water rights; and

WHEREAS, complicated legal issues exist with respect to water rights in the Milk River Basin because of the 1909 Boundary Waters Treaty, the location in the Basin of federal Bureau of Reclamation irrigation projects, and the existence in the Basin of federal reserved water rights claims; and

WHEREAS, in view of these complicated legal issues, it may not be feasible at this time to issue a preliminary decree of water rights in the Milk River Basin; however, a temporary preliminary decree can be issued; and

WHEREAS, the Legislature finds that it is in the interest of water users in the Milk River Basin that the Montana Water Court issue a temporary preliminary decree in the Basin as soon as practicable."

85-2-322. Hearing — order.

Compiler's Comments

1987 Amendment: Near end of (5) changed "85-2-306(2)" to "85-2-306(3)".

85-2-329. Definitions.

Compiler's Comments

1997 Amendment: Chapter 497 in definition of application, near end before "water reservation", inserted "state". Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

Applicability: Section 4, Ch. 445, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 21, 1993.

Effective Date: Section 5, Ch. 445, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

85-2-330. Basin closure — exceptions.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), after "department", deleted "or the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Applicability: Section 4, Ch. 445, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 21, 1993.

Effective Date: Section 5, Ch. 445, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

85-2-331. Reservations within Missouri River basin and Little Missouri River basin.

Compiler's Comments

1997 Amendments: Chapter 330 in (4) inserted third sentence relating to certificates for ground water development; and made minor changes in style. Amendment effective April 21, 1997.

Chapter 497 in (1), near middle of introductory clause, and in (3)(a) and (3)(b), near middle, substituted reference to state water reservations for reference to reservations of water; in (2) and (4), in five places, before reference to reservations, inserted "state water"; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1995 Amendment: Chapter 418 in (3)(a), (3)(b), (3)(c), and (4), in three places, substituted "department" for "board"; in (3)(a), at beginning, deleted "Before July 1, 1992"; and in (3)(b), at beginning, deleted "Before December 31, 1994". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 303 at beginning of (3)(b), after "December 31", substituted "1994" for "1993"; and made minor changes in style. Amendment effective April 12, 1993.

1989 Amendment: In introductory clause of (1) inserted "or in the Little Missouri River basin"; substituted (1)(a) and (1)(b), relating to reservation above and below Fort Peck dam, for end of (1) that read: "July 1, 1989, except that applications for reservation of water below Fort Peck dam must be filed no later than July 1, 1991"; at end of (2) inserted "and the Little Missouri River basin"; at beginning of (3)(a) substituted "July 1, 1992" for "December 31, 1991"; at end of (3)(b) inserted "and in the Little Missouri River basin"; and in (4) inserted "in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri River basin". Amendment effective March 18, 1989.

1987 Amendment: At end of (1) inserted exception for water below Fort Peck Dam; at end of (3)(a) inserted "above Fort Peck dam"; inserted (3)(b) requiring Board before December 31, 1991, to make final determination on applications filed before July 1, 1989, for reservation of water in Missouri River above Fort Peck Dam; inserted (3)(c) requiring Board to determine which applications are above or below Fort Peck Dam; and in (4) inserted second sentence concerning subordination.

1985 Amendment: In (1) and (3) changed deadline for filing applications from July 1, 1987, to July 1, 1989; and in (3) changed deadline for final board determination from December 31, 1989, to December 31, 1991.

Applicability: Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

Appropriation — Deadline Change: House Bill 952, L. 1985 (approved May 13, 1985), appropriated funds for water reservations in the upper Missouri River Basin, and changed the deadlines set forth in Ch. 573, L. 1985, for filing applications for water reservations and for action by the Board of Natural Resources & Conservation (functions now transferred to Department of Natural Resources and Conservation) on reservation applications. The preamble to House Bill 952, L. 1985, read: "WHEREAS, the Select Committee on Water Marketing was commissioned by

the 1983 Legislature to undertake a study of the advantages and disadvantages of water marketing; and

WHEREAS, the Select Committee in completing its study determined that Montana needs to address broader questions of water policy in order to protect Montana's interests in the allocation and management of state waters; and

WHEREAS, the Select Committee has presented a comprehensive series of recommendations that must be considered as a whole; and

WHEREAS, these recommendations serve to revise Montana's water policy in order to maximize Montana's authority over management of state waters and other natural resources and to conserve water for existing and future beneficial uses by Montanans; and

WHEREAS, many of these recommendations are embodied in House Bill No. 680, which is under consideration by the 49th Legislature, as well as contained in the Select Committee's final report; and

WHEREAS, funds are needed for various agencies of state government to implement these recommendations.

THEREFORE, the Legislature of the State of Montana finds it appropriate to allocate funds for the implementation of the recommendations and to further develop a comprehensive water policy."

Administrative Rules

Title 36, chapter 16, subchapter 1, ARM Water reservations.

85-2-335. Definitions.

Compiler's Comments

1995 Amendment: Chapter 487 deleted definition of domestic use that read: ""Domestic use" means use of water common to family homes, including use for culinary purposes, washing, drinking water for humans and domestic pets, and irrigation of a lawn or garden of less than 1 acre, not to exceed a total of 3.5 acre-feet per year. The term includes municipal uses for expanded domestic use but does not include commercial or industrial use"; deleted definition of ground water that read: ""Ground water" means any water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not a part of that surface water"; and in definition of Upper Clark Fork River basin, at end after "dam", deleted "but does not include the Blackfoot River, designated as subbasin 76F, or Rock Creek, designated as subbasin 76E". Amendment effective April 14, 1995.

Severability: Section 11, Ch. 487, L. 1995, was a severability clause.

Applicability: Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

Effective Date: Section 6, Ch. 741, L. 1991, provided that this section is effective on passage and approval. Approved May 1, 1991.

Applicability: Section 7, Ch. 741, L. 1991, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act] [effective May 1, 1991]."

85-2-336. Basin closure — exception.

Compiler's Comments

1997 Amendment: Chapter 497 in (3), in first sentence, near beginning before "water reservations", inserted "state" and in second sentence, near beginning after "filing of a", inserted "state water"; and in (4), near middle, substituted "state water reservations" for "reservations of water". Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1995 Amendments: Chapter 418 in (4), at beginning, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 487 in (1), at end, deleted "during the period from May 1, 1991, until June 30, 1995"; in (2)(a), at end, deleted "or water for domestic use"; in (2)(b), at beginning of first sentence after "application", inserted "filed prior to January 1, 2000" and at end, after "part 7", inserted "at sites designated as of January 1, 1994", inserted second sentence limiting total flow rates to 10 cubic feet per second, and in third sentence, after "actions", inserted "may not be used for dilution and"; inserted (2)(c) through (2)(e) excluding applications made for water for stock use, stored water, and power generation; in (3), at end of second sentence, deleted "during the period of the basin

closure provided in subsection (1)"; in (4), near middle after "water", deleted "except ground water" and at end deleted "during the period of the basin closure provided in subsection (1)"; and made minor changes in style. Amendment effective April 14, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Severability: Section 11, Ch. 487, L. 1995, was a severability clause.

Applicability: Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

Effective Date: Section 6, Ch. 741, L. 1991, provided that this section is effective on passage and approval. Approved May 1, 1991.

Applicability: Section 7, Ch. 741, L. 1991, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act] [effective May 1, 1991]."

85-2-337. Ground water permit applications — report required.

Compiler's Comments

1997 Amendment: Chapter 353 in (1), near middle of first sentence after "hydrologist", substituted "addressing the hydrologic connection between" for "verifying that" and near end, after "ground water", substituted "and" for "is not a part of or substantially or directly connected to"; at beginning of (2) inserted exception clause and language relating to preponderance of evidence and after "85-2-311" deleted "the department shall find, based on substantial credible evidence"; inserted (3) regarding an augmentation plan; and made minor changes in style. Amendment effective April 22, 1997.

Effective Date: Section 6, Ch. 741, L. 1991, provided that this section is effective on passage and approval. Approved May 1, 1991.

Applicability: Section 7, Ch. 741, L. 1991, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act] [effective May 1, 1991]."

85-2-338. Upper Clark Fork River basin steering committee — membership and duties — comprehensive management plan.

Compiler's Comments

1997 Amendment: Chapter 353 in (1), at beginning of second sentence after "The", inserted "steering committee has 22 members, who must be appointed as follows"; inserted (1)(a) and (1)(b) regarding membership from basin conservation districts and county commissions; in (1)(c), after "appoint the", substituted "remaining 10 committee members and any additional committee members not appointed under subsections (1)(a) and (1)(b) and shall ensure that committee membership includes a balance of affected basin interests and is in conformance with subsection (2)" for "members of the committee, selecting them"; at beginning of (2) inserted "Steering committee members must be selected"; in (2)(a) substituted "agriculture" for "agricultural organizations"; in (2)(i), after "water", substituted "users not otherwise represented" for "user organizations"; inserted (3) regarding length and number of terms; inserted (4) regarding staggering of initial terms; deleted former (2)(b) that read: "(b) make recommendations to the 1997 legislature concerning representation, terms, and the method of appointing members to the steering committee"; and made minor changes in style. Amendment effective April 22, 1997.

1995 Amendment: Chapter 487 in (2), in introductory clause after "committee", inserted "consistent with the Upper Clark Fork River basin comprehensive management plan" and after "shall" substituted (2)(a) through (2)(m) regarding Steering Committee duties for former (2)(a) through (2)(e) that read: "complete an Upper Clark Fork River basin comprehensive management plan pursuant to 85-1-203. The plan must:

(a) consider and balance all beneficial uses of the water in the Upper Clark Fork River basin;

(b) include a description of the standards applied, the data relied upon, and the methodology used in preparing the plan;

(c) contain recommendations regarding the Upper Clark Fork River basin closure as provided in 85-2-336;

(d) identify and make recommendations regarding the resolution of water-related issues in the Upper Clark Fork River basin; and

(e) include the Blackfoot River, designated as subbasin 76F, and Rock Creek, designated as subbasin 76E, in any considerations made under subsections (2)(a) through (2)(d)"; deleted (3) that read: "(3) The steering committee shall complete and submit a management plan to the governor and the legislature by December 31, 1994"; and made minor changes in style. Amendment effective April 14, 1995.

Severability: Section 11, Ch. 487, L. 1995, was a severability clause.

Applicability: Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

Effective Date: Section 6, Ch. 741, L. 1991, provided that this section is effective on passage and approval. Approved May 1, 1991.

Applicability: Section 7, Ch. 741, L. 1991, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act] [effective May 1, 1991]."

85-2-339. Terminated.

Compiler's Comments

Effective Date: Section 4, Ch. 281, L. 1999, provided that this section is effective on passage and approval. Approved April 8, 1999.

Applicability: Section 5, Ch. 281, L. 1999, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 8, 1999.

Termination: Section 6, Ch. 281, L. 1999, provided: "[This act] terminates February 28, 2001."

85-2-340. Definitions.

Compiler's Comments

1997 Amendment: Chapter 497 in definition of application, near end before "water reservation", inserted "state". Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

Applicability: Section 4, Ch. 244, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 1, 1993.

Effective Date: Section 5, Ch. 244, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 1, 1993.

85-2-341. Basin closure — exceptions.

Compiler's Comments

1997 Amendment: Chapter 497 in (1), near end before "reservation", inserted "state water". Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1995 Amendment: Chapter 418 in (1), after "department", deleted "or the board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Applicability: Section 4, Ch. 244, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 1, 1993.

Effective Date: Section 5, Ch. 244, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 1, 1993.

85-2-342. Definitions.

Compiler's Comments

1997 Amendment: Chapter 497 in definition of application, near end before "water reservation", inserted "state". Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

Effective Date: Section 4, Ch. 385, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 16, 1993.

Applicability: Section 5, Ch. 385, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 16, 1993.

85-2-343. Basin closure — exceptions.

Compiler's Comments

1997 Amendment: Chapter 441 near middle of (1), after "within the upper Missouri River basin", deleted "during the period from April 16, 1993"; inserted (2)(e) relating to use of water from Muddy Creek drainage; and made minor changes in style.

1997 Statement of Intent: The statement of intent attached to Ch. 441, L. 1997, provided: "This bill is intended to allow an applicant to apply for a water permit on the Muddy Creek drainage to use excess water to prevent significant impacts on adjoining lands. This conservation measure will be allowed only if the permit will help control erosion on the Muddy Creek drainage."

1995 Amendment: Chapter 418 in (1), after "department", deleted "and the board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Effective Date: Section 4, Ch. 385, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 16, 1993.

Applicability: Section 5, Ch. 385, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 16, 1993.

85-2-344. Bitterroot River subbasin temporary closure — definitions — exceptions.

Compiler's Comments

Effective Date: Section 3, Ch. 205, L. 1999, provided: "[This act] is effective on passage and approval." Approved March 29, 1999.

Applicability: Section 4, Ch. 205, L. 1999, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective March 29, 1999.

85-2-350. Clark Fork River basin task force — water management plan.

Compiler's Comments

Effective Date: Section 5, Ch. 447, L. 2001, provided that this section is effective on passage and approval. Approved April 30, 2001.

Termination: Section 6, Ch. 447, L. 2001, provided: "[This act] terminates April 15, 2005."

85-2-351. Notice to permitholders — Clark Fork River basin.

Compiler's Comments

Effective Date: Section 5, Ch. 447, L. 2001, provided that this section is effective on passage and approval. Approved April 30, 2001.

Termination: Section 6, Ch. 447, L. 2001, provided: "[This act] terminates April 15, 2005."

Part 4
Utilization of Water

Part Case Notes

Findings and Conclusions as to Water Rights Held Inadequate — Judgment Vacated and Remanded: When a midstream and downstream water user filed suit against the upstream user to have the District Court declare the relative water rights of the parties, the findings of fact and conclusions of law entered by the District Court were so bare and inadequate as to provide no basis for meaningful appellate review. Because it could not be determined from the District Court's bare conclusions (i.e., that the parties had failed to prove their case by a preponderance of the evidence and had abandoned their rights) what the factual or evidentiary basis for the District Court's decision was, the Supreme Court vacated the judgment as to all of the three parties and remanded the case to the District Court and directed it to enter findings and conclusions reflective of the

evidence presented at trial and the legal contentions of the parties. 79 Ranch, Inc. v. Pitsch, 193 M 229, 631 P2d 690, 38 St. Rep. 1048 (1981).

Part Law Review Articles

Use Preferences for Water, Beck, 76 N.D.L. Rev. 753 (2000).

85-2-401. Priority — recognition and confirmation of changes in appropriations issued after July 1, 1973.

Compiler's Comments

1997 Amendment: Chapter 497 inserted (4) concerning recognition and confirmation of changes in appropriation rights actions of Department after July 1, 1973; and made minor changes in style. Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

Case Notes

Appropriative Rights Annual Rather Than Seasonal: Generally, there is no division of the year into an irrigation season and a storage season, so as to give later direct users a seasonal preference over earlier indirect users, or vice versa. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

Damage Award to Appropriator of Costs of Lawsuit Filed to Enforce Rights: In a water rights dispute, upstream junior appropriators damaged downstream senior appropriators' headgate. A lawsuit over their respective water rights ensued, and the senior appropriators were successful both at trial and on appeal. At trial, the jury awarded the senior appropriators their court costs and attorney fees as damages. The Supreme Court refused to overturn the award, ruling that the costs of the lawsuit were consequential to the interference with the headgate and not so remote as to preclude recovery. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

No Grounds for Change of Pre-1973 Water Right: Upstream junior appropriators were precluded from challenging a change in place of use made by downstream senior appropriators' predecessor in interest in 1941 because the junior appropriators held no rights to the waters at issue in 1941. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

Right of Priority: Priority of application for water appropriation is an existing right which is preserved from extinction by the provisions of Art. IX, sec. 3, Mont. Const. Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

Priority of Senior Main Stem Water Rights Over Junior Tributary Water Rights: Appellant owns water rights in Clear Creek dating to 1910. Petitioners have water rights in Rock Creek dating to 1896. Clear Creek is a tributary of Rock Creek. In 1970, appellant obtained a court order directing the Rock Creek Water Commissioner to "carry out" the Clear Creek water rights of appellant. Following the District Court order, the Water Commissioner honored in full the requests of appellant for water without regard to any priority in the relationship of the creeks' water rights. As a result, at times of water shortage, senior Rock Creek decreed waters are cut off. In 1977, petitioners filed this action to rescind the 1970 order and to direct the Water Commissioner to subject the Clear Creek water rights to the priorities of Rock Creek water rights. The District Court ruled that the 1970 court order, applied by the Water Commissioner to fulfill junior appropriations ahead of prior decreed rights, was improper. The Supreme Court affirmed the District Court's order and further stated that the order did not violate due process. The Supreme Court reasoned that the only rights affected by the District Court order were the rights of the parties before the court. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

Waters of Tributary: The waters of a tributary belong to the stream into which the tributary flows to the extent of prior appropriations. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

Valid Water Right Not Affected by Release of Surplus to Junior User: Defendants' predecessor in interest began using water in the amount of 110 gallons a minute from Mahle Spring in 1917 for domestic, stock, and irrigation purposes. Mahle Spring flows into Ashley Creek. In 1958, defendants completed construction of a dam whose purpose was to stabilize their water supply only, not to increase the amount of water appropriated. In April 1973, defendants filed notice of completion of ground water appropriation without well, claiming 110 gallons a minute. In 1957, plaintiff's predecessor in interest began using water from Ashley Creek. At times, when Ashley Creek dried up, defendants agreed to release water from the dam. In 1978, plaintiff obtained a water use permit for Ashley Creek. Subsequently, defendants refused to release any water from

the dam. Plaintiff filed an action to adjudicate the parties' water rights and to enjoin defendants from interfering with the flow of Ashley Creek. The Montana Supreme Court upheld the District Court's ruling that defendants are entitled to 110 gallons a minute with a priority date of 1917 and that plaintiff is entitled only to the excess over that. The court denied plaintiff's claim that defendants were estopped from asserting a superior claim, reasoning that the release of the water did not cause plaintiff's predecessor in interest to change her position for the worse because the defendants had already established a valid claim to the water and thus the release was either a mere gratuity or a release of surplus water. In the absence of evidence that defendant was not simply releasing surplus water, the court also denied plaintiff's claim of laches. Finally, the court denied plaintiff's claim that the release from the dam was evidence that defendants were not making beneficial use of all the water since the District Court findings indicated that the defendants' total claim was fully justified. Bagnell v. Lemery, 202 M 238, 657 P2d 608, 40 St. Rep. 58 (1983).

Prior Rights: Where plaintiff had over the years constructed a series of dikes in order to spread over his land the water which would flow down a dry gully after the melting of snow or a heavy rainfall, he had a prior right to the extent that his project was finished. He who first diverts the water to a beneficial use has the prior right thereto where the right is based upon the custom and practice of the early settlers and where there was no compliance with the statutes. Midkiff v. Kincheloe, 127 M 324, 263 P2d 976 (1953). (See, however, the dissenting opinion in the case in which it was contended that the waters were floodwaters and wastewaters which the defendant had a right to impound in a stock reservoir, 127 M 324, 263 P2d 976 (1953).)

Temporary Suspension of Prior Right: When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right in the order of priority may use the water until such time as the prior appropriator's needs justify his demanding that the junior appropriator give way to his superior claim. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled on other grounds in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

Abandonment — Resumption: Where use of water is abandoned and resumed, use vests from the date of resumption. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); O'Shea v. Doty, 68 M 316, 218 P 658 (1923).

Priority of Appropriation: Priority of appropriation of water confers superiority of right without reference to the character of the use, whether natural or artificial. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

Collateral References

Appropriated waters, determination of rights to, 78 Am. Jur. 2d Waters §§345, 346, 361.

Appropriation of water as creating right, as against subsequent appropriator, to continue method or means of diversion. 121 ALR 1044.

Right of appropriator of water to recapture water which has escaped or is otherwise no longer within his immediate possession. 89 ALR 210.

85-2-402. Changes in appropriation rights.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 132 at beginning of third sentence in (1) inserted exception clause and near middle of sentence after "right" substituted "without the approval of the department" for "except, as permitted under this section, by applying for and receiving the approval of the department"; near beginning of (2) inserted reference to subsection (15); inserted (15) allowing appropriator to change water right for replacement wells without prior approval of department if certain criteria are met; and made minor changes in style. Amendment effective March 27, 2001.

Chapter 381 in (1) at beginning of third sentence inserted exception clause and near middle after "appropriation right" substituted "without" for "except, as permitted under this section, by applying for and receiving"; and made minor changes in style. Amendment effective April 27, 2001.

1999 Amendment: Chapter 42 in (5)(b) at beginning inserted "for the withdrawal and transportation of appropriated water for out-of-state use"; and made minor changes in style. Amendment effective February 24, 1999.

Extension of Termination Date: Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999. Section 6, Ch. 322,

L. 1995, and sec. 14, Ch. 487, L. 1995, provided a termination date of June 30, 2005, for one version of this section; however, the 1995 termination date was not extended by Ch. 123, L. 1999.

1997 Amendments: (Temporary version and version effective July 1, 1999) Chapter 353 in (2)(d), after "85-2-408", inserted "or 85-2-439". Amendment effective April 22, 1997.

(All versions) Chapter 497 in (1) inserted first and second sentences concerning right to make change and lack of presumption in change proceeding; and in (2)(a), near beginning, substituted "change in appropriation right" for "use", before "water rights of other persons" inserted "use of the existing", near middle, after "persons or other", inserted "perfected or", after "a permit" inserted "or certificate", and at end substituted "a state water reservation has been issued under part 3" for "water has been reserved". Amendment effective May 1, 1997.

(Temporary version and version effective July 1, 1999) In (6), near middle of first sentence after "requirements for", inserted "federal non-Indian and Indian". Amendment effective May 1, 1997.

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

1995 Amendments — Composite Section: (Temporary version) Chapter 322 in (2)(b) inserted language pertaining to temporary change authorization for instream use to benefit fishery resource pursuant to 85-2-408; at beginning of (2)(d) inserted exception clause relating to 85-2-436 or 85-2-408; and made minor changes in style.

(Version effective July 1, 1999) At beginning of (1)(b) and (1)(d) inserted exception clause; and made minor changes in style. Amendment terminates June 30, 2005.

(Temporary version) Chapter 487 in (2)(b), after "85-2-436", inserted "or water use pursuant to 85-2-439"; and made minor changes in style. Amendment effective April 14, 1995, and terminates June 30, 2005. The amendment in (2)(b) rendered the Ch. 322 use of "either" after "85-2-408 when" inappropriate.

(Version effective July 1, 1999) In (2)(b), at beginning, inserted exception clause; and made minor changes in style. Amendment effective July 1, 1999, and terminates June 30, 2005. The insertion in (2)(b) of exception clause required the addition of "or" to separate exception clauses and required corresponding changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 322, L. 1995, provided: "This legislation, jointly developed by representatives from the agricultural, recreation, and conservation communities, is intended to authorize the temporary use of existing water rights for instream flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work within the prior appropriation water rights system.

This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease existing water rights to protect fisheries and allows persons who own water rights to temporarily change the use of that water to instream flow to benefit the fishery resource.

To monitor and review the implementation of this instream flow program, the legislature directs the office of the governor to convene on an ongoing and regular basis a working group that includes representatives from the agricultural, recreation, and conservation communities. This working group shall consult with the department of natural resources and conservation on relevant changes in water use and shall submit a report to the governor and the legislature in 2001 outlining the status of the program."

Severability: Section 11, Ch. 487, L. 1995, was a severability clause.

Applicability: Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

1993 Amendments: Chapter 370 in (1), in first sentence after "this section", substituted "by applying for and receiving the approval" for "and with the approval" and inserted second sentence requiring applicant to submit a correct and complete application; in (2) and (4), after "proves by", substituted "a preponderance of evidence" for "substantial credible evidence"; near end of first sentence of (9), before "completed", deleted "properly" and at end of second sentence, after "works", substituted "describing how the appropriation was completed" for "that the appropriation has been properly completed in substantial accordance with the terms and conditions of the change approval"; and made minor changes in style. Amendment effective April 16, 1993.

Chapter 460 in (2) substituted "subsections (4) through (6)" for "subsections (3) through (5)"; in (2) and (4), after "proves by", substituted "a preponderance of evidence" for "substantial credible evidence"; inserted (2)(f) concerning water quality and (2)(g) concerning effluent limitations; inserted (3) requiring that a valid objection be made before an applicant needs to

prove that the change approval criteria have been met; in (5)(a) substituted "subsections (2) and (4)" for "subsections (2) and (3)"; in (6)(b)(i) substituted "subsection (2) or (4)" for "subsection (2) or (3)"; in (6)(c) substituted "subsections (6)(b)(ii) and (6)(b)(iii)" for "subsections (5)(b)(ii) and (5)(b)(iii)"; inserted (14) allowing the Department to adopt rules; and made minor changes in style. Amendment effective April 21, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 460, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of natural resources and conservation authority to adopt administrative rules. The bill adds statutory criteria for the department to consider in the processing of an application for a permit, change authorization, controlled ground water area, or basin closure. In adopting rules implementing this bill and in interpreting the new statutory language, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] should assess the magnitude, character, duration, and geographical extent of the projected effects on the uses of water as classified and utilize this assessment in a practical manner."

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

Section 7, Ch. 460, L. 1993, was a severability clause.

Retroactive Applicability: Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

Section 8, Ch. 460, L. 1993, provided: "[Sections 1 and 3] [85-2-311 and 85-2-402] apply retroactively, within the meaning of 1-2-109, to all applications for a permit or change in appropriation right that the department has not noticed out for objection as of [the effective date of this act]." Effective April 21, 1993.

1991 Amendments: Chapter 308 inserted (2)(e) regarding salvaged water.

Chapter 805 inserted (8) requiring appropriator to notify Department that appropriation has been completed and requiring notification to contain certified statement by person with experience in design, construction, or operation of appropriation works that appropriation has been properly completed in accordance with terms of change approval. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 308, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of natural resources and conservation concerning the adoption of rules to allow the appropriation, use, and change of use of salvaged water. The legislature directs the department of natural resources and conservation to adopt rules that promote the conservation and efficient use of water by implementing the provisions of this bill."

Saving Clause: Section 5, Ch. 308, L. 1991, was a saving clause.

1989 Amendments: Chapter 432 inserted (2)(d) relating to possessory interest; and made minor changes in phraseology. Amendment effective April 4, 1989.

Chapter 658 at beginning of (2)(b) inserted exception clause; and made minor changes in phraseology. Amendment effective May 11, 1989, and terminates June 30, 1993.

1987 Amendment: In (7) inserted last sentence concerning time extension.

1985 Amendment: Substituted (1) through (8) (see 1985 Session Law) for former (1) through (6) that read: "(1) An appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the department.

(2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308(2), and hearings shall be held in accordance with 85-2-309.

(3) An appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation right from an agricultural or irrigation use to an industrial use.

(4) The department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may,

after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(6) Without obtaining prior approval from the department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the water rights of other persons. If the department determines that the proposed change might adversely affect the water rights of other persons, notice of the proposed change must be given in accordance with 85-2-307. If the department then determines that an objection filed by a person whose water rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections must meet the requirements of 85-2-308, and hearings must be held in accordance with 85-2-309"; and inserted (11) relating to invalidating a change in appropriation right made contrary to law.

Applicability: Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

1983 Amendment: In (3), after "agricultural" inserted "or irrigation"; inserted (6) through (8) describing criteria and procedures for departmental approval of a proposed change in appropriation.

Administrative Rules

ARM 36.15.603 Permits for water diversions.

Case Notes

DECISIONS UNDER CURRENT LAW

Burden of Proof at All Stages: This section requires the Department to approve an appropriation right change if: (1) the appropriator proves that the proposed use will not adversely affect the water rights of others; (2) the proposed means of diversion, construction, and operation are adequate; and (3) the proposed use is a beneficial one. Deletion by 1985 amendment of language referring to a contested case hearing stage in the application process did not have the effect of making this burden of proof apply only at the application stage, with the objector having the burden of proof at the hearing stage. The applicant has the burden of proof at all stages before the Department and courts. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

Evidence That Change Would Not Affect Objector's Rights: Applicant applied for a change in water rights that would alter the place of use, the amount of acres irrigated, and the type of irrigation used. The hearings examiner properly precluded applicant from showing the nature of objectors' water rights in an attempt to demonstrate that the rights would not be affected by applicant's proposed change. The records of objectors' water rights are in the Water Court's temporary preliminary decree, and the hearings examiner correctly concluded that the rights in the decree were prima facie evidence that the objectors had water rights in the stream. The provisions of this chapter, commonly referred to as the Water Use Act, have a separate procedure by which applicant can attack rights claimed by objectors. To allow applicant to present evidence pertaining to objectors' water rights could lead to readjudication of rights claimed in the creek. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

Failure of Applicant to Carry Burden of Proof: Applicant for a change of appropriation failed to meet the burden of proving that the change would not adversely affect objectors' rights. The application was properly denied because the evidence in the record does not sustain a conclusion of no adverse effect and because it cannot be concluded from the record that the means of diversion and operation are adequate. The hearings examiner's decision to deny the application was not clearly erroneous in view of the reliable, probative, and substantial evidence in the record. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

Retroactivity and Validity of Change in Burden of Proof for Change of Water Appropriation: The fact that a water right existing at the time of adoption of the 1972 Montana Constitution is recognized by that constitution does not mean that if the owner of the right applies for a change in the right, the burden of proof must be placed on the objector. The objector had the burden in 1972,

but the holder now has the burden under this section. The change in the burden of proof is not an impermissible retroactive application of the statute to the detriment of vested rights acquired under the 1972 Montana Constitution. Statutes that modify the procedure for exercising a vested right or for carrying out a duty do not constitute retroactive legislation. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

Standing of Junior Appropriators to Object: The contention by applicant for a change of appropriation that junior downstream appropriators and junior upstream appropriator lacked standing to object to the change was without merit because either can be damaged by a change in the amount of water appropriated downstream if a shortage ensues and a senior appropriator causes the downstream or upstream appropriator to forego his water use until the senior's rights are fulfilled. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

Change in Point of Use — Judicial Review of Procedural Orders Improper: Pursuant to 1973 water use law, appellant applied for Department of Natural Resources and Conservation (DNRC) approval to change the point of use of its pre-1973 water right. DNRC hearing examiner ordered objectors to respond to appellant's discovery request, yet refused to dismiss the objections of objectors who failed to respond. Upon review, the Water Court reversed the DNRC denial. Appellant appealed, arguing review was inappropriate. The Supreme Court agreed, stating that judicial review of the hearing examiner's procedural order was improper as there had been no final decision or exhaustion of administrative remedies. Kingsbury Ditch Co. v. Dept. of Natural Resources and Conservation, 223 M 379, 725 P2d 1209, 43 St. Rep. 1805 (1986).

Enlargement of Dam: Permission for additional appropriation on an adjudicated stream was proper where the findings indicated that there was surplus water to be appropriated, there would be no injury to prior appropriators, impoundment of water would be beneficial, and the proposed dam could be operated so as not to interfere with others. Sunset Irrigation District v. Ailport, 166 M 11, 531 P2d 1349 (1974).

DECISIONS UNDER FORMER LAW

Change in Point of Diversion — Burden of Proof of Injury: Under section 89-803, R.C.M. 1947 (now repealed), the point of diversion may be changed if the change would not prejudice the rights of other appropriators. The party claiming to be prejudiced has the burden of proving the prejudice. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980); following Lokowich v. Helena, 46 M 575, 129 P 1063 (1913).

Change in Place of Diversion — Water Exchange Prevented: The defendants, upstream subsequent appropriators with respect to the plaintiff, diverted all the waters of a creek. Further downstream but still above the plaintiff, the defendants replenished the creek with water from a canal. The plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants. Thompson v. Harvey, 164 M 133, 519 P2d 963 (1974).

Diversion Point Changed: An appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion, and the fact that a water commissioner might have to be employed to oversee the appropriation was not the kind of burden on other appropriators that would prevent the change. McIntosh v. Graveley, 159 M 72, 495 P2d 186 (1972).

Use of Water Changed: Where an appropriator had a decreed right to use water for irrigation of specified land outside the drainage area, his use of the water on other land outside the drainage area did not impose an undue burden on other appropriators, so long as he did not increase the amount of water diverted from the drainage area. McIntosh v. Graveley, 159 M 72, 495 P2d 186 (1972).

Remedies of Servient Owner: Changes in a ditch appurtenant to a water right did not forfeit the ditch right or justify the use of self-help by the servient landowner to fill in a portion of the ditch. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964).

Substantial Change: Under section 89-803, R.C.M. 1947 (now repealed), the owner of a ditch appurtenant to a water right could change the location by minor meandering along the course of the ditch and its marginal land with a bulldozer to account for topographical adjustments in the terrain, so long as he did not add any new burden to the servient estate or cause any additional damage thereto. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964).

Sale of Portion of Land — Division of Water Right:

When an owner of a tract of land with an appurtenant water right grants a portion of the tract without any express division or reservation, the water right is divided in the proportion the number of irrigated acres conveyed bears to the total irrigated acres. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963).

Neither a change in the place of diversion of water nor a change in its use from mining to agriculture, or vice versa, affects its appropriation. Thomas v. Ball, 66 M 161, 213 P 597 (1923). See also Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933); Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933); Loyning v. Rankin, 118 M 235, 165 P2d 1006 (1946).

Actual diversion of water and its beneficial use existing, prospective, or in contemplation constitute an appropriation, which is not affected by a change in the point of diversion or place of use. Wheat v. Cameron, 64 M 494, 210 P 761 (1922).

The location of a flume maintained over the land of another, as well as the use of the water flowing through it, may be changed, provided the change adds no new burdens to the servient estate or causes additional damage thereto. Pioneer Min. Co. v. Bannack Gold Min. Co., 60 M 254, 198 P 748 (1921).

Burden of Proof of Injury:

For a period of more than 50 years the defendant accumulated water rights and used them wherever and whenever needed to irrigate 34,000 acres of land. The burden was on the plaintiffs to show that they had been injured or prejudiced by such changing use. Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

The party who claims to have been injured by another's change in place of diversion of water right has the burden of alleging and proving the injury. Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933); Lokowich v. Helena, 46 M 575, 129 P 1063 (1913); Hansen v. Larsen, 44 M 350, 120 P 229 (1911).

Change in Place of Use — Decree Not Detailed:

A water rights decree failed to describe the particular acreage to be irrigated and expressed the water rights in terms of flow per unit of time without stating during how many such units of time water could be taken. Adjudicated owners could not expand the use of water to additional lands or in length of time to the injury of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1939).

The conclusiveness of a judgment as res judicata in a water right suit between the same parties or their successors in interest in a prior action is not impaired by the alleged fact that in authorizing a change of place of use or point of diversion, it violated the provisions of section 89-803, R.C.M. 1947 (now repealed). Brennan v. Jones, 101 M 550, 55 P2d 697 (1936).

Change of Use — Sale: Appropriations not originally made for the purpose of sale may have their use changed to that purpose if subsequent appropriators are not thereby injured. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

Change in Use — Outside of Watershed: Pursuant to an earlier water rights decree, the defendant irrigated land outside the watershed of the source. When the defendant brought additional lands outside the watershed under irrigation with this water right, the plaintiffs could not claim they were injured by this change in use. Their lands were either within the watershed of the source or higher than the defendant's irrigated land and would not benefit from percolating waters from his land. Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933).

Change in Use — Sale of Water Not in Use: An appropriator of a water right for placer mining purposes attempted to convey to another a right to use the waters when not being used for mining. Although an appropriator may change the use of his appropriation, he may not sell the same in the interim when the water is not being used. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Creek v. Bozeman Water Works Co., 15 M 121, 38 P 459 (1894).

Change in Place of Diversion or Use — Who May Complain: Only an injured subsequent appropriator may complain that a prior appropriator's change in place of diversion or use is affecting subsequent rights. Carlson v. Helena, 43 M 1, 114 P 110 (1911).

Change in Place of Diversion and Use — Placer Mining: The successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes. Head v. Hale, 38 M 302, 100 P 222 (1909).

Change in Place of Use — Deprivation of Subsequent Right: After the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes. The defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch. Such change in use was

unlawful because it absolutely deprived the plaintiff of his subsequent right. Gassert v. Noyes, 18 M 216, 44 P 959 (1896).

Change in Use — Mining to Irrigation: A water right was abandoned for mining purposes, the water returned to its original channel, and then recaptured by the original owner to be used for irrigation purposes. Such change in use was lawful. Meagher v. Hardenbrook, 11 M 385, 28 P 451 (1891).

Collateral References

Waters and Water Courses *key* 30, 145.

94 C.J.S. Waters §381.

78 Am. Jur. 2d Waters §§260, 354, 357.

Liability, as regards surface waters, for raising surface level of land. 12 ALR 2d 1338, superseded by 88 ALR 4th 891.

85-2-403. Transfer of appropriation right.

Compiler's Comments

1987 Amendment: In (2) deleted reference to subsection (6) of 85-2-402.

1983 Amendments: Chapter 448, in (1), after "use water" deleted "under a permit or certificate of water right"; deleted former (2) and (3), which read: "(2) The person receiving the appropriation interest shall file with the department notice of the transfer on a form prescribed by the department.

(3) Without obtaining prior approval from the department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307. If the department then determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308(2) and hearings shall be held in accordance with 85-2-309."; (subsection (3) was enacted as 85-2-402(6)).

Chapter 674 also deleted former (2) that required a person receiving an appropriation interest to file with the Department a notice of transfer; and inserted new (2) relating both to the effect of a failure to comply with procedures for change in appropriation upon a conveyance or reservation and to the retroactive application of the subsection to conveyances or reservations made after July 1, 1973.

In (2), the Code Commissioner changed a reference to "subsection (2)" to "85-2-402(6)" because (2) (formerly (3)) was deleted by Ch. 448, L. 1983, and reenacted as 85-2-402(6). The apparent intent was to apply new subsection (2) of this section, including retroactive effect, to failure to comply with former subsection (3) of this section, as reenacted as 85-2-402(6).

Case Notes

DECISIONS UNDER CURRENT LAW

Application of Approval Provision to Rights Perfected Prior to Statute — Construction With Constitutional Guarantee: Article IX, sec. 3, Mont. Const., providing that "all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed", is not violated by application of this section's provision, stating that prior approval of the Department of Natural Resources and Conservation must be obtained before an appropriator may sell, sever, or make appurtenant to other lands an appropriation right that was perfected prior to the effective date of this section. The law has not changed, and the Department has simply been given a review to determine an issue that could previously be determined only by a District Court. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying upon rehearing 38 St. Rep. 1618 (1981).

Chapter's Application to Rights Perfected Prior to Its Effective Date: Except where it indicates a contrary intent, this chapter applies to water rights perfected prior to the effective date of this chapter, and failure to comply with the terms of this chapter does not render a conveyance or reservation void but suspends ability to use the right until the statutorily mandated permission is granted by the Department of Natural Resources and Conservation. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying upon rehearing 38 St. Rep. 1618 (1981).

Sale of Land and One of Two Water Rights — Legal Effects: Landowner owned two water rights on river, one called the "McNiven Right" and one called the "Grannis Right". He sold part of his land together with part of the McNiven Right. The Supreme Court held that: (1) both the McNiven and the Grannis Rights were appurtenant to the conveyed land and both remained appurtenant to the conveyed land after the sales; (2) the conveyance impliedly reserved the Grannis Right to seller and passed title to part of the McNiven Right to buyer; (3) under this section, buyer's right to use the McNiven Right would be delayed until appropriate approval is granted by the Department of Natural Resources and Conservation as required by this section, and seller must apply under this section for permission to sever from the land conveyed the Grannis Right which the deed impliedly reserved to seller. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying upon rehearing 38 St. Rep. 1618 (1981).

Sale of a Water Right With Implied Reservation of Another Water Right: Landowner owned two water rights on river and each had a related ditch right; one was called the "McNiven Right" and the other was called the "Grannis Right". He sold part of his land together with part of the McNiven Right and "related ditch rights". The Supreme Court held that the words "related ditch rights" in the deed's water right grant referred only to the McNiven ditch, and further held that since the landowner held two water rights and related ditch rights, the conveyance of the McNiven water and ditch right impliedly reserved to landowner the Grannis water right and related ditch right. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying upon rehearing 38 St. Rep. 1618 (1981).

DECISIONS UNDER FORMER LAW

Change in Use — Appurtenant to Land: After purchasing an adjoining tract of land with an appurtenant water right, a farmer proceeded to irrigate all of his land with the newly purchased water right. This change in use resulted in the water right becoming appurtenant to all of the land. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963).

Sale of Portion of Land — Division of Water Right: When an owner of a tract of land with an appurtenant water right grants a portion of the tract without any express division or reservation, the water right is divided in the proportion the number of irrigated acres conveyed bears to the total irrigated acres. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963).

Conveyance of Right as Appurtenance: When land is conveyed, including the appurtenances, any water rights previously enjoyed are thereby transferred. When the grantor later purports to convey the water right only, the latter deed does not constitute severance of the water right, as it adds nothing to the conveyance previously made. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Collateral References

Rights and duties of owners inter se with respect to upkeep and repair of water easement. 169 ALR 1147.

Assignability and divisibility of easement in gross or license in respect of land or water. 130 ALR 1253.

Character of easement in respect of water as one in gross or appurtenant. 89 ALR 1187.

85-2-404. Abandonment of appropriation right.

Compiler's Comments

Extension of Termination Date: Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999. Section 14, Ch. 487, L. 1995, provided a termination date of June 30, 2005, for one version of this section; however, the 1995 termination date was not extended by Ch. 123, L. 1999.

1997 Amendment: (All versions) Chapter 174 in (2), near end after "right", deleted "in whole or"; and in (5), near end before "determined", inserted "finally". Amendment effective March 28, 1997.

Saving Clause: Section 7, Ch. 174, L. 1997, was a saving clause.

1995 Amendment: (Temporary version) Chapter 487 in (4), after "85-2-436", inserted "the use of water pursuant to 85-2-439"; and made minor changes in style. Amendment effective April 14, 1995, and terminates June 30, 2005.

(Version effective July 1, 1999) At beginning of (4) inserted "The use of water pursuant to 85-2-439 or"; and made minor changes in style. Amendment effective July 1, 1999, and terminates June 30, 2005.

Severability: Section 11, Ch. 487, L. 1995, was a severability clause.

Applicability: Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

1991 Amendment: (Temporary version) In (4), after "85-2-436", inserted "or the temporary change pursuant to 85-2-407" and in two places, after "abandonment", deleted "by the lessor".

(Version effective July 1, 1999) Inserted (4) providing that a temporary change pursuant to 85-2-407 is not an abandonment.

1989 Amendment: Inserted (4) regarding lease of an existing right pursuant to the water leasing study; and made minor changes in phraseology. Amendment effective May 11, 1989, and terminates June 30, 1993.

1987 Amendment: Inserted (3) establishing that nonuse as a result of participation in state or federal conservation set-aside program is not presumed abandonment; at beginning of (4) substituted "Subsections (1) and (2)" for "This section"; and made minor change in phraseology.

Case Notes

No Different Standard for Abandonment of Water Rights Used for Mining Purposes: Graveley had not used the water right for his mining claim for more than 50 years but nevertheless claimed that he had not abandoned the right simply because the lack of profitability of mining the claim had led to the nonuse. Declining to distinguish the law of abandonment between various uses of water, the Supreme Court noted that the Legislature had not chosen to apply a different standard for determining the abandonment of water rights used for mining purposes and held that because Graveley had not introduced evidence sufficient to rebut the presumption of abandonment, the water right claim was terminated. In re Adjudication of Existing Rights to Use of All Water, Both Surface & Underground, Within Clark Fork River Drainage Above Blackfoot River, 274 M 340, 908 P2d 1353, 52 St. Rep. 1264 (1995).

Abandonment of Water Right by Nonuse Distinguished From Abandonment of Easement or Ditch Right: After hearing, the Water Court determined that three water rights held by appellants Pitsch had been abandoned because of nonuse over approximately 40 years. The Supreme Court held that the Water Court did not err in holding that the case was not governed by E.E. Eggebrecht, Inc. v. Waters, 217 M 291, 704 P2d 422 (1985), and that there was no conflict between Eggebrecht and 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215 (1983). Eggebrecht concerns the abandonment of easements by grant, more analogous to a ditch right by grant than a water right, while 79 Ranch concerns abandonment of a water right. There is no reason why Montana law on abandonment of those interests should be identical. In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

General Evidence of Conditions Insufficient to Excuse Long Period of Nonuse: Appellants presented general evidence to the Water Court of a variety of negative factors that caused them to not use perfected water rights for a period of 40 years. The Water Court held, in accordance with 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215 (1983), that appellants had abandoned their rights through nonuse. The Supreme Court held that evidence presented by appellants of dry conditions in the 1920s, "dust bowl years" of the 1930s, the depression, World War II, blown-in ditches, lack of water, and lack of money was conclusory in nature and not specific enough to excuse the long period of nonuse. Other parties to the case presented evidence that some amount of water was available and that blown-in ditches were easily opened. Under these facts, the Supreme Court held that the Water Court did not err in applying the abandonment presumption of *79 Ranch*, which the appellants failed to rebut by their evidence. In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

Post-1973 Evidence Unpersuasive as to Adjudication of Existing Water Right: The purpose of statewide water rights adjudication is to adjudicate those rights as they existed on July 1, 1973, the effective date of the Montana Water Use Act. Therefore, the Water Court did not err in refusing to consider evidence pertaining to a water right claimant's actions taken after 1973 as showing a lack of intent to abandon the water right. In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992).

Water Right and Easement as Separate Rights — Abandonment: Water rights and easements or ditch rights are separate and distinct rights; therefore, one can be abandoned without abandoning the other. In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992), following McDonnell v. Huffine, 44 M 411, 120 P 792 (1912). See also Rieman v. Anderson, 282 M 139, 935 P2d 1122, 54 St. Rep. 286 (1997).

Forty Years of Nonuse as Raising Rebuttable Presumption of Intent to Abandon: In litigation to establish plaintiff's and defendant's respective priorities to water appropriated from Big Coulee Creek, the evidence showed that neither had used previously appropriated water for a period of at

least 40 years. Thus, the District Court did not err in holding that under section 89-802, R.C.M. 1947 (now repealed), the appropriation rights of both parties had been abandoned for lack of use of the water. While abandonment of a water right is a question of fact, nonuse for a period of at least 40 years raises, in effect, a rebuttable presumption of abandonment. A claim that the predecessors of the parties could not afford to use the water by irrigating their land did not excuse the failure to use the water or rebut the presumption of abandonment since economics could excuse nearly every otherwise abandoned water right. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992), in which nonuse for 23-plus years was sufficient to constitute a presumption of abandonment despite the fact that the water right was carried as an asset on the county's books during the period of nonuse, and In re Adjudication of Existing Rights to Use of All Water, Both Surface & Underground, Within Clark Fork River Drainage Above Blackfoot River, 274 M 340, 908 P2d 1353, 52 St. Rep. 1264 (1995), in which continuous nonuse of water for a mining claim for over 50 years raised a rebuttable presumption of abandonment, despite claimant's contention that the cyclical nature of the mining industry and its uncertain economics were reason enough to explain the long period of nonuse. See also Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

Abandonment by Nonuse: Under section 89-802, R.C.M. 1947 (now repealed), 75 years of nonuse is sufficient to provide "clear evidence" of abandonment of the unused portion of a water right. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

Intent to Abandon: Mere nonuse of a ditch appurtenant to a water right is not sufficient to establish abandonment. There must be concurrent intent to abandon. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964), followed in Rieman v. Anderson, 282 M 139, 935 P2d 1122, 54 St. Rep. 286 (1997).

"Abandonment" Defined: Before it may be said that the owner of a water right has abandoned it, there must be the necessary concurrence of act and intent to abandon. He must have relinquished it because he no longer desired to possess it. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

Abandonment — Essential Elements: Abandonment of a water right is a voluntary act, and to constitute it there must be a concurrence of act and intent. Neither the relinquishment of possession nor the intent not to resume it for a beneficial use is alone sufficient to bring about its abandonment. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936); Thomas v. Ball, 66 M 161, 213 P 597 (1923).

Abandonment — Trespassers: Plaintiff's predecessors in interest for 13 years used a water right acquired by a desert land entryman after the entry had been canceled and thus were trespassers upon the public domain. That fact did not deprive the plaintiff from resuming the use of the water upon acquiring possession, unaffected by any junior rights which came into being in the meantime, there being no law enforcing abandonment of a vested water right as a penalty for exercising it as a trespasser. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Abandonment — Resumption: Where use of water is abandoned and resumed, use vests from the date of resumption. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); O'Shea v. Doty, 68 M 316, 218 P 658 (1923).

Abandonment — Burden of Proof — Nonuse: One who claims an abandonment of a water right has the burden of proving it by a preponderance of clear and definite evidence. Where the only evidence was nonuse for 7 years, whereupon its use was resumed by the owner and the water right later sold to another, the resumption and sale were evidence that abandonment was not intended. Thomas v. Ball, 66 M 161, 213 P 597 (1923).

Abandonment of Ditch — No Effect on Water Right: An appropriation was made from a creek, turned into a ditch, and eventually used at placer mines. Years later the appropriator abandoned the ditch, returned the water to the creek, and recaptured it for irrigation use. The abandonment of the ditch was not an abandonment of the entire water right. Meagher v. Hardenbrook, 11 M 385, 28 P 451 (1891).

Abandonment — Insufficient Supply: Defendant's appropriation for placer mining was not abandoned by his failure to use the appropriation for 5 years since there was not enough water to work the mines during those years. McCauley v. McKeig, 8 M 389, 21 P 22 (1889).

Law Review Articles

A New Rule of Law for the Abandonment of Water Rights, Hightower, 45 Mont. L. Rev. 167 (1984).

85-2-406. District court supervision of water distribution.

Compiler's Comments

1997 Amendment: Chapter 174 inserted (2)(a) allowing enforcement of a prior decree pending entry of another enforceable decree or adjudication; in (2)(b), in first sentence before "determined", inserted "conclusively", after "chapter" deleted "or when a basin is the subject of a temporary preliminary decree or preliminary decree, as modified after objections and hearings", after "controversy" deleted "or any person whose rights are or may be affected by enforcement of the decree", and at end, after "court", substituted "to certify the matter to the chief water judge" for "for relief", inserted second sentence regarding certification of existing rights, in third sentence, after "sought", substituted "shall retain exclusive jurisdiction" for "may" and after "appropriate" substituted "pending adjudication of the existing water rights certified to the water judge" for "to preserve property rights or the status quo pending the issuance of the final decree", and inserted fourth and fifth sentences regarding claim priority and return of the Water Court decision to District Court; in (3), at end of first sentence after "court", deleted "that issued the final decree"; in (4) inserted first sentence regarding enforceability of a preliminary or temporary preliminary decree and in second sentence, after first "decree", inserted "or preliminary decree"; deleted (5)(b) that read: "(b) The water judge is not bound by a supreme court determination on an appeal entered under this subsection in issuing any subsequent decree under part 2 of this chapter"; and made minor changes in style. Amendment effective March 28, 1997.

Saving Clause: Section 7, Ch. 174, L. 1997, was a saving clause.

1989 Amendment: In (2), after "chapter", inserted "or when a basin is the subject of a temporary preliminary decree or preliminary decree, as modified after objections and hearings" and after "controversy" inserted "or any person whose rights are or may be affected by enforcement of the decree"; in first sentence of (3) substituted "final decree" for "general determination of existing rights" and at end of second sentence inserted exception clause; inserted (4) requiring Water Judge to establish lists of existing rights and priorities; inserted (5) providing person whose existing rights and priorities are determined in temporary preliminary or preliminary decree or person exercising statutory suspension the right to appeal determination and providing that Water Judge in issuing subsequent decree is not bound by Supreme Court determination on appeal; and made minor changes in style and grammar. Amendment effective April 21, 1989.

Saving Clause: Section 9, Ch. 604, L. 1989, was a saving clause.

Severability: Section 10, Ch. 604, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

Case Notes

DECISIONS UNDER CURRENT LAW

District Court Error in Restraining Use of Contracted Irrigation Water: Micks contracted to purchase the right to 775 acre feet of water from the Deadman"s Basin Water Users Association, to be appropriated from the Deadman's Basin Reservoir, in order to irrigate a hay crop. In April 2000, the District Court appointed two Water Commissioners to distribute the reservoir water pursuant to a rotation plan. In August 2000, the District Court, on its own motion, found that the water level in the reservoir had reached a critical level, that the remaining water was necessary to maintain domestic, municipal, stock, and wildlife usage, and that the irrigation of crops from the river was prohibited as long as the reservoir level remained critically low. Micks determined that he had used only 431 acre feet of his contracted 775 acre feet, and based on his limited usage and other reasons, he presumed that the District Court prohibition did not apply to him, so he continued to irrigate his hay crop. Micks' continued irrigation was discovered, and he was ordered by the District Court to show cause why he should not be held in contempt for failure to comply with the prohibition order. Micks requested that the District Court reconsider its order, but the request was denied, so Micks appealed. The Supreme Court noted that under Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824

P2d 260 (1992), the jurisdiction to interpret and determine existing water rights rests exclusively with the Water Courts and that although the District Court has the authority to supervise the distribution of previously adjudicated water or to enforce an existing water decree and may in certain cases fill in a pre-1973 decree with further delineations, such as time or season of use and acreage of application, in this case, the District Court made a priority determination regarding domestic and irrigation water consumption based on the court's own inclinations, exceeding its authority to simply fill in a water decree with further delineations. Micks' contract unambiguously required a pro rata reduction in water distribution when an inadequate amount existed to satisfy outstanding water purchase contracts. Therefore, the District Court erred as a matter of law when it employed a first come, first served policy in contravention of the water contract. Denial of Micks' motion to reconsider the prohibition order was reversible error, and his motion to restrain the Water Commissioners from interfering with use of Deadman's Basin Reservoir irrigation water to which he was entitled should have been granted. In re Petition of Deadman's Basin Water Users Ass'n to Appoint Water Comm'r to Distribute Stored Water, 2002 MT 15, 308 M 168, 40 P3d 387 (2002).

Recharge of River — Right to Use of Water by Subsequent Appropriator Even Though No Water Available to Upstream Prior Appropriator: A Water Commissioner closed the headgate of the Baker Ditch Company, a downstream appropriator with decreed water rights, because there was no water available to an upstream superior appropriator, even though there was water available to the Company due to recharge of the river by return flows, seepage, and other sources. The Commissioner evidently believed that he had to enforce the decree to the extent that if a prior appropriator was without water upstream, a subsequent appropriator downstream could not divert water under its rights even though the river was being recharged. However, if a subsequent appropriator is using water in accordance with the decree and that use cannot in any way be a detriment to a prior appropriator, then the subsequent appropriator has the right to the use of the water. Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260, 49 St. Rep. 17 (1992), replacing the prior opinion at 48 St. Rep. 972 (1991).

Jurisdiction to Determine Existing Water Rights to Rest With Water Court: Defendants appealed from a District Court judgment granting plaintiffs a stockwater right of 200 miner's inches. The Supreme Court vacated the judgment, holding that a final adjudication of a water right rests with the Water Court and not the District Court. Mildenberger v. Galbraith, 249 M 161, 815 P2d 130, 48 St. Rep. 621 (1991), followed in State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

Grounds for "Filling-In" Pre-1973 Water Decree: A District Court may in certain instances "fill-in" a pre-1973 water decree with further delineations such as the time or season of use and acreage of application. However, such judicial interpretation should be limited to situations similar to that addressed by the Supreme Court in Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), where the appropriator has either expanded his appropriation, exceeded what can be beneficially used, or damaged junior appropriators. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984). See also State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

Priority of Senior Main Stem Water Rights Over Junior Tributary Water Rights: Appellant owns water rights in Clear Creek dating to 1910. Petitioners have water rights in Rock Creek dating to 1896. Clear Creek is a tributary of Rock Creek. In 1970, appellant obtained a court order directing the Rock Creek Water Commissioner to "carry out" the Clear Creek water rights of appellant. Following the District Court order, the Water Commissioner honored in full the requests of appellant for water without regard to any priority in the relationship of the creeks' water rights. As a result, at times of water shortage, senior Rock Creek decreed waters are cut off. In 1977, petitioners filed this action to rescind the 1970 order and to direct the Water Commissioner to subject the Clear Creek water rights to the priorities of Rock Creek water rights. The District Court ruled that the 1970 court order, applied by the Water Commissioner to fulfill junior appropriations ahead of prior decreed rights, was improper. The Supreme Court affirmed the District Court's order and further stated that the order did not violate due process. The Supreme Court reasoned that the only rights affected by the District Court order were the rights of the parties before the court. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

Valid Water Right Not Affected by Release of Surplus to Junior User: Defendants' predecessor in interest began using water in the amount of 110 gallons a minute from Mahle Spring in 1917 for domestic, stock, and irrigation purposes. Mahle Spring flows into Ashley Creek. In 1958, defendants completed construction of a dam whose purpose was to stabilize their water supply only, not to increase the amount of water appropriated. In April 1973, defendants filed notice of

completion of ground water appropriation without well, claiming 110 gallons a minute. In 1957, plaintiff's predecessor in interest began using water from Ashley Creek. At times, when Ashley Creek dried up, defendants agreed to release water from the dam. In 1978, plaintiff obtained a water use permit for Ashley Creek. Subsequently, defendants refused to release any water from the dam. Plaintiff filed an action to adjudicate the parties' water rights and to enjoin defendants from interfering with the flow of Ashley Creek. The Montana Supreme Court upheld the District Court's ruling that defendants are entitled to 110 gallons a minute with a priority date of 1917 and that plaintiff is entitled only to the excess over that. The court denied plaintiff's claim that defendants were estopped from asserting a superior claim, reasoning that the release of the water did not cause plaintiff's predecessor in interest to change her position for the worse because the defendants had already established a valid claim to the water and thus the release was either a mere gratuity or a release of surplus water. In the absence of evidence that defendant was not simply releasing surplus water, the court also denied plaintiff's claim of laches. Finally, the court denied plaintiff's claim that the release from the dam was evidence that defendants were not making beneficial use of all the water since the District Court findings indicated that the defendants' total claim was fully justified. Bagnell v. Lemery, 202 M 238, 657 P2d 608, 40 St. Rep. 58 (1983).

Findings and Conclusions as to Water Rights Held Inadequate — Judgment Vacated and Remanded: When a midstream and downstream water user filed suit against the upstream user to have the District Court declare the relative water rights of the parties, the findings of fact and conclusions of law entered by the District Court were so bare and inadequate as to provide no basis for meaningful appellate review. Because it could not be determined from the District Court's bare conclusions (i.e., that the parties had failed to prove their case by a preponderance of the evidence and had abandoned their rights) what the factual or evidentiary basis for the District Court's decision was, the Supreme Court vacated the judgment as to all of the three parties and remanded the case to the District Court and directed it to enter findings and conclusions reflective of the evidence presented at trial and the legal contentions of the parties. 79 Ranch, Inc. v. Pitsch, 193 M 229, 631 P2d 690, 38 St. Rep. 1048 (1981).

Standing to Challenge Award of Water Right: A party has standing to challenge a water right only if it conflicts with those granted to him. Thus, he has no standing to challenge a right to water from a source in which he has no water right. However, he may challenge a water right from a source from which he has a water right whether the challenged right is prior or subsequent to his own. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

Preliminary Injunctive Proceedings: In the same way that substantive property rights cannot be adjudicated in a summary way and that title to real estate may not be litigated in an action for an injunction, water rights should not be determined in a preliminary proceeding for injunctive relief. Eliason v. Evans, 178 M 212, 583 P2d 398 (1978).

DECISIONS UNDER FORMER LAW

Damages for Wrongful Diversion of Water:

Where several parties have diverted water so as to injure the crops of another, they cannot be held jointly liable for the acts of each other nor can they be sued in one action for the entire damage, with or without an apportionment of the damage. Howell v. Bent, 48 M 268, 137 P 49 (1913).

Section 89-815, R.C.M. 1947 (now repealed), does not apply to an action at law for damages for the wrongful diversion of water where there is no allegation in the complaint that would authorize the court to grant equitable relief and there is no evidence to show that the plaintiff is entitled to such relief. Miles v. Du Bey, 15 M 340, 39 P 313 (1895). See Howell v. Bent, 48 M 268, 137 P 49 (1913).

Equitable Actions: Section 89-815, R.C.M. 1947 (now repealed), contemplates equitable actions only, in which relative priorities and conflicting rights of all parties may be settled and where the damages claimed are a mere incident. Howell v. Bent, 48 M 268, 137 P 49 (1913); Miles v. Du Bey, 15 M 340, 39 P 313 (1895).

Pleadings: The District Court may settle the relative priorities and rights of all the parties to a water right suit in one judgment only when pleadings have been framed so as to justify such settlement. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

Claimant to Be Able to Use Water Before He May Object to the Use by Others: Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water or

water right does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water or for damages for its diversion. Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905).

Injunction: Property owners having the right to divert the waters of a creek for irrigation purposes may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled. Beach v. Spokane Ranch & Water Co., 25 M 379, 65 P 111 (1901).

Collateral References

Injunction: right to injunction to protect water rights as affected by fact that party seeking injunction contemplates no immediate use of rights, or by doctrine of comparative injury. 106 ALR 687.

Measure of damages for interference with percolating waters. 35 ALR 1222, supplemented by 55 ALR 1385, 109 ALR 395.

85-2-407. Temporary changes in appropriation right.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 381 at beginning of (1) inserted exception clause; and made minor changes in style. Amendment effective April 27, 2001.

Chapter 433 in (2) at beginning inserted exception clause; inserted (9) authorizing approval of temporary change in appropriation right under 85-2-408 for period equal to expected life of project, up to 30 years, if quantity of water subject to temporary change is available from new water conservation or storage project development; and made minor changes in style. Amendment effective July 1, 2001, and terminates June 30, 2005.

1995 Amendment: Chapter 322 inserted (4)(b) authorizing an appropriator to object during initial temporary change application, during temporary change renewal process, and once during term of temporary change permit; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 322, L. 1995, provided: "This legislation, jointly developed by representatives from the agricultural, recreation, and conservation communities, is intended to authorize the temporary use of existing water rights for instream flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work within the prior appropriation water rights system.

This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease existing water rights to protect fisheries and allows persons who own water rights to temporarily change the use of that water to instream flow to benefit the fishery resource.

To monitor and review the implementation of this instream flow program, the legislature directs the office of the governor to convene on an ongoing and regular basis a working group that includes representatives from the agricultural, recreation, and conservation communities. This working group shall consult with the department of natural resources and conservation on relevant changes in water use and shall submit a report to the governor and the legislature in 2001 outlining the status of the program."

1991 Statement of Intent: The statement of intent attached to Ch. 435, L. 1991, provided: "It is the declared policy of the state in 85-1-101 that water resources be put to optimum beneficial use to secure maximum economic and social prosperity for its citizens. The legislature recognizes that water supplies are limited and vary from year to year. As water supplies become fully appropriated, the reallocation of some water may be necessary to meet changing economic and social needs.

The appropriate means of reallocating water among competing demands is with the voluntary approval of water right holders. With sufficient innovation and economic incentives, water can be reallocated voluntarily, without loss of appropriation rights, and to the profit of prior appropriators, through the temporary change of water rights in anticipation of periods of water scarcity. This legislation clarifies that these types of arrangements are allowed, except when other appropriators might be adversely affected. Thus, water can be reallocated for optimum beneficial use and the maximum economic and social prosperity of all Montana citizens."

85-2-408. Temporary change authorization for instream flow — additional requirements.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 322, L. 1995, provided: "This legislation, jointly developed by representatives from the agricultural, recreation, and conservation communities, is intended to authorize the temporary use of existing water rights for

instream flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work within the prior appropriation water rights system.

This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease existing water rights to protect fisheries and allows persons who own water rights to temporarily change the use of that water to instream flow to benefit the fishery resource.

To monitor and review the implementation of this instream flow program, the legislature directs the office of the governor to convene on an ongoing and regular basis a working group that includes representatives from the agricultural, recreation, and conservation communities. This working group shall consult with the department of natural resources and conservation on relevant changes in water use and shall submit a report to the governor and the legislature in 2001 outlining the status of the program."

Termination: Section 6, Ch. 322, L. 1995, provided that this section terminates June 30, 2005.

85-2-409. Temporary change validity — limitations.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 322, L. 1995, provided: "This legislation, jointly developed by representatives from the agricultural, recreation, and conservation communities, is intended to authorize the temporary use of existing water rights for instream flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work within the prior appropriation water rights system.

This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease existing water rights to protect fisheries and allows persons who own water rights to temporarily change the use of that water to instream flow to benefit the fishery resource.

To monitor and review the implementation of this instream flow program, the legislature directs the office of the governor to convene on an ongoing and regular basis a working group that includes representatives from the agricultural, recreation, and conservation communities. This working group shall consult with the department of natural resources and conservation on relevant changes in water use and shall submit a report to the governor and the legislature in 2001 outlining the status of the program."

Termination: Section 6, Ch. 322, L. 1995, provided that this section terminates June 30, 2005.

85-2-410. Short-term lease of appropriation right.

Compiler's Comments

Effective Date: Section 7, Ch. 381, L. 2001, provided: "[This act] is effective on passage and approval." Approved April 27, 2001.

85-2-411. Water turned into natural channels.

Case Notes

Canal Water Turned Into Slough — Amount That May Be Reclaimed: The defendant permitted waters from a canal and spring to run in a slough and then used the slough as a waterway. The defendant could reclaim from the slough only that amount of water equal to what he put in. Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

Seepage Water Potholed and Recaptured: Since seepage water that has its rise along the bed of a stream and forms a natural accretion thereto belongs to the stream as a part of its source of supply, the same as do feeder springs, and an appropriator of water on such stream has the right to all such tributary flow even as against the owner of the land, the conducting of water from upper reaches of a tributary to "potholes" and "reservoirs" and then capturing the seepage therefrom in ditches is insufficient proof of creating a new supply for an additional water right. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

Percolation From Irrigation on Adjacent Lands: While under section 89-804, R.C.M. 1947 (now repealed), one may employ the natural channel of a stream for the conveyance of water which he has developed and reclaim it if the rights of prior appropriators are not thereby diminished in quantity or deteriorated in quality, the rule has no application where an increase in the flow of the stream results solely by percolation from irrigation on adjacent lands. West Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938); State ex rel. Mungas v. District Court, 102 M 533, 59 P2d 71 (1936); Rock Creek Ditch & Flume Co. v. Miller, 93 M 248, 17 P2d 1074, 89 ALR 200 (1933); Beaverhead Canal Co. v. Dillon Elec. Light & Power Co., 34 M 135, 85 P 880 (1906).

Deterioration in Quality Prohibited: While section 89-804, R.C.M. 1947 (now repealed), authorizes an appropriator to turn water into the channel of a stream other than the one from which he appropriates, he may do so only if the waters in the stream the channel of which he thus uses are not deteriorated in quality to the detriment of a prior appropriator. Missoula Pub. Serv. Co. v. Bitter Root Irrigation District, 80 M 64, 257 P 1038 (1927).

Developed Water Supply — Burden of Proof as to Amount: One who claims to have developed a water supply has the burden of proving the amount developed, especially when it is mingled with a water supply to which another is entitled. Spaulding v. Stone, 46 M 483, 129 P 327 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909).

Drainage Ditch — Interception of Stream's Source: In order to catch seepage water from irrigated land, the defendant constructed a drainage ditch that paralleled and intersected a stream. Because the ditch intercepted seepage water that was a source of supply for the stream, the defendant did not develop a new water supply to which he was entitled. Spaulding v. Stone, 46 M 483, 129 P 327 (1912).

Collateral References

What constitutes natural drainway or watercourse for flow of surface water. 81 ALR 262.

Right to drain surface water into natural watercourse. 28 ALR 1262.

Liability of one who diverts stream into new channel for overflow. 12 ALR 187.

85-2-412. Return of surplus water to stream.

Case Notes

Surplus Water: Water in excess of the amount which defendant was entitled to appropriate and which ran over spillway on to plaintiff's land was "surplus water" and not artificial water. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

Duty of Appropriator to Turn Surplus Back Into Stream: Under this section, a prior appropriator of water must turn back into the stream from which the water is taken all over and above what is actually and necessarily used by him. Brennan v. Jones, 101 M 550, 55 P2d 697 (1936); Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Creek v. Bozeman Water Works Co., 15 M 121, 38 P 459 (1894).

Rights of Subsequent Appropriators: Subsequent appropriators of water may compel a prior appropriator to release water for their use which he does not need for a beneficial use. Gans & Klein Inv. Co. v. Sanford, 91 M 512, 8 P2d 808 (1932).

Extent of Right of Owner: Where a party has all the water his necessities require or that his ditches will carry, it is immaterial that he has a right, under decree or otherwise, to a greater flow from the stream; he must permit the excess to remain in the stream, or having diverted it, return it to the stream in such a manner that it will be available to subsequent appropriators. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

Unused Excess Not Appropriated: The diversion of water for domestic purposes in excess of what is required and allowing such excess to overflow lands without any intention of irrigating and without any intention of using such excess for any useful purpose does not constitute an appropriation of the excess. Power v. Switzer, 21 M 523, 55 P 32 (1898).

Law Review Articles

Once-Released Irrigation Waters: Liability and Litigation, 36 Mont. L. Rev. (1975).

Collateral References

Liability for overflow of water confined or diverted for public water power purposes. 91 ALR 3d 1065.

Liability for overflow or escape of water from reservoir, ditch, or artificial pond. 169 ALR 517.

85-2-413. Diversion of natural flow of waters — when permitted.

Case Notes

Recharge of River — Right to Use of Water by Subsequent Appropriator Even Though No Water Available to Upstream Prior Appropriator: A Water Commissioner closed the headgate of the Baker Ditch Company, a downstream appropriator with decreed water rights, because there was no water available to an upstream superior appropriator, even though there was water available to the Company due to recharge of the river by return flows, seepage, and other sources. The Commissioner evidently believed that he had to enforce the decree to the extent that if a prior appropriator was without water upstream, a subsequent appropriator downstream could not divert water under its rights even though the river was being recharged. However, if a subsequent appropriator is using water in accordance with the decree and that use cannot in any way be a detriment to a prior appropriator, then the subsequent appropriator has the right to the use of the

water. Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260, 49 St. Rep. 17 (1992), replacing the prior opinion at 48 St. Rep. 972 (1991).

Appropriative Rights Annual Rather Than Seasonal: Generally, there is no division of the year into an irrigation season and a storage season, so as to give later direct users a seasonal preference over earlier indirect users, or vice versa. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

Grounds for "Filling-In" Pre-1973 Water Decree: A District Court may in certain instances "fill-in" a pre-1973 water decree with further delineations such as the time or season of use and acreage of application. However, such judicial interpretation should be limited to situations similar to that addressed by the Supreme Court in Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), where the appropriator has either expanded his appropriation, exceeded what can be beneficially used, or damaged junior appropriators. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

Lawful Exchange: Owners of rights in a canal who, because of the topography of the area, could not transport water from the canal directly to their land, properly diverted the natural flow of the creek for use on their land and replaced the water with water from the canal which intersected with the stream below the point of diversion. Thompson v. Harvey, 164 M 133, 519 P2d 963 (1974).

Misuse of Channel: Where petitioners for an order authorizing a change in a point of diversion on a creek asserted that protestors had misused a channel on Deep Creek by exchanging canal water for stream water which was removed at points above the canal, this use of the channel was specifically authorized in Montana law and the protestors did not have unclean hands. Thompson v. Harvey, 164 M 133, 519 P2d 963 (1974).

Interference With Prior Rights: Primary rights to the use of water in a stream are those of appropriators of its natural flow. The burden is upon a subsequent storage claimant (in this case, defendant State Water Conservation Board, precursor to Department of Natural Resources and Conservation) or upon one who uses a watercourse as a part of his distribution system of developed or alien waters affirmatively to disprove interference with prior rights in a suit to enjoin such interference. Allendale Irrigation Co. v. St. Water Conservation Bd., 113 M 436, 127 P2d 227 (1942).

Collateral References

Waters and Water Courses *key* 78, et seq.

93 C.J.S. Waters §134, et seq.

85-2-414. Conduction of water.

Case Notes

Failure to Enjoin Against Interference With Secondary Easement Rights Not Error: Engel asserted District Court error in failing to enjoin Gampps from interfering with Engel's use of a secondary easement to maintain an irrigation ditch running across the property of both parties. However, there was substantial evidence that Engel's access for routine inspections and maintenance was, and always had been, free and uninterrupted. Although failing to enjoin Gampps, the District Court nevertheless fashioned an order balancing Engel's reserved right for occasional access with Gampps' right not to be unreasonably burdened by Engel's secondary easement, so the District Court was affirmed. Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

Condemnation of Land for Conduct of Water Subject to Eminent Domain Proceedings: An action to condemn land pursuant to 85-2-414 must follow the eminent domain proceedings set out in Title 70, ch. 30. A water appropriator could not contend that his right of eminent domain was taken away when he had not even initiated the proper procedures to pursue the action. Careless Creek Ranch Co. v. Murnion, 230 M 216, 748 P2d 475, 45 St. Rep. 154 (1988).

Reservoir Water at Sufficient Height for Use Intended: Defendant had no claim under this section to eminent domain over land covered by raising the water level behind his reservoir because the reservoir was already at a sufficient height to make the water enter a ditch, thereby fulfilling its intended use for irrigation. Careless Creek Ranch Co. v. Murnion, 230 M 216, 748 P2d 475, 45 St. Rep. 154 (1988).

Prescriptive Easement: This section has no application in the case of a prescriptive easement in a water right since the dominant tenement will not be required to pay for an easement acquired by prescription. O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969).

Right of Easement Holder to Make Repairs:

In a proceeding to quiet title to a secondary easement on another's land for irrigation purposes and to enable the dominant owner to maintain and repair his ditches, an award of so much of the

lands of the servient owner as may be necessary for the purposes of maintenance was not objectionable for indefiniteness and uncertainty. Laden v. Atkeson, 112 M 302, 116 P2d 881 (1941), distinguished in Stalcup v. Cameron Ditch Co., 130 M 294, 300 P2d 511 (1956), and followed in Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

The owner of a secondary easement, such as a right to pass over the land of the servient owner for the purpose of making repairs on a dam and ditches, has a duty to repair a route that has become impassable or merely inconvenient rather than to materially deviate therefrom without consent of the servient owner. He may dig up soil and use it for repairs, doing no more injury than is necessary. Laden v. Atkeson, 112 M 302, 116 P2d 881 (1941), distinguished in Stalcup v. Cameron Ditch Co., 130 M 294, 300 P2d 511 (1956), and followed in Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

Wing Dam Not Constituting Waste: Under this section, which gives an appropriator of water the right to raise the level of water in a stream by means of a dam to a sufficient height to make it enter a ditch, the contention that where a wing dam is used, the water which does not enter the ditch is improperly wasted was erroneous. State ex rel. Crowley v. District Court, 108 M 89, 88 P2d 23, 121 ALR 1031 (1939).

Water Rights and Ditches Separate Rights: Water rights and ditch rights are separate and distinct property rights. One may own a water right without a ditch right or a ditch right without a water right. Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

Collateral References

Eminent Domain *key* 28; Waters and Water Courses *key* 167, 168.

29A C.J.S. Eminent Domain §§45, 46; 93 C.J.S. Waters §301, et seq.

Rights, as between private parties, as to relocation of aqueduct, ditch or flume easement not originally arising by necessity. 80 ALR 2d 790, 792.

85-2-415. Owners of water to sell surplus.

Case Notes

Change of Use — Sale: Appropriations not originally made for the purpose of sale may have their use changed to that purpose if subsequent appropriators are not thereby injured. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

Claims of Adverse Possession or Common-Law Dedication No Defense: Where defendant townspeople for many years took water for domestic uses with the acquiescence of ditch owners and either performed labor in repairing the ditch or paid an annual charge for the privilege of obtaining the water, thus recognizing the paramount right of plaintiffs, they could not rely upon the defense of a common-law dedication in the absence of a showing of an offer to dedicate, in an action to enjoin their further use. Nor could defendant townspeople rely upon the defense of adverse possession or use. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

Injunction Against Further Use: Where the owners of a water right had for many years permitted the inhabitants of a town to tap their nearby ditch for domestic uses for a consideration consisting in some instances of services about the ditch and in others of rental money, thus presumably acting under sections 89-823 through 89-826, R.C.M. 1947 (85-2-415 through 85-2-418), and then sought to enjoin such further use, inhabitants were not entitled to injunctive relief in the absence of proof of a tender of the customary rates although such use was clothed with a public interest. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

Restrictions on Sale of Water: After an appropriator of water has used it sufficiently to fulfill the purposes of his appropriation, he may not take the water of the stream remaining which he cannot use for such purposes and sell it so that it will deprive subsequent appropriators of their right to use it. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

Tender Essential to Demand Delivery and Institute Suit: While sections 89-823 through 89-826, R.C.M. 1947 (85-2-415 through 85-2-418), give to one who desires water from an appropriator who has a surplus and is entitled to sell it the right to demand delivery thereof and to institute suit to compel delivery if refused, he may do so only upon payment or a tender of the usual or customary rates per inch. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

Collateral References

Waters and Water Courses *key* 130, 141 through 145, 153.

94 C.J.S. Waters §§348 through 350, 370 through 375.

85-2-417. Enforcement of right to surplus.

Collateral References

Waters and Water Courses *key* 152.
94 C.J.S. Waters §387, et seq.

85-2-418. Purchaser cannot sell surplus water.

Case Notes

Application of Section: The provision of this section relating to the retaking and selling of surplus water for commercial purposes applies to the sale and disposition of water by volume and has no application to water which has been abandoned and which through seepage and percolation reaches the waters of a natural stream. Rock Creek Ditch & Flume Co. v. Miller, 93 M 248, 17 P2d 1074, 89 ALR 200 (1933), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962).

Collateral References

Waters and Water Courses *key* 130.
94 C.J.S. Waters §351.

85-2-419. Salvaged water.

Compiler's Comments

2001 Amendment: Chapter 381 at beginning of third sentence inserted exception clause and near middle of fourth sentence after "salvaged water" deleted "for instream flow purposes" and near end after "85-2-408" inserted "85-2-410"; and made minor changes in style. Amendment effective April 27, 2001.

1999 Amendment: Chapter 123 in second sentence near middle after "salvage water" deleted "as defined in 85-2-102" and in fourth sentence near end inserted references to 85-2-408 and 85-2-439; and made minor changes in style. Amendment effective March 19, 1999.

1991 Statement of Intent: The statement of intent attached to Ch. 308, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of natural resources and conservation concerning the adoption of rules to allow the appropriation, use, and change of use of salvaged water. The legislature directs the department of natural resources and conservation to adopt rules that promote the conservation and efficient use of water by implementing the provisions of this bill."

Saving Clause: Section 5, Ch. 308, L. 1991, was a saving clause.

85-2-421. Purpose.

Compiler's Comments

1987 Amendment: Near beginning of section deleted reference to 85-2-425.

1985 Amendment: Substituted requirement that transfers be filed with the department and that the department notify the water court and the county clerk and recorder of each transfer filed for former requirement that transfers be recorded with the county clerk and recorder, who was to notify the department and the water court of each transfer recorded.

85-2-422. Definition.

Compiler's Comments

1987 Amendment: Near beginning of section deleted reference to 85-2-425.

85-2-424. Filing.

Compiler's Comments

1997 Amendment: Chapter 167 in (1), before "shall", deleted "or his agent or representative"; in (2), at end of first sentence, substituted "contain a water rights disclosure whereby the transferor shall acknowledge, at or before closing, whether or not any water rights are associated with the property to be transferred and whether or not any water rights will transfer with the real property" for "note whether or not the transfer includes a transfer of water rights" and in second sentence, after "certificate", substituted "discloses" for "notes" and at end substituted "a water right transfer certificate must be completed and filed with the department" for "the clerk and recorder shall provide such person the form prescribed under 85-2-423 for the transfer of water rights"; substituted (3) requiring sending copies to the Department on a monthly basis for former language that read: "The county clerk and recorder shall send to the department a list of all transfers that involve transfers of water rights. The list must be sent every month and must include all transfers for the month immediately preceding the date of submittal to the department.

The list must include the names and addresses of all parties to the transfer and a legal description of the land subject to the transfer"; and made minor changes in style. Amendment effective January 1, 1998.

Effective Date — Applicability: Section 5, Ch. 167, L. 1997 provided: "[This act] is effective January 1, 1998, and does not apply to deeds entering escrow before that date."

1991 Amendment: Deleted (4) that read: "(4) The department shall send a reference copy of the water right transfer certificate to the office of the chief water judge and to the county clerk and recorder in the county in which the transfer occurred". Amendment effectively July 1, 1991.

1985 Amendment: In (1) substituted "transferor" for "parties to a transfer", substituted requirement that certificate be filed with the department for former requirement that certificate be recorded with the county clerk and recorder, and after "certificate" inserted remainder of subsection requiring transferor to file certificate within 60 days of recording of deed or instrument evidencing transfer of real property; in (3) substituted language concerning list of transfers for "The county clerk and recorder shall cause a permanent record of the water right transfer certificate to be made"; and in (4) substituted requirement that department send reference copy of certificate to chief water judge and to county clerk and recorder in county in which transfer occurred for former requirement that county clerk and recorder send copy of certificate to department and chief water judge.

85-2-426. Fee.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), at beginning, substituted "department" for "board of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: In (1) in first sentence, after "fee that", substituted "will be no higher than necessary to" for "must", after "department" inserted "and the county clerk and recorder", and in last sentence substituted "filing" for "recordation"; and in (2) substituted language concerning deposit of the fee for "The county clerk and recorder shall:

(a) collect the fee required under subsection (1) and forward it to the department to be deposited in the water right appropriation account provided for in 85-2-318; and

(b) charge and collect a recording fee as provided for in 7-4-2631 for recording the document."

Statement of Intent: The statement of intent attached to SB 401 (Ch. 674, L. 1983) provided: "Senate Bill 401 requires a statement of intent because it provides, [in section 6 (85-2-426)] that the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] must by rule prescribe a fee for the processing of a copy of a water right transfer certificate. It is the intent of the legislature that the board study the cost of processing such certificates and set the fee commensurate with the department's cost in processing a certificate. In making its cost analysis study the board should consult with the department and obtain the department's opinion as to what the department's costs will be. The fee may not be set so high that it generates revenue in excess of actual costs."

Administrative Rules

ARM 36.12.102 Forms.

ARM 36.12.103 Application and special fees.

85-2-431. Penalty.

Compiler's Comments

1997 Amendment: Chapter 167 in (2), at beginning, substituted "The transferor of a water right" for "A person". Amendment effective January 1, 1998.

Effective Date — Applicability: Section 5, Ch. 167, L. 1997, provided: "[This act] is effective January 1, 1998, and does not apply to deeds entered before that date."

85-2-436. Water leasing study.

Compiler's Comments

1999 Amendment: Chapter 123 in (2)(f) at end of first sentence after "term" substituted "equal to the expected life of the project but to not more than 30 years" for "of not more than 20 years"; in (3)(b) at end substituted "2008" for "1998"; and made minor changes in style. Amendment effective March 19, 1999, and terminates June 30, 2009.

Extension of Termination Date: Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999.

1995 Amendments: Chapter 418 in (2)(a), (3)(a), and (3)(b) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 487 in (2), at beginning of second sentence, inserted "Except as provided in 85-2-439". Amendment effective April 14, 1995.

Chapter 545 in (1), near beginning, in (3)(a), in first sentence, and in (3)(b), near middle, substituted "environmental quality council" for "water policy committee". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Severability: Section 11, Ch. 487, L. 1995, was a severability clause.

Applicability: Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1993 Amendments: Chapter 175 in second sentence of (3)(a), after "lease", inserted "a summary of stream reach designation activity under 85-2-437, and a summary of leasing activity on all designated streams" and in third sentence, after "leased", inserted "additional"; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 370 near beginning of (2)(b), before "application", inserted "correct and complete" and near end, before "complete application", inserted "correct and"; in (2)(f) substituted "a preponderance of evidence" for "substantial credible evidence"; and made minor changes in style. Amendment effective April 16, 1993.

Severability: Section 11, Ch. 370, L. 1993, was a severability clause.

Retroactive Applicability: Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

1991 Amendment: In (2)(e) increased lease term from 4 years to 10 years and after "years" substituted "but it may be renewed once for up to 10 years, except that a lease of water made available from the development of a water conservation or storage project is restricted to a term of not more than 20 years" for "but may be renewed for up to 10 years per renewal, if allowed by law and upon notification to the department. If this section terminates without reauthorization by the legislature, all leases and lease authorizations expire on the date of termination"; in (2)(f), before "lease", deleted "original"; in (2)(i), after "terms", deleted "the renewal of the lease"; in (2)(j), after "installing", deleted "measuring"; inserted (3)(a) requiring Department to submit to Board, Commission, and Water Policy Committee by December 1 annual progress report, including lease information, and requiring Department to provide compelling information justifying any water rights not leased by December 1 of any year in progress report; in (3)(b), before "study", inserted

"final" and at end extended date from 1990 to 1998; inserted (4) providing that section does not create right to bring suit to compel renewal of expired lease; and made minor changes in style. Amendment effective May 1, 1991.

Effective Date: Section 10, Ch. 658, L. 1989, provided that this section is effective May 11, 1989.

85-2-437. Department designation of eligible stream reaches.

Compiler's Comments

1999 Amendment: Chapter 123 in (3) near beginning of first sentence increased number of designated stream reaches from 20 to 40. Amendment effective March 19, 1999, and terminates June 30, 2009.

Extension of Termination Date: Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999.

1995 Amendment: Chapter 418 in (1), (2), and (3), in two places, substituted "department" for "board". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 175 in first sentence of (3) increased number of stream reaches that may be designated from 10 to 20. Amendment effective July 1, 1993.

1991 Amendment: In (3) increased Board authority to designate stream reaches from 5 to 10 and inserted second sentence authorizing Board to remove designation from stream reach and to designate another stream reach if Department determines water lease cannot be reasonably obtained on designated stream reach. Amendment effective May 1, 1991.

Effective Date: Section 10, Ch. 658, L. 1989, provided that this section is effective May 11, 1989.

85-2-438. Lease validity.

Compiler's Comments

1999 Amendment: Chapter 123 near middle after "June 30" substituted "2009" for "1999". Amendment effective March 1, 1999, and terminates June 30, 2009.

Extension of Termination Date: Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999.

Effective Date: Section 8, Ch. 740, L. 1991, provided that this section is effective on passage and approval. Approved May 1, 1991.

85-2-439. Upper Clark Fork River basin instream flow pilot program.

Compiler's Comments

Severability: Section 11, Ch. 487, L. 1995, was a severability clause.

Applicability: Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

Effective Date: Section 13, Ch. 487, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 14, 1995.

Termination: Section 14, Ch. 487, L. 1995, provided: "[Sections 4 through 8] [85-2-102, 85-2-125, 85-2-439, 85-2-402, and 85-2-404] terminate June 30, 2005."

85-2-440. Upper Clark Fork River basin change and lease validity — limitations.

Compiler's Comments

Effective Date: Section 6, Ch. 353, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 22, 1997.

Part 5
Ground Water

Part Law Review Articles

Water Law—Summary of Groundwater Legislation of 1961, 22 Mont. L. Rev. 131 (1961).

Ground Water Legislation in the Light of Experience in the Western States, Clark, 22 Mont. L. Rev. 42 (Fall 1960).

Groundwater Contamination: A Look at the Federal Provisions, Gorbert, 14 Compleat Law. 17 (1997).

Muddling Through the Mire of Wetland Regulation: Is Congress on Target With Its Clean Water Act Reauthorization Bill?, Jackson, 18 Whittier L. Rev. 665 (1997).

Applying the Owned Property Exclusion to Groundwater Contamination Claims, Newman & McCormack, 38 For the Def., 33 (1996).

Did the Clean Water Act Overlook Ground Waters?, Ditta, 57 La. L. Rev. 295 (1996).

Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma, Quatrochi, 23 Boston College Envtl. Aff. L. Rev. 603 (1996).

Total Aquifer Management: A New Approach to Groundwater Protection, Vance, 30 U.S.F. L. Rev. 803 (1996).

Get Off Farmer Brown's Back: A Common Sense Approach to Farmer Liability for Groundwater Contamination Caused by the Normal Application of Pesticides, Munson, 18 Hamline L. Rev. 521 (1995).

A Comparison of State Groundwater Laws, Patrick & Archer, 30 Tulsa L.J. 123 (1994).

Agricultural Pesticide Contamination of Groundwater: Developing a "Right-to-Spray Law" for Blameless Contamination, Centner & Wetzstein, 14 J. Agric. Tax'n & L. 38 (1992).

Groundwater and Its Future: Competing Interests and Burgeoning Markets, Gregory, 11 Stan. Envtl. L.J. 229 (1992).

Groundwater Law for Mineral Lawyers, Dellapenna, 13 E. Min. L. Found. 3-1 (1992).

Agricultural Chemical Contamination of Groundwater: An Economic Analysis of Alternative Liability Rules, Mill, 1991 U. Ill. L. Rev. 1135 (1991).

Designation and Protection of Critical Groundwater Areas, Peterson, 1991 B.Y.U. L. Rev. 1393 (1991).

Groundwater Modeling: Capabilities and Limitations, Use and Abuse, Schween & Larson, 32 Rocky Mtn. Min. L. Inst. 22.1 (1986).

Controlling Groundwater Use and Quality: A Fragmented System, Getches, 17 Nat. Resources Lawyer 623 (1985).

Administration of Ground Water Rights: A Darkening Cloud Over Irrigated Agriculture, Shupe, 20 Gonz. L. Rev. 729 (1984-85).

Information for State Groundwater Quality Policymaking, Roberts & Butler, 24 Nat. Resources J. 1015 (1984).

Commerce Clause Curbs State Control of Interstate Use of Ground Water: City of El Paso v. Reynolds, Gross, 24 Nat. Resources J. 213 (1984).

Management of Groundwater Through Mandatory Conservation, Kelly, 61 Den. L. J. 1 (1983).

Part Collateral References

8 Am. Jur. POF2d Aquifer: interference with the use of senior well-withdrawal from common aquifer, pp. 51 through 577.

Adjoining landowners: liability of landowner withdrawing ground water from own land for subsidence of adjoining owner's land. 5 ALR 4th 614.

Subterranean and percolating waters; springs; wells. 55 ALR 1385, supplemented by 109 ALR 395.

Measure of damages for interference with percolating waters. 35 ALR 1222, supplemented by 55 ALR 1385; 109 ALR 395.

Right to conduct and use artesian water out of artesian basin. 31 ALR 906.

Summary Proceedings, Montana Groundwater Conference, "Planning a Groundwater Strategy", Montana Environmental Quality Council, 1982.

85-2-501. Definitions.

Compiler's Comments

1991 Amendment: In definition of ground water substituted "water that is beneath the ground surface" for "fresh water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and which is not a part of that surface water". Amendment effective July 1, 1991.

Law Review Articles

Groundwater Legislation in the Light of Experience in the Western States, 22 Mont. L. Rev. 42 (1960).

Collateral References

Subterranean stream, 78 Am. Jur. 2d Waters §§209 through 211.

Montana Water Law for the 1980's, Stone (1981), pp. 97 through 102.

85-2-502. Administrative rules.

Compiler's Comments

1995 Amendment: Chapter 418 at beginning substituted "department may prescribe and enforce" for "board may prescribe and the department shall enforce" and after "entry" deleted "for that purpose by the department"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-2-505. Waste and contamination of ground water prohibited.

Compiler's Comments

2001 Amendment: Chapter 578 inserted (1)(e) regarding water produced in association with coal bed methane well; and made minor changes in style. Amendment effective May 5, 2001.

Severability: Section 8, Ch. 578, L. 2001, was a severability clause.

Law Review Articles

Once Released Irrigation Waters: Liability and Litigation, 36 Mont. L. Rev. (1975).

85-2-506. Controlled ground water areas — designation or modification.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) and (3) substituted "department" for "board"; in (2), after "proposed to the", deleted "board by the"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 460 near middle of (2), after "motion", inserted "by petition of a state or local public health agency for identified public health risks"; at end of (2)(e), after "migration", deleted "and a degradation of ground water quality within the ground water area"; inserted (2)(f) concerning water quality and (2)(g) concerning nonsuitability for beneficial use; and made minor changes in style. Amendment effective April 21, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 460, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of natural resources and conservation authority to adopt administrative rules. The bill adds statutory criteria for the department to consider in the processing of an application for a permit, change authorization, controlled ground water area, or basin closure. In adopting rules implementing this bill and in interpreting the new statutory language, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] should assess the magnitude, character, duration, and geographical extent of the projected effects on the uses of water as classified and utilize this assessment in a practical manner."

Severability: Section 7, Ch. 460, L. 1993, was a severability clause.

1985 Amendment: Inserted (2)(e) authorizing the designation or modification of an area of controlled ground water use upon alleged facts showing that excessive ground water withdrawals would cause contaminant migration and a degradation of ground water quality within the ground water area.

85-2-507. Limiting withdrawals — modification of order.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), in first sentence, (2), in three places, (4)(b), (4)(c), (5)(a), in three places, (5)(b), in two places, (7), in two places, and (8), in first sentence, substituted "department" for "board"; in (5)(a), in third sentence before "order", deleted "board's"; in (9), after "pending", deleted "before the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: At end of (8) changed "subsection (1)" to "subsection (7)".

85-2-512. Investigations.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), near end, substituted "department of environmental quality" for "department of health and environmental sciences"; at beginning of (2) deleted "In addition to the foregoing"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-2-514. Inspection of wells.

Compiler's Comments

1995 Amendment: Chapter 418 substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-2-516. Well logs.

Compiler's Comments

2001 Amendment: Chapter 78 at end of first sentence substituted "through its offices" for "at its offices and at the offices of the county clerk and recorders". Amendment effective March 20, 2001.

85-2-520. Penalties.

Compiler's Comments

1995 Amendment: Chapter 418 after "department" deleted "or the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-2-521. Coal bed methane wells — requirements.

Compiler's Comments

Severability: Section 8, Ch. 578, L. 2001, was a severability clause.

Effective Date: Section 9(1), Ch. 578, L. 2001, provided that this section is effective on passage and approval. Approved May 5, 2001.

Part 6
Yellowstone River Basin

Part Collateral References

Final Report of the Select Committee on Water Marketing, Environmental Quality Council (1985).

85-2-601. Statement of legislative findings and policy.

Law Review Articles

Water Rights, the Public Trust Doctrine and the Protection of Instream Uses, Ausness, 1986 U. Ill. L. Rev. 407 (1986).

85-2-603. Suspension of action.

Compiler's Comments

1995 Amendment: Chapter 418 in (1)(a), at beginning, substituted "department" for "board of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-2-605. Reservations.

Compiler's Comments

1997 Amendment: Chapter 145 inserted (2) extending water reservations in the Yellowstone Basin until they are perfected; and made minor changes in style. Amendment effective March 25, 1997.

Administrative Rules

Title 36, chapter 16, subchapter 1, ARM Water reservation rules — application content — completion plan.

85-2-608. Certain changes of use allowed.

Compiler's Comments

Section Not Codified: Section 89-8-111, R.C.M. 1947, a severability clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 116, L. 1974.

Part 7
Indian and Federal Water Rights — Water Rights Within Indian Reservations

Part Compiler's Comments

Rules of Procedure: The rules of procedure for the Water Courts for the state of Montana are set forth in full under 85-2-231.

Part Case Notes

DECISIONS UNDER CURRENT LAW

Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional: In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by 85-2-311. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under 85-2-702 or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

State May Not Grant Water Use Permits on Indian Lands When Reserved Tribal Rights Not Quantified: The Confederated Salish and Kootenai Tribes of the Flathead Reservation objected to

the Department of Natural Resources and Conservation (DNRC) issuing new water use permits to nontribal members owning land in fee on the reservation. The tribes argued that 85-2-311 clearly states that an applicant for a water use permit has to demonstrate that the proposed use will not unreasonably interfere with a planned use for which the water has been reserved and that such a showing cannot be made by an applicant until the tribes reserved rights are quantified by a compact negotiated with the state pursuant to 85-2-702. The Supreme Court held that 85-2-311 does include Indian reserved water rights and that an applicant cannot show that there will be no adverse impact on tribal rights until those rights have been quantified by a negotiated compact with the state. Therefore, DNRC does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights. (See Ch. 497, L. 1997.) In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), followed in Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985).

State Water Court — Jurisdiction to Adjudicate Indian Reserved Water Rights: In an original proceeding to determine jurisdiction of the Water Court over Indian tribes and water flowing through state reservations, the Supreme Court held that Article I of the Montana Constitution does not bar state jurisdiction to adjudicate Indian reserved water rights. With the 1952 McCarran amendment, the U.S. Congress diminished the scope of absolute federal jurisdiction over controversies involving federal water rights by allowing state courts concurrent jurisdiction to adjudicate federal water rights. In Colo. River Water Conserv. District v. U.S., 424 US 800 (1976), the U.S. Supreme Court held that the McCarran amendment applied to Indian water rights. The state Legislature's enactment of the Water Use Act (Title 85, ch. 2) pursuant to Art. IX, sec. 3, Mont. Const., constitutes a valid and binding consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

Water Use Act — Adjudication of Indian and Federal Reserved Water Rights:

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate Indian reserved water rights. Although state appropriative water rights and Indian reserved water rights differ in origin and definition, the Water Use Act, as amended, permits the Water Court to treat Indian reserved water rights differently from state appropriative rights. The Water Use Act does not state explicitly that the Water Court shall apply federal law in adjudicating Indian reserved rights; however, state courts are required to follow federal law with regard to those water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986), and In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996).

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate federal reserved water rights. Although federal reserved rights differ from state appropriative rights in origin, determination of priority date, and quantification standards, the Water Use Act recognizes the distinction between federal reserved rights and state-created appropriative rights. As the Act permits each different class of water rights to be treated differently, the Act is adequate to allow for adjudication of federal reserved rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986), and In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996).

Federal Reserved Water Rights — Jurisdiction Over Water Court Not Barred by Suspension Provision: After the U.S. Supreme Court decision in Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), that the McCarran amendment, 43 U.S.C. §666, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights, the state requested that the Montana Supreme Court exercise its powers of supervisory control over the state Water Court concerning the adjudication of federal reserved water rights. In assuming jurisdiction, the Supreme Court ruled that the request for supervisory control is not barred by the suspension provisions of 85-2-217, as the proceeding will not generally adjudicate any Indian reserved water rights or any federal reserved water rights. This proceeding will consider the following issues: (1) is the state Water Court prohibited from exercising jurisdiction over Indian reserved water rights based on the disclaimer clause of Art. I of the Montana Constitution or otherwise; (2) is the Montana Water Use Act, Title 85, ch. 2, adequate to adjudicate federal reserved water rights; and (3) is the Montana Water Use Act adequate to adjudicate federal reserved water rights held, on its own

behalf, by the United States or any of its agencies. State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833, 41 St. Rep. 2373 (1984).

State Court Jurisdiction Over Federal and Indian Water Rights: The McCarran amendment, 43 U.S.C. §666, granting state courts jurisdiction over the United States in litigation involving a comprehensive adjudication of water rights, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights in actions brought by the United States on behalf of an Indian tribe as well as in actions brought by an Indian tribe itself. Assuming that the state adjudication procedure is adequate and complies with state law, dismissal of adjudication actions filed in federal District Court out of deference to state adjudication proceedings was proper. Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 877, 103 S Ct 3201 (1983), reversing N. Cheyenne Tribe v. Adsit, 668 F2d 1080 (9th Cir. 1982); followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

DECISIONS UNDER FORMER LAW

Appropriation on Indian Lands:

Defendant's contention that an appropriation of a water right was made on Indian lands prior to opening for settlement and therefore initiated by trespass and hence void could not be sustained because the provision of the Crow Indian treaty of 1868 that white men should be excluded from Indian lands is directory and not mandatory. Whites could be excluded if inimical to Indian welfare. It was discretionary with those charged with protecting Indian rights to take action against whites invading without the consent of the tribe. The Indian land became public domain subject to squatter's rights after ratification of agreement for settlement in 1891. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled on other grounds in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

By the treaty of May 7, 1868, between the United States and the Crow Indians, establishing the Crow Indian Reservation, the federal government impliedly reserved to itself the waters thereon for irrigation and other purposes for use by the Indians, hence they were not subject to appropriation by others. The right to use water appurtenant to lands on an Indian reservation and held by Indians under trust patents is property of the United States, and state courts are without jurisdiction to enter a decree affecting such right; but when an Indian becomes seized of a fee simple title after removal of a trust patent, the conveyance of land transfers the right to use the water appurtenant to the land. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

Appropriation Made on Public Domain by Settler: A settler on lands which were a part of the public domain could make a valid appropriation of water thereon. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

Method of Procedure: The United States, under section 89-808, R.C.M. 1947 (now repealed), must proceed, in making appropriations of water from nonnavigable streams of this state, as a corporation or individual. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912). See U.S. v. Burley, 172 F 615 (9th Cir. 1909); Burley v. U.S., 179 F 1 (9th Cir. 1910). See also Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

Part Law Review Articles

Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Water Use Act, 41 Mont. L. Rev. 73 (1980).

Comments on Indian Water Rights, 41 Mont. L. Rev. 39 (1980).

Riparian Rights Within Indian Reservations, 38 Mont. L. Rev. 424 (1977).

Western Water and the Reservation Theory—The Need for a Water Rights Settlement Act, 26 Mont. L. Rev. 199 (1965).

Ciotti: Preserving Federal Protection of Indian Reserved Water Rights in Montana, Nelson, 20 Pub. Land & Resources L. Rev. 131 (1999).

Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights, Sanders, 17 Pub. Land & Resources L. Rev. 153 (1996).

Indian Winters Water Rights Administration: Averting New War, Willimas, 11 Pub. Land L. Rev. 53 (1990).

Quantification of Indian Reserved Water Rights in Montana: State ex rel. Greeley in the Footsteps of San Carlos Apache Tribe, MacIntyre, 8 Pub. Land L. Rev. 33 (1987).

Taming the Rapids: Negotiation of Federal Reserved Water Rights in Montana, Miller, 6 Pub. Land L. Rev. 167 (1985).

Namen: Riparian Rights on Flathead Lake, 1 Pub. Land L. Rev. 103 (1980).

Public Land Law: Some Connecting Threads and Future Directions, Wilkinson, 1 Pub. Land L. Rev. 1 (1980).

Federal Reserved Water Rights Doctrine Under the Wilderness Act: Is It Finally Here to Stay?, Latimer, 20 J. Land, Resources & Envtl. L. 3 (2000).

Tribal Water Quality Standards: Are There Any Limits?, Baker, 7 Duke Envtl. L. & Pol'y F. 367 (1997).

Clean Water and Human Rights in Indian Country, Suagee, 11 Nat. Resources & Env't, 46 (1996).

The National and Regional Archives: Important Records Related to Indian and Non-Indian Mining Activities and Water Rights, Leutbecker, 1996 Min. L. Series: Rocky Mtn. Min. L. Found. CH6 (1996).

Urban and Interstate Perspectives on Off-Reservation Tribal Water Leases, Sly, 10 Nat. Resources & Env't 43 (1996).

Jurisdiction Over Water Quality on Native American Lands, Uram & Decker, 8 J. Nat. Resources & Envtl. L. 1-21 (1993).

Administration of Reserved and Non-Reserved Water Rights on an Indian Reservation: Post-Adjudication Questions on the Big Horn River, Hannum 32 Nat. Resources J. 681 (1992).

Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects, Brienza, 11 Stan. Envtl. L.J. 151 (1992).

Indian Reserved Water Rights: An Argument for the Right to Export and Sell, 24 Land & Water L. Rev. 131 (1989).

Leasing Indian Water Off the Reservation: A Use Consistent With the Reservation's Purpose, 76 Calif. L. Rev. 179 (1988).

Protection of Water Flows for National Parks, Tarlock, 22 Land & Water L. Rev. 29 (1987).

An Argument for the Marketability of Indian Reserved Water Rights: Tapping the Untapped Reservoir, Schapiro, 23 Idaho L. Rev. 277 (1986-87).

Federal Reserved Water Rights in National Forest Wilderness Areas, Vassallo, 21 Land & Water L. Rev. 381 (1986).

Indian Water Rights: Then and Now, Maynes, 15 Colo. Law. 1 (1986).

Water in Indian Country: From Paper Rights to a Managed Resource, Shupe, 57 U. Colo. L. Rev. 561 (1986).

Water in the Western Wilderness: The Duty to Assert Reserved Water Rights, Abrams, 1986 U. Ill. L. Rev. 387 (1986).

Indian Allotment Water Rights, Collins, 20 Land & Water L. Rev. 421 (1985).

Indian Water Law: The Continuing Jurisdictional Nightmare, Lightstone, 25 Nat. Resources J. 841 (1985).

Water Rights: Enforcing the Federal-Indian Trust After Nevada v. United States [103 S. Ct. 2906], 13 Am. Indian L. Rev. 79 (1985).

Indian Reserved Water Rights Doctrine Expanded (case note), Colville Confederated Tribes v. Walton, 647 F2d 42 (9th Cir. 1981), 23 Nat. Resources J. 205 (1983).

The Application of Federal Reserved Water Rights to Groundwater in the Western States, Bork III, 16 Creighton L. Rev. 781 (1983).

Water Rights for Expanded Uses on Federal Reservations, Samelson, 61 Den. L. J. 67 (1983).

85-2-701. Legislative intent.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), in second sentence, substituted "It is the intent of the legislature that the unified proceedings include all claimants" for "Therefore, it is the intent of the legislature that the attorney general's petition required in 85-2-211 include all claimants". Amendment effective March 12, 1997.

1995 Amendment: Chapter 418 in (2) inserted last sentence concerning representation of Governor. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: Inserted (2) establishing negotiation of federal reserved rights as highest priority for Commission.

Purpose: Subsection (1) of sec. 1, Ch. 697, L. 1979, provided: "[This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights."

Case Notes

DECISIONS UNDER CURRENT LAW

State May Not Grant Water Use Permits on Indian Lands When Reserved Tribal Rights Not Quantified: The Confederated Salish and Kootenai Tribes of the Flathead Reservation objected to the Department of Natural Resources and Conservation (DNRC) issuing new water use permits to nontribal members owning land in fee on the reservation. The tribes argued that 85-2-311 clearly states that an applicant for a water use permit has to demonstrate that the proposed use will not unreasonably interfere with a planned use for which the water has been reserved and that such a showing cannot be made by an applicant until the tribes reserved rights are quantified by a compact negotiated with the state pursuant to 85-2-702. The Supreme Court held that 85-2-311 does include Indian reserved water rights and that an applicant cannot show that there will be no adverse impact on tribal rights until those rights have been quantified by a negotiated compact with the state. Therefore, DNRC does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights. (See Ch. 497, L. 1997.) In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), followed in Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985).

Collateral References

Montana Water Law for the 1980's, Stone (1981), pp. 103 through 121.

85-2-702. Negotiation with Indian tribes.

Compiler's Comments

1997 Amendment: Chapter 44 in (3), in second sentence, substituted "July 1, 2005" for "July 1, 1999"; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendment: In second sentence of (3) substituted July 1, 1999, for July 1, 1993; and made minor change in style. Amendment effective May 17, 1991.

1987 Amendment: In (3), near middle, extended approval period from July 1, 1987, to July 1, 1993.

1985 Amendment: In (2) after "governing body", substituted "and approval by the appropriate federal authority" for "and the congress of the United States"; in (3), in first sentence, substituted "ratification" for "approval", after "tribe" deleted "or federal agency", and inserted "and unless an objection to the compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without alteration", in second sentence, after "tribe", deleted "or federal agency", substituted "1987" for "1985", before "Indian claims" deleted "federal and", and substituted "6 months" for "60 days".

Select Committee Bill: Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See Committee report published December 1984 by the Montana Legislative Council.

1981 Amendment: Added (3) requiring that either the terms of an approved compact or information concerning unresolved claims for reserved rights be included in the preliminary decree.

Commissioner Correction: Because of rearrangement of sec. 27, Ch. 697, L. 1979, the Code Commissioner, 1979, changed "The compact commission" to "The reserved water rights compact commission, created by 2-15-212," in subsection (1).

Case Notes

DECISIONS UNDER CURRENT LAW

Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional: In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by 85-2-311. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel.

Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under this section or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

State May Not Grant Water Use Permits on Indian Lands When Reserved Tribal Rights Not Quantified: The Confederated Salish and Kootenai Tribes of the Flathead Reservation objected to the Department of Natural Resources and Conservation (DNRC) issuing new water use permits to nontribal members owning land in fee on the reservation. The tribes argued that 85-2-311 clearly states that an applicant for a water use permit has to demonstrate that the proposed use will not unreasonably interfere with a planned use for which the water has been reserved and that such a showing cannot be made by an applicant until the tribes reserved rights are quantified by a compact negotiated with the state pursuant to this section. The Supreme Court held that 85-2-311 does include Indian reserved water rights and that an applicant cannot show that there will be no adverse impact on tribal rights until those rights have been quantified by a negotiated compact with the state. Therefore, DNRC does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights. (See Ch. 497, L. 1997.) In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), followed in Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985).

85-2-704. Termination of negotiations.

Compiler's Comments

1985 Amendment: In (1) substituted "negotiating tribe or federal agency" for "other party to the negotiations", and substituted "6 months" for "60 days"; and inserted (2) permitting the reopening of terminated negotiations only by mutual agreement of the parties.

Select Committee Bill: Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). The Legislature did not adopt the exact version proposed by the Committee. See Committee report published December 1984 by the Montana Legislative Council.

1981 Amendment: In (1) inserted the last sentence requiring a tribe or federal agency to file its claims for reserved rights within 60 days of the termination of negotiations.

85-2-705. Status reports to chief water judge.

Compiler's Comments

Select Committee Bill: Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). The Legislature did not adopt the exact version proposed by the Committee. See Committee report published December 1984 by the Montana Legislative Council.

85-2-708. Water administration interim agreements within Indian reservations.

Compiler's Comments

Saving Clause: Section 22, Ch. 497, L. 1997, was a saving clause.

Severability: Section 23, Ch. 497, L. 1997, was a severability clause.

Part 8
Diversions From the Yellowstone River Basin

85-2-806. Combined proceeding.

Compiler's Comments

1995 Amendment: Chapter 418 in first sentence, after "conjunction with", deleted "any board" and after "enable the" deleted "board and"; in third sentence, after "unless the", substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 9
Ground Water Assessment

85-2-901. Short title.

Compiler's Comments

Effective Date: Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

85-2-902. Findings and purpose.

Compiler's Comments

Effective Date: Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

85-2-903. Definitions.

Compiler's Comments

Effective Date: Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

85-2-905. Ground water assessment account.

Compiler's Comments

1999 Amendment: Chapter 552 in (4)(a) substituted "$366,000" for "14.1%" and substituted "and $300,000 of the interest earnings from the resource indemnity trust fund, as authorized by 15-38-202" for "and 2.2% of the proceeds from the metaliferous mines license taxes, as authorized by 15-37-117". Amendment effective on occurrence of contingency.

The amendment to this section made by Ch. 144, L. 1999, was rendered void by sec. 12(2), Ch. 552, L. 1999, a coordination section.

1997 Amendments — Composite Section: Chapter 42 in (1), in first sentence, substituted "special revenue fund" for "state special revenue fund"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 444 in (4)(a)(i) substituted "proceeds" for "funds"; in (4)(b) substituted "by state government agencies" for "by federal or state government agencies"; inserted (4)(c) relating to proceeds allocated to the ground water assessment account by 15-36-324 and 15-38-106; and made minor changes in style. Amendment effective July 1, 1997.

Style changes were slightly different in the chapters. In each case, the codifier chose the more appropriate.

The amendments to this section made by sec. 5, Ch. 120, L. 1997, were rendered void by sec. 7, Ch. 542, L. 1997, a coordination section.

1995 Amendment: Chapter 31 at beginning of (4)(a) deleted "on July 1, 1993, and", after "each" deleted "succeeding", and near middle inserted language directing 2.2% of metalliferous mines license tax proceeds to the ground water assessment account; and made minor changes in style. Amendment effective February 6, 1995.

Retroactive Applicability: Section 3, Ch. 31, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all metalliferous mines taxes collected after December 31, 1994."

Appropriation: Section 18, Ch. 769, L. 1991, provided: "There is appropriated to the Montana bureau of mines and geology for the biennium ending June 30, 1993, all funds in the ground water assessment account, established in [section 4] [85-2-905], in the state special revenue fund, for purposes of establishing a ground water monitoring program and a ground water characterization program."

Coordination Instruction: Section 20, Ch. 769, L. 1991, provided: "If Senate Bill No. 407 is passed and approved and does not contain a provision that allocates a portion of public water supply system fees to the ground water assessment account, then [section 4(4)(d) of this act] [85-2-905(4)(d) (temporary version)] is void." Senate Bill No. 407 was approved April 26, 1991, as Ch. 645, L. 1991, and included a provision allocating fees to the ground water assessment account. Therefore, 85-2-905(4)(d) (temporary version) is valid.

Effective Date: Section 21(1), Ch. 769, L. 1991, provided that the temporary version of this section is effective July 1, 1991.

Termination: Section 22, Ch. 769, L. 1991, provided that subsections (4)(a) through (4)(d) of this section terminate July 1, 1993. Chapter 769, L. 1991, enacted two versions of the ground water assessment account. The effect of the termination provided in sec. 22, Ch. 769, L. 1991, is the implementation of the 1993 version of 85-2-905.

85-2-906. Ground water characterization program — ground water monitoring program.

Compiler's Comments

Effective Date: Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

85-2-907. Ground water information collection by local governments.

Compiler's Comments

Effective Date: Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

CHAPTER 3
ATMOSPHERIC WATER
WEATHER MODIFICATION

Chapter Law Review Articles

Atmospheric Water Resources Development and International Law, Davis, 31 Nat. Resources J. 11 (1991).

Part 1
General Provisions

85-3-101. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 deleted definition of Board that read: ""Board" means the board or natural resources and conservation provided for in 2-15-3302"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-3-102. Standards for research in weather modification control.

Compiler's Comments

1995 Amendment: Chapter 418 at beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 36, chapter 20, ARM Weather modification.

85-3-104. Nonliability of state and agents for acts of private persons.

Compiler's Comments

1995 Amendment: Chapter 418 near middle, before "the department", deleted "the board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 2
Licenses and Permits

Part Administrative Rules

Title 36, chapter 20, ARM Weather modification.

85-3-201. License and permit required for weather modification and control.

Compiler's Comments

1995 Amendment: Chapter 418 near end substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-3-202. Department to review applications.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), in second sentence after "report and", deleted "submit it to the board"; at beginning of (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 611 in (1) inserted second, third, fourth, and fifth sentences relating to report and public meeting requirements; and made minor changes in style. Amendment effective May 5, 1993.

Statement of Policy: Section 3, Ch. 611, L. 1993, provided: "The legislature, pursuant to its mandate and authority under Article IX of the Montana constitution, declares that it is the policy of the state that before further development of certain atmospheric water resources within Montana may occur, the 1995 session of the legislature must be provided with information concerning the expected environmental impacts of any anticipated weather modification activities."

Suspension of Action — Report to Legislature: Section 4, Ch. 611, L. 1993, provided: "(1) Prior to April 30, 1995, the board may not grant an application for a proposed weather modification activity if the primary benefit of the weather modification activity is outside Montana.

(2) For any pending application or for any application filed after [the effective date of this act] [effective May 5, 1993] for a permit to conduct weather modification activities suspended under subsection (1), the department of natural resources and conservation and the applicant shall, in consultation with the water policy committee, comply with the requirements of 85-3-202(1). The department shall submit the report and environmental impact statement to the water policy committee. The water policy committee shall consider the report and environmental impact statement and submit a final report to the legislature. The water policy committee need not file a weather modification report to the legislature if the department does not file a report and environmental impact statement with the water policy committee prior to October 1, 1994."

Severability: Section 5, Ch. 611, L. 1993, was a severability clause.

Retroactive Applicability: Section 6, Ch. 611, L. 1993, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to applications currently pending with the department of natural resources and conservation on or after [the effective date of this act] [effective May 5, 1993] and to applications currently pending with the department for which a commitment to a funding agreement exists for the preparation of an environmental impact statement."

Administrative Rules

ARM 36.20.103 Licenses and permits — forms.

ARM 36.20.104 Licenses and permits — exemptions.

ARM 36.20.306 Processing applications — Department responsibilities.

ARM 36.20.307 Action on permit applications — Board decision criteria.

85-3-203. Licenses — qualifications of licensees.

Compiler's Comments

1995 Amendment: Chapter 418 in two places substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.20.103 Licenses and permits — forms.

Title 36, chapter 20, subchapter 2, ARM Licensing procedures and requirements.

85-3-204. Licenses — term and renewal.

Administrative Rules

ARM 36.20.203 License term and renewal.

85-3-205. License or renewal fee.

Administrative Rules

ARM 36.20.201 License applications.

85-3-206. Permits — requirements and hearing.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), (2), in two places, (2)(c), (2)(e), (3), in two places, and (4) substituted "department" for "board"; in (2), near beginning, substituted "after completion of the report" for "after submission of the department's report"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 611 inserted (2) requiring hearing within 30 days of submission of report; in (2)(d), after "85-3-212", inserted "and the department's costs incurred under 85-3-202 have been paid"; in (2)(e), at end, inserted introductory clause; inserted (2)(e)(i) through (2)(e)(iii) outlining specific findings for general welfare and public good determination; substituted (3) relating to when Board may not hold hearing for former language that read: "If the board determines that a hearing is necessary, the department shall hold a public hearing in the area to be affected by the issuance of the permit. The department may in its discretion assess the permit applicant for the costs incurred by the department in holding the hearing"; inserted (4) concerning costs payable by applicant; and made minor changes in style. Amendment effective May 5, 1993.

Statement of Policy: Section 3, Ch. 611, L. 1993, provided: "The legislature, pursuant to its mandate and authority under Article IX of the Montana constitution, declares that it is the policy of the state that before further development of certain atmospheric water resources within Montana may occur, the 1995 session of the legislature must be provided with information concerning the expected environmental impacts of any anticipated weather modification activities."

Suspension of Action — Report to Legislature: Section 4, Ch. 611, L. 1993, provided: "(1) Prior to April 30, 1995, the board may not grant an application for a proposed weather modification activity if the primary benefit of the weather modification activity is outside Montana.

(2) For any pending application or for any application filed after [the effective date of this act] [effective May 5, 1993] for a permit to conduct weather modification activities suspended under subsection (1), the department of natural resources and conservation and the applicant shall, in consultation with the water policy committee, comply with the requirements of 85-3-202(1). The department shall submit the report and environmental impact statement to the water policy committee. The water policy committee shall consider the report and environmental impact statement and submit a final report to the legislature. The water policy committee need not file a weather modification report to the legislature if the department does not file a report and environmental impact statement with the water policy committee prior to October 1, 1994."

Severability: Section 5, Ch. 611, L. 1993, was a severability clause.

Retroactive Applicability: Section 6, Ch. 611, L. 1993, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to applications currently pending with the department of natural resources and conservation on or after [the effective date of this act]

[effective May 5, 1993] and to applications currently pending with the department for which a commitment to a funding agreement exists for the preparation of an environmental impact statement."

Administrative Rules
ARM 36.20.103 Licenses and permits — forms.
Title 36, chapter 20, subchapter 3, ARM Permitting procedures and requirements.

85-3-207. Separate permit for each operation.

Compiler's Comments
1995 Amendment: Chapter 418 in (2), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-3-208. Notice of intention to apply for permit.

Administrative Rules
ARM 36.20.103 Licenses and permits — forms.
ARM 36.20.301 Permit applications — general.
ARM 36.20.302 Permit applications — notice of intention.

85-3-209. Notice of intention — contents.

Administrative Rules
ARM 36.20.301 Permit applications — general.
ARM 36.20.302 Permit applications — notice of intention.

85-3-210. Publication of notice of intention.

Administrative Rules
ARM 36.20.306 Processing applications — Department responsibilities.

85-3-211. Proof of financial responsibility by applicant.

Compiler's Comments
1997 Amendment: Chapter 42 near middle substituted "department" for "board"; and made minor changes in style. Amendment effective March 12, 1997.

Administrative Rules
ARM 36.20.301 Permit applications — general.
ARM 36.20.303 Permit applications — proof of financial responsibility.

85-3-212. Permit fee.

Compiler's Comments
1995 Amendment: Chapter 418 at end of second sentence deleted "by the board"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules
ARM 36.20.301 Permit applications — general.
ARM 36.20.307 Action on permit applications — Department decision criteria.

85-3-213. State special revenue fund.

Compiler's Comments
1991 Amendment: At end inserted "or as appropriated by the legislature". Amendment effective April 24, 1991.
1987 Amendment: In middle, after "chapter", inserted "other than those collected in a justice's court".
1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

85-3-214. Termination of licenses and permits.

Compiler's Comments

1995 Amendment: Chapter 418 substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

ARM 36.20.204 License termination.

ARM 36.20.308 Permit suspension and revocation.

Part 3
Records

Part Administrative Rules

ARM 36.20.103 Licenses and permits — forms.

ARM 36.20.401 Records and reporting.

Part 4
County Weather Modification Authorities

Part Compiler's Comments

Source: Chapter 609, L. 1983, was based in part on Chapter 61-04.1, Laws of North Dakota.

85-3-412. Petition content.

Compiler's Comments

2001 Amendment: Chapter 574 in (1)(c) near end of first sentence substituted "tax upon the taxable value of all taxable property" for "tax not to exceed 2 mills upon the net taxable valuation of property" and substituted second sentence providing that tax is subject to 15-10-420 for "which tax may be levied in excess of the mill levy limit fixed by law for taxes for general county purposes"; and made minor changes in style. Amendment effective July 1, 2001.

85-3-422. Tax certified by weather modification authority — disposition of proceeds.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) near middle of first sentence substituted "tax on the taxable value of all taxable property" for "tax of not to exceed 2 mills upon the taxable valuation of the property" and near beginning of second sentence substituted "may" for "must" and at end deleted "and may be levied in excess of the mill levy limit fixed by law for taxes for general county purposes"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 in (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

85-3-423. County budget waived for first appropriation — conditions.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 278 in first sentence at beginning deleted "The provisions of 7-6-2342 apply" and near middle after "by the authority" deleted part of former second sentence that read: "In that case and only for the initial or first appropriation for the authority"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 deleted former last sentence that read: "However, the appropriation may not exceed an amount equal to the amount that would be raised by a 2-mill levy upon the taxable valuation of the property in the county." Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

CHAPTER 5
WATER COMMISSIONERS AND WATER MEDIATORS

Chapter Attorney General's Opinions

Water Commissioner Employee of District Court Judge: When a District Court Judge appoints a Water Commissioner under Title 85, ch. 5, the District Court Judge, rather than the water users, is considered the employer for the purpose of payment of workers' compensation. 40 A.G. Op. 56 (1984).

Part 1
Appointment and Duties

Part Attorney General's Opinions

Water Commissioner Employee of District Court Judge: When a District Court Judge appoints a Water Commissioner under Title 85, ch. 5, the District Court Judge, rather than the water users, is considered the employer for the purpose of payment of workers' compensation. 40 A.G. Op. 56 (1984).

Part Law Review Articles

Modern Western Legislation as a Pattern for Changes in the Montana Law of Water Rights, 28 Mont. L. Rev. 95 (1966).

Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest, Sterne, 27 Envtl. L. 203 (1997).

The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines, Rasband, 32 Land & Water L. Rev. 1 (1997).

The Reserved Water Rights Doctrine, Powell, 25 Real Est. L.J. 306 (1997).

Water Law on the Public Lands: Facing a Fork in the River, Targ, 12 Nat. Resources & Env't 14 (1997).

Maintaining Federal Water Rights in the Western United States, Wilcox & Stanton, Army Law. 3 (1996).

Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—for a Time, Neuman, 67 U. Colo. L. Rev. 259 (1996).

Seven Myths of Northwest Water Law and Associated Stories, Blumm, 26 Envtl. L. 141 (1996).

The Federal Reserved Rights Doctrine and Practicably Irrigable Acreage: Past, Present, and Future, O'Hair, 10 B.Y.U. J. Pub. L. 263 (1996).

The Straw That Broke the Developer's Back: Rights That Run With the Water, Manley, 12 Prac. Real Est. Law. 12 (1996).

Water Rights and the Common Wealth, Freyfogle, 26 Envtl. L. 27 (1996).

Water Rights Litigation for the Natural Resources Practitioner, Draper, 1996 Min. L. Series: Rocky Mtn. Min. L. Found. CH8 (1996).

"Whiskey Is for Drinkin' but Water is for Fightin' About": A First-Hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108., Mossman, 30 Creighton L. Rev. 67 (1996).

85-5-101. Appointment of water commissioners.

Compiler's Comments

1989 Amendments: Chapter 468 in first sentence of (2), after "court", substituted "may" for "shall", after "application by" inserted "both", and after "conservation" inserted "and one or more holders of valid water rights in the source"; inserted second sentence of (4) allowing Department to be included in apportionment of costs; and made minor changes in phraseology. Amendment effective April 6, 1989.

Chapter 604 in (1), in first sentence after "jurisdiction", inserted "including temporary preliminary, preliminary, and final decrees issued by a water judge"; and in (2) inserted "temporary preliminary decree, preliminary decree, or". Amendment effective April 21, 1989.

Saving Clause: Section 9, Ch. 604, L. 1989, was a saving clause.

Severability: Section 10, Ch. 604, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

1983 Amendment: In (2), after "district court" deleted "which issued the final decree"; and in (4), inserted ", including permittees and certificate holders".

Case Notes

Distribution of Waters: In an action by landowners against the State Water Conservation Board (precursor of the Department of Natural Resources and Conservation), for declaration of the respective rights of the parties to waters in a creek, plaintiffs alleged that the defendant's refusal to unlock the headgate to a ditch rendered it impossible for the Water Commissioner to measure and distribute the waters in question. Defendant's denial of this material allegation precluded a judgment on the pleadings. Johnson v. St. Water Conserv. Bd., 140 M 603, 374 P2d 325 (1962).

Persons Concluded by Decree:

Any act of the judge or of any Water Commissioner appointed by him done in violation of the plain mandate of the statute, which gives to the Commissioner authority to admeasure and distribute to the parties bound by the decree or decrees the waters to which they are entitled under the decrees, cannot be relied upon by a person to establish his claimed right to the prior use of waters by adverse possession. Lamping v. Diehl, 126 M 193, 246 P2d 230 (1952).

On certiorari, where landowner, who was not a party to an original water right suit or a successor in interest of a party thereto but who claimed a right under an appropriation the legality of which had not been a subject of litigation, tapped the stream and when advised by Water Commissioner that water in stream was insufficient for needs of those with decreed rights, continued in its use, a finding that he was guilty of contempt was not warranted in the absence of a showing that he interfered with the Commissioner in performance of his duties. State ex rel. Reeder v. District Court, 100 M 376, 47 P2d 653 (1935).

A person not mentioned in the decree, who joined in a petition for the appointment of the Water Commissioner and afterward refused to respect the decree, made himself a party thereto and was liable to be punished in contempt proceedings. State ex rel. Pool v. District Court, 34 M 258, 86 P 798 (1906).

Contempt in County Other Than Where Decree Made: Where the violation of the decree of the District Court of Cascade County was committed in Lewis and Clark County, the courts of Lewis and Clark County may punish for the violation. Contempts, being criminal in their nature, must be tried in the county where they were committed. State ex rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

River and Tributaries Flowing in Several Counties: Where a river and its tributaries flowed in three counties, the District Court of any one of the counties had jurisdiction to adjudicate the water rights on the whole watershed. The court which first acquired jurisdiction retained it for the purpose of disposing of the whole controversy, and no court of coordinate power could interfere with its action. Such court "having jurisdiction" appoints the Water Commissioner to enforce its decree. This rule does not apply to rights not adjudicated in that decree. State ex. rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

Nature of Proceedings:

Procedure under Montana statutes authorizing an owner or user of waters of an adjudicated stream who is dissatisfied with the method of distribution to file a written claim in the appropriate court and providing for a hearing and the making of appropriate findings and orders is not a formal trial but is more in the nature of proceedings ancillary to an original decree adjudicating rights on the stream. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

In a proceeding brought under this act, relating to the appointment and duties of Water Commissioners, by one owning or using an adjudicated water right who is dissatisfied with the method of distribution of the waters in a stream by a Commissioner, a formal trial, upon pleadings filed by the interested parties, is not contemplated. The only pleading required is the complaint, and the sole question for determination is whether the Commissioner has distributed the waters in accordance with the decree. Other users may present themselves at the hearing and resist the demands of a complainant orally if they object to the granting of relief. Gans & Klein Inv. Co. v. Sanford, 91 M 512, 8 P2d 808 (1932).

Contempt Proceeding Not Procedure to Adjudicate Water Rights: A Water Commissioner does not possess complete and exclusive jurisdiction to control the stream, regardless of whether all rights are adjudicated under court decree fixing measurement of water. Nor may the District

Court in a contempt proceeding, summary in nature, decide that contemnor claiming right in stream, otherwise adjudicated, has no right. This may be done only by appropriate action after due notice and hearing. State ex rel. Reeder v. District Court, 100 M 376, 47 P2d 653 (1935), distinguished in Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

Damages for Impairment of Water Rights: The provisions relating to the appointment of a Water Commissioner and prescribing his duties and powers do not provide an exclusive remedy for one whose water rights have been impaired and therefore do not preclude him from maintaining an action for damages. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926), distinguished in Sain v. Mont. Power Co., 20 F. Supp. 843 (D.C. Mont. 1937).

Collateral References

Waters and Water Courses *key* 133, 152, 217.
94 C.J.S. Waters §762.

85-5-103. Oath and bond.

Case Notes

Discretion to Fix Bond: The District Court has discretion to set the sum of a bond under this section at $1. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

85-5-105. Power and duty to distribute water.

Case Notes

Recharge of River — Right to Use of Water by Subsequent Appropriator Even Though No Water Available to Upstream Prior Appropriator: A Water Commissioner closed the headgate of the Baker Ditch Company, a downstream appropriator with decreed water rights, because there was no water available to an upstream superior appropriator, even though there was water available to the Company due to recharge of the river by return flows, seepage, and other sources. The Commissioner evidently believed that he had to enforce the decree to the extent that if a prior appropriator was without water upstream, a subsequent appropriator downstream could not divert water under its rights even though the river was being recharged. However, if a subsequent appropriator is using water in accordance with the decree and that use cannot in any way be a detriment to a prior appropriator, then the subsequent appropriator has the right to the use of the water. Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260, 49 St. Rep. 17 (1992), replacing the prior opinion at 48 St. Rep. 972 (1991).

Expiration of Commissioner's Term — Action Not Rendered Invalid: The purpose of this section is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters. In order to assure this type of distribution, instructions given by a District Court must be binding upon the office of the Water Commissioner, not merely upon the individual holding the office at a particular time. Thus the filing of an action to clarify decreed rights subsequent to the expiration of a Commissioner's term does not render the action invalid. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

85-5-107. Record of daily distribution of water.

Compiler's Comments

1983 Amendment: In first sentence after "monthly" inserted "or seasonally, at the discretion of the district judge"; after "water distributed" inserted "each day"; after "such month" substituted "or season" for "daily"; after "salary per day" inserted "and other costs of the water commissioner approved by the district judge".

85-5-108. Authority and arrest power.

Case Notes

Power of Commissioner Appointed in Another County: The fact that a Water Commissioner is by this section vested with the same power of arrest as is a Sheriff or Constable, whose powers are confined to their counties, does not militate against the holding that the District Court of one county may appoint a Commissioner in another county to which his duties are wholly confined. One violating a water right decree will not be heard to say that his arrest should have been accomplished by some other officer. State ex rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

Offender Liable to Injured Party for Damages: It is true that under the authority vested in him by this section the Commissioner may arrest an offender for interference with such distribution and take him before the court for punishment, but such action does not in any manner compensate the party injured by the unlawful act of the culprit and therefore does not preclude him from

maintaining an action for damages. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926), distinguished in Sain v. Mont. Power Co., 20 F. Supp. 843 (D.C. Mont. 1937).

Nonjudicial Officer: This section does not constitute Water Commissioners judicial officers in the sense that violations of their orders are contempts committed in the immediate view and presence of the court. State ex rel. Flynn v. District Court, 33 M 115, 82 P 450 (1905).

85-5-110. Appointment of water mediators — duties.

Compiler's Comments

1991 Amendment: In (1) and (1)(b), before "nondecreed basin", inserted "decreed or"; inserted (1)(c) providing for appointment of a water mediator in the discretion of a District Court Judge having jurisdiction; and made minor changes in style.

Saving Clause: Section 4, Ch. 625, L. 1989, was a saving clause.

Severability: Section 5, Ch. 625, L. 1989, was a severability clause.

Effective Date: Section 6, Ch. 625, L. 1989, provided that this section is effective April 24, 1989.

85-5-111. Water commissioner and mediator education.

Compiler's Comments

Saving Clause: Section 4, Ch. 625, L. 1989, was a saving clause.

Severability: Section 5, Ch. 625, L. 1989, was a severability clause.

Effective Date: Section 6, Ch. 625, L. 1989, provided that this section is effective April 24, 1989.

Part 2
Charges and Expenses

85-5-201. Distribution of water and related expenses.

Compiler's Comments

1983 Amendment: Provided specifically for distribution of water to and payment of expenses by permit or certificate holders by inserting "permit or certificate"; and made minor changes in phraseology.

Case Notes

Court Allowed to Assess Lands in Another County: The District Court of one county has power to make an assessment for costs and expenses against lands situated in another county benefited by appointment of a Water Commissioner, thereby creating liens upon such lands. This procedure is no more objectionable than the statutory provision that a judgment rendered in one county is a lien upon real estate of the debtor in another county under 25-9-302. State ex rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

Part 3
Rights and Duties of Water Users

85-5-301. Complaint by dissatisfied user.

Case Notes

Jurisdiction of District Court to "Update" Old Water Rights Decree — Statute Governing Complaints by Dissatisfied Users Inapplicable: Pursuant to a previous writ of supervisory control, a remand to the District Court, and findings entered by the Senior Water Master, the Supreme Court found that the Order Authorizing Updated Decree, entered by the judges of the Fourth Judicial District in January of 1989, was beyond the jurisdiction of the District Court. The order was intended to deal with the problem of a 1902 water rights decree by a District Court, in which the judge adjudicated 27 water rights on Carlton Creek, that had become so brittle with age and damaged by time that the decree could not be readily handled. In the process of updating and reissuing the 1902 order, the Supreme Court found that the Fourth Judicial District Judges had actually made a de facto adjudication of water rights in an overly appropriated drainage and that that adjudication had been undertaken without notice and hearing to the holders of certain of those water rights. Citing Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the Supreme Court held that under 85-2-234(6), it is within the sole jurisdiction of the Water Court to determine such things as priority dates, flow rates, place of use, and means of diversion with respect to a water right. The Supreme Court also held that the matters adjudicated by the decree were not within the scope of matters cognizable under this section because that section concerns the correct administration of

a water rights decree while the Updated Decree attempts to change the terms of the decree itself. For these reasons, the Supreme Court vacated the 1989 Updated Decree. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

Continuance of Water Use Case Properly Denied: On October 7, 4 days before a scheduled hearing on charges of contempt of the order of a Water Commissioner, counsel for relator sent a letter notifying the court that his schedule would prevent him from appearing and requesting that the hearing be continued until November 4 or 18, approximately 1 month later. However, the court properly denied the request in light of the fact that the continuance would have left relator in sole possession and use of all waters of the creek for over a month at a time when very little remained of the irrigation season. Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

Knowledge of Water Commissioner's Directives and Procedures Sufficient to Uphold Contempt Charge: A water user's participation in many water controversies over a period of several years, his continuing refusal to abide by a Water Commissioner's directives, and his prior knowledge of procedures involving water Commissioners and Water Courts provided sufficient substantial evidence for a lower court to find that the water user was in contempt of court for failing to obey an order of a Water Commissioner. Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

Proceedings to Be Informal: The procedure in a dissatisfied water user's action filed under this section is informal. Since standard trial procedures are not followed in this informal, summary proceeding, the time limits governing posttrial procedures should not be strictly applied. Morrison v. Higbee, 204 M 501, 668 P2d 1029, 40 St. Rep. 1031 (1983).

Scope of Court's Authority in Dissatisfied Water User's Action: The purpose of a dissatisfied water user's action is to enforce the original decree and oversee the Water Commissioner's distribution of water through properly maintained ditches, headgates, and other water measuring devices. In an action of this type, it was appropriate for a District Court to order the removal of trees and brush on an irrigation ditchbank when the purpose of the removal was to enhance the method of distribution of water. Morrison v. Higbee, 204 M 501, 668 P2d 1029, 40 St. Rep. 1031 (1983).

Court's Findings Exceeding Scope of Section: Findings based upon facts and occurrences subsequent to the decree under consideration and those outside of the pleadings, record, and judgment role of that decree exceeded the scope of this section. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Evidence Sufficient to Establish Interference With Water Commissioner: Evidence that a water user locked and rendered inoperative headgate controls at the diversion point from a creek was sufficient to establish that the water user interfered with and hindered the duties of the Water Commissioner. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Expiration of Commissioner's Term — Action Not Rendered Invalid: The purpose of this section is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters, and in order to assure this type of distribution, instructions given by a District Court must be binding upon the office of the Water Commissioner, not merely upon the individual holding the office at a particular time. Thus the filing of an action to clarify decreed rights subsequent to the expiration of a Commissioner's term does not render the action invalid. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Notice to All Water Users on a Creek: The District Court is not required to give notice in an action for clarification of a 1890 water rights decree to all water users on a creek under the prior decree. Specifically, notice is not required to be given to users who have not questioned a Water Commissioner's authority and whose rights are not adversely affected. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Prior Decree Uncertain: The purpose of an action pursuant to this section is not to adjudicate water rights previously determined by decree but only to enforce the rights determined by the prior decree. Thus, in determining whether a Water Commissioner properly distributed water, a District Court must look to two factors: (1) what was adjudged in the former proceeding and decree; and (2) was the Water Commissioner distributing the water in accordance with what was adjudged. As to the first factor, the absence of identifying the respective lands of the water owners is sufficient by itself to support the District Court's finding that the prior decree was uncertain in meaning and susceptible of different interpretations. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Standing: Plaintiff has standing to pursue an action under this section on the basis that he is dissatisfied with the method of distribution of a Water Commissioner and that plaintiff's

entitlement to more water is in jeopardy. Plaintiff may also have standing if he is dissatisfied with the method of distribution of the Water Commissioner and his entitlement to a right prior to that allowed him by a Water Commissioner is being challenged. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Counterclaim Denied: A counterclaim against a petition of an irrigation district for additional appropriation of water was properly denied where evidence was uncontradicted that water was going to waste and that impoundment would be beneficial. Sunset Irrigation District v. Ailport, 166 M 11, 531 P2d 1349 (1974).

Purpose of Summary Proceeding: The District Court had no authority in a proceeding under this section to approve a method of distribution which changed the point of diversion of water to a tract and changed the transportation ditch thereto, because the only function of the court in such a proceeding is to determine whether the water involved is being allocated in compliance with existing decrees and not to decree new water rights. Allen v. Wampler, 143 M 486, 392 P2d 82 (1964).

Purpose Not to Adjudicate Water Rights: The purpose of the summary proceeding authorized by this section is not to adjudicate water rights determined by prior decrees or, under the guise of instructions to the Commissioner after hearing, to summarily subordinate the right of one to that of another where, as between the two, their rights have never been adjudicated. A Water Commissioner is as disinterested in such proceeding as a stakeholder or interpleader and may not champion the rights of an owner whose rights have never been adjudicated and who had no notice and did not appear at the hearing. State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

Real Parties in Interest: As in the case of an injunction action against a Water Commissioner, so in a proceeding under this section, the real parties interested are the parties whose water rights are affected. The constitutional right of due process cannot be abridged by the court's instructing the Water Commissioner in a manner subordinating the right of one to that of another to conform to a decree to which the former was not a party, merely because time and expense would be consumed in litigation between users whose rights between themselves have not been adjudicated. State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

Appropriations in Anticipation of Future Needs: When the intention is made manifest, the court must take into consideration prospective or future needs in entering a water right decree, and a mere description of lands does not justify the extended use of water in the absence of recitals in the pleadings and decree and proof in the record that the appropriation is made in anticipation of future needs. In reviewing the acts of the Water Commissioner in distributing water, in a proceeding under this section, reasonable diligence must be shown to have been exercised since entry of the decree in developing such needs. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

Diversion Into Fishpond Without Outlet Constituting Unauthorized New Appropriation: Where, after the appointment of a Water Commissioner, there never was more than enough water in an adjudicated stream to supply the needs of the parties under their adjudicated rights, a diversion of water therefrom by one of them into a fishpond which had no outlet constituted an attempted new appropriation under sections 89-829 through 89-838, R.C.M. 1947 (now repealed), which in the absence of a decree establishing it was unauthorized and therefore properly prohibited by an order of a court in a proceeding under this section. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

Reference to Entire Record to Construe Obscure or Uncertain Decree: In construing a water right decree which is lacking in certain elements or obscure and uncertain in meaning, the Supreme Court, on appeal from orders of the District Court in a proceeding under this section relating to the actions of a Water Commissioner in distributing water to claimants whose rights were adjudicated in prior decrees, may refer to the pleadings, judgment roll, or the entire record of the case. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

Rule as to Extended Use of Water Irrespective of the Rights of Others: Owners of decreed rights are not entitled to increase the use of the water decreed on additional lands even if they do not exceed their decreed quota per unit of time, when to do so would result in injury to subsequent appropriators. The decreed right is limited to water taken and beneficially applied on lands either in actual or contemplated irrigation at the time it was decreed. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

Jurisdiction Federal Court May Entertain: That a prior decree of a state court settling water priorities in a particular stream permanently enjoined parties thereto from interfering with rights of each other did not preclude federal court from entertaining jurisdiction of a suit to have the power company's rights adjudged inferior to plaintiffs', in view of holdings of state court

authorizing independent actions, notwithstanding prior injunction; nor does the fact that state court had appointed a Water Commissioner and through him was still exercising jurisdiction over the res preclude exercise of jurisdiction, especially where state laws did not contemplate that his adjustment of water rights should be exclusive. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

Questions to Be Determined: In a proceeding under this section, the primary questions for consideration by the trial court are: (1) what was adjudged in the former proceeding and decree; and (2) was the Water Commissioner distributing the water in accordance with what was there adjudged. Brennan v. Jones, 101 M 550, 55 P2d 697 (1936).

Jurisdiction of District Court: In a proceeding brought under this section by a dissatisfied water user against a Water Commissioner appointed to admeasure the waters of a tributary of a river, defendant's contention that his refusal to distribute water to plaintiff was justified by the fact that the tributary flowed entirely in his county and that therefore the District Court of a neighboring county was without jurisdiction to render the decree upon which plaintiff relied as the basis of his water right was without merit. Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933), distinguished in State ex rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

Claimant to Be Able to Use Water Before He May Object to the Use by Others: Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water or water right does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water or for damages for its diversion. Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905).

Attorney General's Opinions

Water Commissioner Employee of District Court Judge: When a District Court Judge appoints a Water Commissioner under Title 85, ch. 5, the District Court Judge, rather than the water users, is considered the employer for the purpose of payment of workers' compensation. 40 A.G. Op. 56 (1984).

85-5-302. Maintenance of headgates and measuring devices.

Compiler's Comments

1989 Amendment: Near beginning of first sentence, after "water", deleted "under a decree" and in two places, before "certified", deleted "registered or"; and made minor changes in phraseology. Amendment effective April 4, 1989.

Case Notes

Scope of Court's Authority in Dissatisfied Water User's Action: The purpose of a dissatisfied water user's action is to enforce the original decree and oversee the Water Commissioner's distribution of water through properly maintained ditches, headgates, and other water measuring devices. In an action of this type, it was appropriate for a District Court to order the removal of trees and brush on an irrigation ditchbank when the purpose of the removal was to enhance the method of distribution of water. Morrison v. Higbee, 204 M 501, 668 P2d 1029, 40 St. Rep. 1031 (1983).

Police Regulation: This section requiring the installation of headgates and measuring boxes in ditches by persons using water from a stream under a decree where a Water Commissioner has been appointed is in the nature of a police regulation, under which the Commissioner may refuse to distribute water to one who fails to do so. It does not license a stranger to appropriate water to his own use from a stream merely because an owner of a right has not complied with such requirement. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

Part 4
Water Ditches Under Joint or Corporate Control

Part Case Notes

Irrigation Contract — Interpretation of Limitations on Water Usage: In an action against an irrigation company, plaintiff irrigator claimed the company had violated its contract by failing to provide him with sufficient water to irrigate his land, the District Court did not err in holding that it was the plaintiff who violated the contract since there was substantial evidence showing that the blockage of the irrigation ditch by the plaintiff resulted in the plaintiff's taking of more than the 400 miner's inches of water a year allowed by the contract. The District Court did err, however, in prohibiting the plaintiff from diverting water by pumping and from irrigating land not historically

irrigated. There was no language in the contract restricting the method of irrigation or the number or location of acres to be irrigated. As long as the plaintiff used no more water than his contractual entitlement, the District Court could not limit the means or place of irrigation. Griffel v. Cove Ditch Co., 207 M 348, 675 P2d 90, 41 St. Rep. 1 (1984).

85-5-407. Appointment of water commissioner after final decree.

Compiler's Comments

1997 Amendment: Chapter 42 in second sentence substituted "this chapter" for "85-5-101 through 85-5-301"; and made minor changes in style. Amendment effective March 12, 1997.

85-5-408. Apportionment of costs.

Compiler's Comments

1997 Amendment: Chapter 42 in (2), in two places, substituted "this chapter" for "85-5-101 through 85-5-301"; and made minor changes in style. Amendment effective March 12, 1997.

CHAPTER 6
WATER USERS' ASSOCIATIONS

Chapter Case Notes

Irrigation Contract — Interpretation of Limitations on Water Usage: In an action against an irrigation company, plaintiff irrigator claimed the company had violated its contract by failing to provide him with sufficient water to irrigate his land, the District Court did not err in holding that it was the plaintiff who violated the contract since there was substantial evidence showing that the blockage of the irrigation ditch by the plaintiff resulted in the plaintiff's taking of more than the 400 miner's inches of water a year allowed by the contract. The District Court did err, however, in prohibiting the plaintiff from diverting water by pumping and from irrigating land not historically irrigated. There was no language in the contract restricting the method of irrigation or the number or location of acres to be irrigated. As long as the plaintiff used no more water than his contractual entitlement, the District Court could not limit the means or place of irrigation. Griffel v. Cove Ditch Co., 207 M 348, 675 P2d 90, 41 St. Rep. 1 (1984).

Chapter Law Review Articles

Water for Growing Communities: Refining Tradition in the Pacific Northwest, Carpenter, 27 Envtl. L. 127 (1997).

Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water, Benson, 16 Va. Envtl. L.J. 363 (1997).

Managing Reclamation Facilities for Ecosystem Benefits, MacDonnell, 67 U. Colo. L. Rev. 197 (1996).

Part 1
General Provisions

85-6-101. Power to levy new assessments.

Collateral References

Waters and Water Courses *key* 238.

94 C.J.S. Waters §§543 through 581.

85-6-103. Transfer of shares of stock.

Collateral References

The Reclamation Act of June 17, 1902, referred to in this section, is found in the United States Code, Title 43, sec. 372, et seq.

85-6-107. Liability of associations.

Case Notes

No Negligence by Irrigation District for Failure to Warn of Unforeseeable Flood: Plaintiffs' property was damaged by an unprecedented flood caused by an ice jam on the Clark Fork River. Plaintiffs alleged that the local irrigation district was liable for breaching its duty to construct and maintain an irrigation system that would protect the property and for failing to warn of the

flooding conditions to allow plaintiffs the opportunity to protect their property. The District Court held that the irrigation district had no duty to prevent the flood or to warn of the impending natural disaster, and the Supreme Court affirmed. The first element that plaintiffs must establish in a negligence action is the existence of a duty of care, and the measure of a duty of care owed is the scope of the risk that the negligent conduct foreseeably entails. Thus, the primary factor in determining whether the irrigation district owed a duty of care was whether it was foreseeable, as a matter of law, that the district's acts or omissions would pose a risk of injury to plaintiffs. Here, substantial evidence supported the conclusion that the risk that flooding would damage plaintiffs' property was unforeseeable, so the district had no duty to erect or maintain flood control structures to prevent the unforeseeable event. The district also exercised reasonable care in the maintenance of the irrigation system that was in place. Further, plaintiffs failed to advance any applicable authority that would impose upon the district a duty to warn of the unforeseeable flood because mere knowledge of the dangerous situation, of which plaintiffs themselves had become aware the night of the flood, did not impose a legal duty to warn. Gaudreau v. Clinton Irrigation District, 2001 MT 164, 306 M 121, 30 P3d 1070 (2001), following Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

Liability of Users' Association Not Exclusive: This section does not preclude liability of a third party for the safe operation of an irrigation ditch by an incorporated users' association. It merely precludes liability of the state of Montana for injuries allegedly caused by its regulation of such companies. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985).

85-6-109. Operation of projects with water users' association — definitions.

Compiler's Comments

1997 Amendment: Chapter 42 in (3), at beginning, substituted "an appeal" for "a complaint"; and made minor changes in style. Amendment effective March 12, 1997.

1995 Amendment: Chapter 418 in (2), in third sentence after "decision to", deleted "the board of natural resources and conservation as provided for in 85-1-212. The board shall notify the association of its decision. If the board's decision is adverse to the association, the association may file within 30 days of receipt of notice of the board's decision a complaint to review the board's decision in" and at end, after "located or", inserted "to the district court"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (5), in last sentence after "representing", increased percentage of ownership protest to 30% from 15%. Amendment effective April 15, 1991.

1981 Amendment: In (5) inserted "sell, or otherwise dispose of" after "abandon" near the beginning, inserted "a water users'" before "association" near the beginning, inserted the second sentence requiring that before action is taken to abandon, sell, or dispose of a project which involves a water user's association, the Department receive a petition approving the abandonment, sale, or disposition, signed by stockholders representing 66 ⅔% or more of the issued and outstanding association stock, substituted "final proposal of abandonment, sale, or other disposal" for "notice of abandonment" in the last sentence, and inserted "sold, or otherwise disposed of" after "abandoned" in the last sentence.

CHAPTER 7
IRRIGATION DISTRICTS

Chapter Case Notes

No Negligence by Irrigation District for Failure to Warn of Unforeseeable Flood: Plaintiffs' property was damaged by an unprecedented flood caused by an ice jam on the Clark Fork River. Plaintiffs alleged that the local irrigation district was liable for breaching its duty to construct and maintain an irrigation system that would protect the property and for failing to warn of the flooding conditions to allow plaintiffs the opportunity to protect their property. The District Court held that the irrigation district had no duty to prevent the flood or to warn of the impending natural disaster, and the Supreme Court affirmed. The first element that plaintiffs must establish in a negligence action is the existence of a duty of care, and the measure of a duty of care owed is the scope of the risk that the negligent conduct foreseeably entails. Thus, the primary factor in

determining whether the irrigation district owed a duty of care was whether it was foreseeable, as a matter of law, that the district's acts or omissions would pose a risk of injury to plaintiffs. Here, substantial evidence supported the conclusion that the risk that flooding would damage plaintiffs' property was unforeseeable, so the district had no duty to erect or maintain flood control structures to prevent the unforeseeable event. The district also exercised reasonable care in the maintenance of the irrigation system that was in place. Further, plaintiffs failed to advance any applicable authority that would impose upon the district a duty to warn of the unforeseeable flood because mere knowledge of the dangerous situation, of which plaintiffs themselves had become aware the night of the flood, did not impose a legal duty to warn. Gaudreau v. Clinton Irrigation District, 2001 MT 164, 306 M 121, 30 P3d 1070 (2001), following Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

Irrigation Districts Special, Limited-Purpose Units of Government — Freeholder Requirement for Qualifications of Commissioners Constitutional — Reasonable Relationship Standard Applied: The freeholder requirement under 85-7-1501 does not violate the right to equal protection under the federal constitution. Montana irrigation districts are special, limited-purpose units of government whose activities have a disproportionate effect on landowners in the districts as a group. It is appropriate to depart from the usual strict scrutiny standard applied to statutes impacting on a citizen's right to vote and to analyze the freeholder requirement of 85-7-1501 under the reasonable relationship standard. Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

Importance of Control of Distribution by District: The most important function of an irrigation district is the control, to the mutual advantage of all the members, of the irrigation system. Water rights remain with the private appropriator, but control lies exclusively with the district. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

Relationship Between District Rights and Nondistrict Rights: A portion of the Fosses' ranch is included in the irrigation district and a portion is not. The part of the ranch not in the district has water rights, which precede the district rights, in two creeks, which during part of the year spill into the district's system. Further, a segment of the district's ditch follows the natural channel of one of the creeks. The Fosses habitually have conveyed their nondistrict water through the ditch, and the district has delivered water to Foss land not included within the district through a district headgate. In 1979, a dispute arose over control of the headgate. The District Court ruled that the Fosses had no legal right to use of the district's distribution system. The Supreme Court reversed and remanded the case for further proceedings in accordance with its ruling that the Fosses may convey their nondistrict water rights to the district and that the district has the obligation to deliver that water. If the ditch is too small to service the district and other water rights, the Fosses should not be required to bear any burden of expansion. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

Chapter Attorney General's Opinions

Voting Procedure Based on Land Ownership Not Violative of "One Man, One Vote" Constitutional Provisions: Montana's weighting of votes according to the size of land holdings in irrigation district elections does not violate the "one man, one vote" requirement of the U.S. Constitution. In upholding the weighted voting scheme in a similar case, the U.S. Supreme Court held in Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 US 719 (1973), that where the tax burden fell unequally according to the size of the land holdings, it was not unreasonable for the votes to be weighted according to the size of the land holdings. 42 A.G. Op. 47 (1987).

Chapter Law Review Articles

The Irrigated Desert and Imperiled Salmon: "Reclaiming" Illegally Spread Water Via the Endangered Species Act, Lacy, 4 U. Den. Water L. Rev. 351 (2001).

Agricultural Water Pollution: From Point to Nonpoint and Beyond, Kershen, 9 Nat. Resources & Env't 3 (1995).

Conservation Districts as the Foundation for Watershed-Based Programs to Prevent and Abate Polluted Agricultural Runoff, Farey, Jones, & Pratt, 18 Hamline L. Rev. 151 (1994).

Confronting the Environmental Legacy of Irrigated Agriculture in the West: The Case of the Central Valley Project, Dunning, 23 Envtl. L. 943 (1993).

Ditch Lining: The Water Right Issue, Browning & Bushong, 21 Colo. Law. 1155 (1992).

The Use of Water Pricing as a Means for Enhancing Water Use Efficiency in Irrigation: Case Studies in Mexico and the United States, Cummings & Nercissiantz, 32 Nat. Resources J. 731 (1992).

Landmark Federal Legislation Signals New Thinking About Irrigation Policy in the Western United States, O'Leary, 6 Nat. Resources & Env't 43 (1991).

Part 1
Creation of Districts — Generally

85-7-101. Creation of irrigation districts by percentage of titleholders.

Case Notes

Inclusion of State School Lands: The Legislature has always assumed that it had authority to fix the policy as to whether state lands, as a matter of justice and equity, should be included in irrigation districts and subject to assessments, as was done by section 2401, R.C.M. 1907, section 4014, R.C.M. 1921, and Ch. 58, L. 1929. Sections 2401 and 4014, supra, were later repealed. In the instant case, section 4014, supra, could not apply to a district created in 1911 under Ch. 146, L. 1909, and in absence of specific legislation on the subject at the time plaintiff district was created, there was no authority for including state lands in the district subject to lien for assessments. Tongue River & Yellowstone River Irrigation District v. Hyslop, 109 M 190, 96 P2d 273 (1939).

Intention of Legislature: In ascertaining the intention of the Legislature in enacting a statute consisting of numerous sections all relating to the same general subject, the act must be considered in its entirety, since it was passed as a whole, not in parts or sections. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

Liberal Construction: After the organization of an irrigation district, the provisions of the act of its creation and rules of procedure should be given most liberal construction in order that the purpose of the act may be carried out. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

Attacking Regularity of District: An action by a landowner seeking to have his irrigated land excluded from an irrigation district on the ground of lack of jurisdiction in the court when the court entered its judgment creating the irrigation district, because of a failure of service of notice and a lack of written consent to the inclusion of his lands, was not a collateral attack upon the judgment of creation. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928), distinguished in Midland Dev. Co. v. Cove Irrigation District, 102 M 479, 58 P2d 1001 (1936).

Public Corporation: An irrigation district created under this act is a public corporation exercising essential governmental functions, one of which is the right to levy taxes, organized for the government of a portion of the state and for the promotion of the public welfare. Thus, it must be deemed a subdivision of the state within the meaning of 7-4-2516 and therefore is not required to pay fees for the recordation of papers in the County Clerk and Recorder's office. Crow Creek Irrigation District v. Crittenden, 71 M 66, 227 P 63 (1924), explained in Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

Jurisdiction of District Court: While the irrigation district act confers certain exclusive powers upon the District Court of the county in which the business of the district is being conducted, there is nothing in the act which gives exclusive jurisdiction to that court to compel the Treasurer of that county by mandamus to pay interest due upon bonds of the district. Therefore, the court of any district or county has the power to issue the writ. State ex rel. Carroll v. District Court, 69 M 415, 222 P 444 (1924), overruled on other grounds in USF&G v. St., 136 M 148, 345 P2d 734 (1959).

Inclusion of Specially Benefited Lands: Under the district irrigation statutes, only such lands as will be specially benefited may be included within a proposed district against the will of the owner. In re Crow Creek Irrigation District, 63 M 293, 207 P 121 (1922).

Nonconsenting Owners: Since the inclusion of a tract of land of a nonconsenting owner in an irrigation district and subjection of it to its pro rata part of the burden of the expense necessarily incident to the construction of the works and the operation of the system deprives him of his property to the extent of the burden thus imposed, such deprivation can be effected only by due process of law, i.e., he must be afforded adequate opportunity to be heard. In re Crow Creek Irrigation District, 63 M 293, 207 P 121 (1922).

Character and Object of Act: For general observations upon the character and objects of the legislation embraced in this chapter, see In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

Constitutionality: Sections 85-7-101 through 85-7-1507, relating to the creation of irrigation districts, are not, in conferring certain alleged nonjudicial powers and duties upon the District Judge, violative of Art. IV, sec. 1, 1889 Mont Const. (Art. III, sec. 1, 1972 Mont. Const.), which

divides the powers of government into the legislative, executive, and judicial departments. O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912).

Collateral References

Waters and Water Courses *key* 224, 225.
94 C.J.S. Waters §762.
45 Am. Jur. 2d Irrigation §§58 through 60, 96.

85-7-102. Evidence of title.

Compiler's Comments

1995 Amendment: Chapter 418 in (1)(b) substituted "department of natural resources and conservation" for "department of state lands"; and in (2), after "department", deleted "of state lands". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (1)(c) substituted "insurance producers" for "insurance agents"; and made minor changes in style.

1987 Amendment: Rearranged subsection (1); inserted (1)(c) establishing that ownership records prepared by licensed title insurance agents provide sufficient evidence of title to irrigation district land; and made minor changes in style and phraseology.

85-7-104. Petition for organization.

Case Notes

Amendment of Petition: In the hearing and determination of petitions, a wide discretion is lodged in the District Court, an abuse of which must be clearly shown before its action in dismissing a petition for insufficiency will be disturbed. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

Signature by Majority of Landowners: Where a petition disclosed on its face that it was not signed by a majority of the landowners in the proposed district, an order dismissing it was proper, since it did not confer jurisdiction to create the district. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

Sufficiency of Petition: Since a homestead or desert entryman does not have a taxable interest in land he holds, prior to final proof, his name cannot be counted in determining the sufficiency of a petition for the creation of an irrigation district. Further, for the purpose of determining whether a petition meets the statutory requirements, the court is authorized to take testimony if necessary. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

Witness Fees and Costs of Objectors to District: The allowance of mileage and per diem to witnesses who were present and ready to testify for the objectors to the creation of an irrigation district and whose testimony would have been relevant, competent, and material was proper, though they were not subpoenaed, sworn, or examined because of the dismissal of the petition for insufficiency. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

Effect of Failure to Give Bond: Failure to give the bond required by this section does not affect the jurisdiction of the court or that of the Commissioners appointed to conduct the affairs of the district, since it is merely designed as security for costs in the event the district is not organized. O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912).

Collateral References

Waters and Water Courses *key* 225.
94 C.J.S. Waters §§771 through 774.

85-7-105. Order and notice of hearing on petition.

Case Notes

Notice to Nonresident: The mailing of a copy of the petition for the creation of an irrigation district and notice of hearing to a nonresident landowner is an indispensable prerequisite to vesting the court with jurisdiction to create the district. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928), distinguished in Wood v. Kalispell, 131 M 390, 310 P2d 1058 (1957).

Sufficiency of Notice: Under this section, which provides that the Clerk of the District Court shall cause to be published at least once a week "for two successive calendar weeks" a notice of the time and place for hearing on a petition for the creation of an irrigation district, a notice published on March 31 and April 7 of a given year was a sufficient compliance with the requirement. The

applicable rule is that publication for the number of times expressed in weeks, not more than 7 days apart, suffices. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928).

Character of Notice: The only notice required to be given under this section of the contemplated creation of an irrigation district was by publication or in certain cases by mail. Therefore, the objection made by landowners on a hearing upon a petition of the District Commissioners for confirmation of a contemplated contract that they had not been served with personal notice of the creation of the district had no merit. In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927).

85-7-106. Hearing on petition.

Case Notes

Conditions Imposed Without Final Judgment — Creation of New District Affirmed: In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the state and its predecessors in interest, the Supreme Court held that the District Court did not err in imposing upon the appellants conditions for the use of their water rights and in not making any final judgment with respect to the appellants, who alleged that the extent of their water rights should be affirmatively established prior to the approval of the creation of the new district. The Supreme Court held that because the extent of the appellants' rights was made subject to the future negotiation or court decree, there was no final judgment to review. The Supreme Court therefore affirmed the District Court's order approving the creation of the district and remanded the case to the District Court for any further necessary proceedings respecting the rights of the parties and interested persons. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

Court to Address Issues Raised by Noncontesting Landowners: In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the state, the District Court did not err in considering issues presented to it by water users who did not contest the formation of the district at a hearing on the petition. While the statutes contemplate that those persons contesting the establishment of the district attend the hearing on the petition, the District Court is also required by statute to determine which lands belonging to holders of appurtenant water rights are to be included in the district and which are not and is required to address the issues raised by those landholders whether or not they attended the hearing on the petition. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

Contents of Order: While the court's order should be clear as to material issues on the hearing of a petition for the creation of an irrigation district, particularly on boundaries, lands included, practicability, benefits and damages to included lands, etc., it should leave the details respecting the works to be constructed to the discretion of the district. Blaser v. Clinton Irrigation District, 100 M 459, 53 P2d 1141 (1935).

Finality of Order: An order of a court creating an irrigation district is in the nature of a judgment or decree. It stands as an absolute finality as to everything directly or impliedly determined and cannot be attacked collaterally unless the judgment roll shows it to be void. Blaser v. Clinton Irrigation District, 100 M 459, 53 P2d 1141 (1935).

Constitutionality: The sections relating to organization of irrigation districts are not invalid as depriving a nonresident of the right of removal of a suit to federal court. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

Court to Determine Whether or Not Land Shall Be Included: Whether or not lands then under irrigation should have been included in an irrigation district subsequently organized was for determination of the court on hearing of petition for organization of district. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

Time of Objecting to Inclusion of Land: The objection that land proposed to be included in an irrigation district should not be included must be made by the landowner at time the district is formed, since there is a hearing afforded for that purpose. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

Taxation of Property of a Public Corporation: The property of a public corporation may not be declared exempt from taxation unless it is made exempt by virtue of express pronouncement of the Montana Constitution or legislative declaration permitted by the Constitution. Further, an irrigation district is not a "municipal corporation" within the meaning of Art. XII, sec. 2, 1889 Mont. Const., providing that the property of municipal corporations shall be exempt from taxation, and therefore the county in which such a district was located had the power to assess and levy a tax upon lands acquired by the district by tax deed. Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

Effect of Failure to Appeal: The provisions of this section and section 3967, R.C.M. 1921 (since repealed), declaring, in effect, that an appeal from a judgment creating an irrigation district and from one confirming a bond issue of such a district shall be the exclusive method of attacking the validity of either, do not bar an action by which it is sought to evade the effect of such judgments on grounds recognized as sufficient to vacate an ordinary judgment—fraud and lack of jurisdiction. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928).

Inclusion of Irrigated Lands: While under the irrigation district act the question of whether lands will or will not be benefited by means of an irrigation system in contemplation is left to the discretion of the court, under this section the inclusion of lands already irrigated from appurtenant water rights depends not upon the exercise of the court's discretion but upon the written consent of the owner. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928).

Description of Land: Where in an order establishing an irrigation district, the description of the lands included in it were sufficient under this section, the fact that the court went further and made a tabulation under various headings, such as "Gross Area", "Area Included", etc., did not render the order void. Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

Collateral References

Waters and Water Courses *key* 225, 227.

94 C.J.S. Waters §§771 through 774.

85-7-107. Court decision — appointment of commissioners.

Case Notes

Court to Address Issues Raised by Noncontesting Landowners: In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the state, the District Court did not err in considering issues presented to it by water users who did not contest the formation of the district at a hearing on the petition. While the statutes contemplate that those persons contesting the establishment of the district attend the hearing on the petition, the District Court is also required by statute to determine which lands belonging to holders of appurtenant water rights are to be included in the district and which are not and is required to address the issues raised by those landholders whether or not they attended the hearing on the petition. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

Exchange Water Users Right to Credit Against Water-Use Charges — Terms of District Membership: In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the state and its predecessors in interest, the Supreme Court found that the District Court did not err in holding that the newly organized district had an obligation to provide exchange water users with water free of charge and that that obligation could be satisfied, as to each of those water users ranked 10th and above in superiority who joined the new district, by extending to them a credit against the water-use charges to be levied by the new district. The Supreme Court viewed the District Court's order as establishing terms for membership in the district for those exchange water users and further found that the District Court had the authority to set terms. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

85-7-109. Irrigation district as public corporation.

Case Notes

Irrigation District a Governmental Entity Immune From Suit: The plaintiffs filed suit in August 1983, alleging that the irrigation district's actions had resulted in crop losses for the plaintiffs. In November 1989, the lower court allowed the defendant to amend its answer to include the defense that the irrigation district was a governmental entity immune from suit. After allowing the amendment, the lower court dismissed the suit on a summary judgment motion. The Supreme Court upheld the lower court's decision on the basis that it was within the lower court's discretion and that the plaintiffs had failed to show that they were prejudiced by the amendment. Love v. Harlem Irrigation District, 245 M 443, 802 P2d 611, 47 St. Rep. 2190 (1990), followed in Bozeman v. AIU Ins. Co., 272 M 349, 900 P2d 296, 52 St. Rep. 823 (1995). After the 1990 Love decision, supra, Loves filed another amended complaint alleging contractual violations, negligence, fraud, and additional damages. Following Whirry v. Swanson, 254 M 248, 836 P2d 1227 (1992), and Mills v. Lincoln County, 262 M 283, 864 P2d 1265 (1993), and distinguishing Boucher v. Dramstad, 522 F. Supp. 604 (D.C. Mont. 1981), the Supreme Court held that despite Loves' claims of issues of fundamental fairness and new theories of recovery, all four elements

composing the doctrine of res judicata were met. The issues having been previously decided in the 1990 Love decision, judgment for the irrigation district on the issues raised by the amended complaint was granted. State ex rel. Harlem Irrigation District v. District Court, 271 M 129, 894 P2d 943, 52 St. Rep. 364 (1995).

85-7-110. Districts organized under earlier laws.

Compiler's Comments

Section Not Codified: Section 89-2110(part), R.C.M. 1947, a temporary and validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 67, Ch. 146, L. 1909, reenacted by section 7263, R.C.M. 1921.

Part 2
Creation of Districts — Adjudicated Streams

85-7-201. Creation of districts by owners of water of adjudicated streams.

Collateral References

Waters and Water Courses *key* 224, 226.
94 C.J.S. Waters §§767, 775 through 777.

85-7-205. Duty of trustees, levy, and indebtedness.

Compiler's Comments

1981 Amendment: Substituted "and may cover the expenses of such work by levy" for provision restricting levy to less than 25 cents per acre in any one year and made minor changes in phraseology at the end of the first sentence.

Collateral References

45 Am. Jur. 2d Irrigation §§62, 63, 66, 70, 71.

85-7-206. Basis and apportionment of annual tax.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Collateral References

Waters and Water Courses *key* 231.
94 C.J.S. Waters §806, et seq.

Part 3
Creation of Districts
Common Water Supply

85-7-301. Creation of district by owners of rights in common water supply.

Case Notes

Powers of District: Where 100 owners of land and water rights organized an irrigation district in 1923 under then existing statutory provisions, without, however, conveying to the district their individual rights, and for the sole purpose of having a central control body to perform the functions of a Water Commissioner in the operation, maintenance, and management of its affairs, under Ch. 100, L. 1925 (this section), curative in character, it became a public corporation. The district was a legally organized entity in 1927 with power to operate, maintain, and manage its irrigation system. Maclay v. Missoula Irrigation District, 90 M 344, 3 P2d 286 (1921).

Collateral References

Waters and Water Courses *key* 217.
94 C.J.S. Waters §762.
45 Am. Jur. 2d Irrigation §57.

85-7-306. Development of water supply — levy for expenses.

Compiler's Comments

1981 Amendment: At the beginning of the last sentence, substituted "The board may levy" for language restricting levy to $4 per acre in any one year.

85-7-307. Tax levy.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Collateral References

Waters and Water Courses *key* 231.

94 C.J.S. Waters §§813 through 818.

Part 4
Subdistricts

Part Compiler's Comments

Saving Clause: Section 34, Ch. 439, L. 1989, was a saving clause.

Severability: Section 35, Ch. 439, L. 1989, was a severability clause.

Effective Date: Section 36, Ch. 439, L. 1989, provided that this part is effective April 4, 1989.

85-7-411. Alteration and determination of subdistrict acreage.

Compiler's Comments

1997 Amendment: Chapter 306 in (1) inserted reference to 85-7-1846 (now terminated). Amendment effective July 1, 1997, and terminates December 31, 1998.

Termination: Section 5, Ch. 306, L. 1997, provided that the 1997 amendments terminate December 31, 1998.

Part 10
Dissolution of Districts

85-7-1001. Proceedings for dissolution of district.

Collateral References

Waters and Water Courses *key* 224.

94 C.J.S. Waters §§835 through 838.

Part 14
Irrigation District Revenue Bond Act

85-7-1411. Authority to acquire, construct, maintain, operate, and lease various undertakings.

Compiler's Comments

2001 Amendment: Chapter 125 in (2) near end inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Part 15
Organization of Districts

85-7-1501. Qualifications of commissioners and term of office.

Compiler's Comments

1989 Amendment: In (1) substituted "owner of irrigable land within the division of the district he is to represent" for "owner of land within the district" and at end substituted "or some portion of the division is situated" for "or some portion thereof, for which the commissioner is elected, is

situated"; in (2), after "hold their respective offices until", deleted "the second Saturday in December following their appointment and until"; and made minor changes in phraseology.

Case Notes

Freeholder Requirement Constitutional — Reasonable Relationship Standard Applied: A landowner within an irrigation district filed a petition seeking to have the election of an irrigation district commissioner set aside on the grounds that the elected commissioner did not own irrigable land within the district as required by this section. The District Court set aside the election, and the commissioner appealed on the grounds that the land ownership requirement violates the equal protection clause of the United States Constitution. The Supreme Court affirmed and held that the freeholder requirement does not violate the right to equal protection under the federal constitution. Montana irrigation districts are special, limited-purpose units of government whose activities have a disproportionate effect on landowners in the districts as a group. It is appropriate to depart from the usual strict scrutiny standard applied to statutes impacting on a citizen's right to vote and to analyze the freeholder requirement of this section under the reasonable relationship standard. Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

85-7-1503. Board meetings.

Collateral References

Waters and Water Courses *key* 227, 228.
94 C.J.S. Waters §§781 through 785.

85-7-1505. Compensation and expenses of commissioners.

Compiler's Comments

2001 Amendment: Chapter 387 in (1) near middle of first sentence after "compensation" substituted "at an amount determined by a majority vote of the board" for "of $25", and inserted second sentence providing that compensation may be no more than $100; and made minor changes in style. Amendment effective October 1, 2001.

1983 Amendment: Substituted "of $25 for each day they are actually and necessarily engaged in the performance of irrigation district duties" for "for board members as provided in 2-15-124".

1981 Amendment: Near the middle of the section, substituted the clause relating to compensation and expenses of members for clause limiting compensation to $20 a day and necessary expenses in attending meetings and made minor changes in phraseology; deleted the last clause relating to approval by the board of expenses and a mileage allowance of 12 cents a mile.

Part 16
Joint Operations

85-7-1603. Withdrawal from joint operation.

Compiler's Comments

1987 Amendment: At end, after "withdrawal", inserted exception clause.

85-7-1611. Board of control — composition and vacancies.

Compiler's Comments

1999 Amendment: Chapter 143 in (1) at end of first sentence inserted "and one member at large", at beginning of second sentence inserted "Each irrigation commissioner must be", and at end of third sentence inserted "or a person representing any person or entity that receives water delivery from the irrigation project that delivers water to the member districts"; and made minor changes in style. Amendment effective March 23, 1999.

85-7-1612. Board of control — powers and duties.

Compiler's Comments

1989 Amendment: In (6), after "lease", substituted "or finance" for "and finance".

1987 Amendment: Inserted (6) authorizing Board of Control to plan, acquire, construct, operate, maintain, lease, and finance joint operations through issuance of revenue bonds; and made minor changes in phraseology.

85-7-1613. Board of control — per diem and expenses.

Compiler's Comments

1983 Amendment: Substituted "of $25 for each day they are actually and necessarily engaged in the performance of irrigation district duties" for "for board members as provided in 2-15-124".

1981 Amendment: Substituted the clause relating to compensation and expenses for clause limiting compensation to $15 per day and necessary expenses in attending meetings near the middle of the section; made minor changes in phraseology.

85-7-1616. Required records and audits.

Compiler's Comments

2001 Amendment: Chapter 483 near beginning of (1) and (2) after "department of" substituted "administration" for "commerce". Amendment effective July 1, 2001.

1995 Amendment: Chapter 179 in (2), at end, deleted "and to examine the same as provided by law for the examination of the affairs of county offices"; inserted (3) providing that the accounting records of boards of control be audited; and made minor changes in style. Amendment effective July 1, 1995.

1983 Amendment: Substituted references to department of commerce for references to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (1) and (2).

Part 17
Elections

Part Attorney General's Opinions

Voter Qualifications — Irrigation District Election: In order to vote in an irrigation district election under Title 85, ch. 7, part 17, an individual must be: (1) a landowner in the irrigation district; (2) a citizen of the United States; (3) 18 years of age or older; and (4) a resident of Montana and the county in which he offers to vote for at least 30 days. 42 A.G. Op. 47 (1987).

85-7-1702. Election or appointment of commissioners — term of office.

Compiler's Comments

1999 Amendment: Chapter 254 substituted current language in (3) authorizing cancellation of election, election by acclamation or appointment, and term of office for former (3) that read: "(3) If there is only one nominee for a ballot position, the nominee may be declared elected by acclamation or in accordance with 13-1-304"; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: Inserted (1) relating to annual elections; at end of (2) inserted "the following procedures must be followed"; in (2)(a), at beginning, inserted "For elections held in accordance with 13-1-401(1)" and near end substituted "the name of the person or persons" for "the name or names of the persons"; inserted (2)(b) relating to nominations made from the floor or on ballots; deleted former (2) that read: "(2) The regular election for commissioners in each district shall be held annually in accordance with 13-1-104 and 13-1-401"; inserted (3) relating to election by acclamation; and made minor changes in style.

1985 Amendment: In (1) substituted "75 days" for "30 days".

1981 Amendment: Inserted (1) relating to the nomination and election of candidates for the office of Commissioner; and inserted "13-1-401" in (2).

Attorney General's Opinions

Commissioner Elections Conducted by Election Administrator: Commissioner elections in drainage and irrigation districts must be conducted by the county's Election Administrator. 38 A.G. Op. 105 (1980).

Officers to Remain Until Successors Properly Qualified: Officers of hospital, fire, irrigation, and drainage districts whose terms were due to expire in the spring of 1980 are entitled to remain in office until their successors are properly qualified following an election held in November 1980. 38 A.G. Op. 74 (1980).

85-7-1703. Vacancies among commissioners.

Compiler's Comments

1989 Amendment: At end of first sentence substituted "by appointment by the board" for "by appointment by the judge of the district court of the county in which the division or major portion thereof is situated"; inserted second sentence relating to a quorum for filling a vacancy; in third sentence, at beginning, inserted clause relating to a vacancy for every position and at end, after "situated", inserted "shall make the appointments"; substituted fourth sentence relating to ownership requirements of irrigable land and residency for "The appointee shall be an owner of

land within the district, shall be a resident of the county in which the division of the district (or some portion of the division for which such commissioner is so elected) is situated, and"; at beginning of last sentence inserted "A commissioner appointed under this section"; and made minor changes in phraseology.

1981 Amendment: Substituted "until the next regular or special election" for "for the remainder of the term" near the middle of the first sentence.

85-7-1710. Qualification of electors and nature of voting rights.

Compiler's Comments

1993 Amendment: Chapter 191 in (1)(a), after "registration of electors", inserted "and county residency"; in (3) inserted second sentence regarding designation of agent by single owner and in two places in fifth sentence, after "corporation", inserted reference to single owner; and made minor changes in style.

1989 Amendment: In (1), before "lands", inserted "irrigable"; at beginning of (4) substituted "The board of commissioners shall choose one of the following methods of balloting" for "The balloting shall take place in the following manner"; inserted (4)(b) relating to a ballot that includes number of acres owned and number of votes being cast; and made minor changes in form and phraseology.

1983 Amendment: In second to last sentence of (3), inserted "or whenever the majority of the district board adopts a resolution allowing it".

1981 Amendment: Substituted "election" for "and school" and inserted "except that no registration of electors may be required" in (1)(a); deleted "residing in the state" from the end of (1)(b); and deleted "The election shall otherwise conform with the provisions of Title 13." as the last sentence in (3).

Case Notes

Voting Power: Under this section a domestic corporation is treated as an individual, and a guardian, executor, administrator, or trustee residing in this state is authorized to exercise the voting power for his ward, estate, or beneficiary. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

Attorney General's Opinions

Voter Qualifications — Irrigation District Election: In order to vote in an irrigation district election under Title 85, ch. 7, part 17, an individual must be: (1) a landowner in the irrigation district; (2) a citizen of the United States; (3) 18 years of age or older; and (4) a resident of Montana and the county in which he offers to vote for at least 30 days. 42 A.G. Op. 47 (1987).

Voting Procedure Based on Land Ownership Not Violative of "One Man, One Vote" Constitutional Provisions: Montana's weighting of votes according to the size of land holdings in irrigation district elections does not violate the "one man, one vote" requirement of the U.S. Constitution. In upholding the weighted voting scheme in a similar case, the U.S. Supreme Court held in Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 US 719 (1973), that where the tax burden fell unequally according to the size of the land holdings, it was not unreasonable for the votes to be weighted according to the size of the land holdings. 42 A.G. Op. 47 (1987).

85-7-1713. Where documents to be filed and proceedings to be held.

Compiler's Comments

1981 Amendment: Substituted "in which the office of the board is established" for "containing the greater portion of said district" at the end of the section.

Part 18
Alteration and Determination of District Acreage

85-7-1802. Elimination of lands from district.

Compiler's Comments

1997 Amendment: Chapter 306 in (1) inserted "in conformance with 85-7-1803 through 85-7-1807"; inserted (2) allowing the owner of a tract of land 3 acres or smaller in size to petition for elimination of the tract from a district if the tract is in a district partially within or adjacent to a first-class city with a population of between 40,000 and 55,000 under the 1990 census and is within 5 miles of the exterior boundary of an incorporated city and is not served by any district, canal,

system, facility, or other undertaking; and made minor changes in style. Amendment effective July 1, 1997, and terminates December 31, 1998.

Termination: Section 5, Ch. 306, L. 1997, provided that the 1997 amendments terminate December 31, 1998.

85-7-1806. Court hearing on petition to eliminate lands.

Collateral References

Waters and Water Courses *key* 226.

94 C.J.S. Waters §§775 through 777.

Right of political subdivision to challenge acts or proceedings by which its boundaries or limits are affected. 86 ALR 1367.

85-7-1808. Extension of boundaries and addition of lands.

Case Notes

Pleadings: In a special proceeding for the extension of an irrigation district, the petition, the jurisdictional notices with proof of service, the objections filed by protestants, and the final judgment serve the same function as the complaint, summons, answer, and judgment in an ordinary civil action. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923).

Record on Appeal: A proceeding for the extension of an irrigation district is neither an equity case nor a proceeding of an equitable nature, and therefore the testimony need not be presented in the transcript by question and answer, otherwise made necessary by subdivision 3 of Rule VII of the Supreme Court. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923).

Constitutionality: This section, prescribing the procedure for the extension of an irrigation district already created, when the act is viewed as a whole and liberally construed as provided in section 85-1-103, is not open to the objection that it operates to deprive the nonconsenting landowner of his property without due process of law, in that while providing for a hearing, it makes no provision for granting relief to him. In re Crow Creek Irrigation District, 63 M 293, 207 P 121 (1922).

85-7-1811. Procedure to correct errors and omissions in orders or decrees.

Collateral References

Waters and Water Courses *key* 226.

94 C.J.S. Waters §§775 through 777.

85-7-1831. Withdrawal of lands to organize separate or consolidated district for cooperation with federal projects — petition.

Collateral References

Waters and Water Courses *key* 226.

94 C.J.S. Waters §§775 through 777.

85-7-1837. Limitation on irrigable acreage — special election or petition.

Compiler's Comments

Saving Clause: Section 3, Ch. 87, L. 1995, was a saving clause.

85-7-1841. Fixing of taxable acreage.

Collateral References

Waters and Water Courses *key* 225, et seq.

94 C.J.S. Waters §794, et seq.

45 Am. Jur. 2d Irrigation §71.

85-7-1845. Appeal to supreme court.

Case Notes

Collateral Attack: Where plaintiff had not appealed from an order establishing an irrigation district, his action to enjoin a sale of its bonds on the ground that the order was void for failure to give accurate descriptions of the lands included in it was in the nature of a collateral attack maintainable only if the invalidity of the order on that ground appeared from its face. Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

Appeal From Part of Judgment:

An exception to the general rule that an appeal does not lie from a part of the judgment is that class of cases where an issue distinct, entire, and complete is formed between some of the parties to

an action and upon which issue a final judgment is given affecting only the interests and rights of the parties to that issue. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923), explained in Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

In a proceeding, special in its nature, for the extension of an irrigation district, in which an objecting landowner appeared and protested against the inclusion of his lands in the proposed extension and their exclusion was ordered, the appeal of petitioners from the order of exclusion was not subject to dismissal as from a portion of the judgment only, the issue between the protestant and the petitioners having been from the whole judgment so far as protestant and petitioners were concerned. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923), explained in Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

Part 19
Operation of Districts

Part Case Notes

Lack of NPDES Permits — Motion by Irrigation Districts to Intervene as of Right Properly Denied: In 1987, Congress added section 518(e) to the Clean Water Act, which authorized the Environmental Protection Agency to permit Indian tribes to be "treated as a state" (TAS) for purposes of promulgating water quality standards. The Flathead Joint Board of Control, two irrigation districts, and four individual irrigators who owned fee land on the reservation sought to intervene as of right, contending that the imposition of tribal water quality standards would violate their civil rights by subjecting them to tribal jurisdiction and would depress the value of their property. Because the intervenors held no National Pollutant Discharge Elimination System (NPDES) permits, they could not be subject to NPDES enforcement proceedings. TAS status does not confer enforcement authority on the tribes; it only allows the tribes to set the standards. Even if the tribes sought enforcement authority, NPDES permits would still be issued by the federal government and enforced in federal, not tribal, courts. Further, a speculative and purely economic interest did not create a protectable interest in litigation concerning a statute that regulates environmental rather than economic interests. Because the transfer of the right to establish water quality standards from the state to the tribes would have no immediate or foreseeable, demonstrable effect on the proposed intervenors, the application to intervene as of right was properly denied. Mont. v. U.S. Envtl. Protection Agency, 137 F3d 1135 (9th Cir. 1998), certiorari denied, 142 L Ed 2d 227, 119 S Ct 275 (1998).

85-7-1901. Board plan for acquisition and construction.

Case Notes

Acquisition of Rights to Use Water: Since an irrigation district is not a "subdivision" of the state within the meaning of Art. XIII, sec. 1, 1889 Mont. Const., providing that neither county, city, town, municipality, "nor other subdivision of the state" shall become a shareholder in or a joint owner with a company or corporation, its Board of Commissioners may acquire shares in a reservoir company or purchase rights to the use of water, as authorized by this section. Thaanum v. Bynum Irrigation District, 72 M 221, 232 P 528 (1925).

Tax Levies: The taxes which an irrigation district is authorized to levy upon the lands included in the district for the purpose of paying for property acquired are in the nature of special assessments as distinguished from general taxes, and by the expenditure of money authorized by this section, it obtains an equivalent in the value of the property purchased, hence does not come within the prohibition of Art. XIII, sec. 1, 1889 Mont. Const. Thaanum v. Bynum Irrigation District, 72 M 221, 232 P 528 (1925).

Collateral References

Waters and Water Courses *key* 227 through 230.

94 C.J.S. Waters §§781 through 785.

85-7-1902. Management of district by board.

Compiler's Comments

1983 Amendment: Near end of second sentence of (4), substituted "current and delinquent taxes and assessments and other financial obligations owing the district" for "taxes and assessments delinquent for not to exceed 2 years".

85-7-1904. Acquisition of water and waterworks by board.

Compiler's Comments

2001 Amendment: Chapter 125 in (1)(c) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1989 Amendment: In (1)(c)(ii) inserted "or subdistrict"; near beginning of (2) substituted "may contract" for "shall have the privilege, if desired, to contract"; in (3), near middle of first sentence, substituted "may not be entered into by the district" for "is final or binding upon the district, and no sum may be paid for such purchase, lease, or contract" and at end inserted clause relating to purchase, lease, or contract benefiting subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

1987 Amendment: In (3), near middle of first sentence after "$150,000", inserted "or 25% of the district's annual operation and maintenance budget, whichever is greater".

1983 Amendment: Near middle of (3) increased from $125,000 to $150,000 the amount to which an irrigation board may bind an irrigation district without the consent of the landowners in the district.

1981 Amendment: Increased the maximum nonwritten consent contract from $80,000 to $125,000 and made minor changes in phraseology near the middle of (3).

Case Notes

Maintenance Done by United States: Subsection (3) does not prevent an irrigation district from levying an assessment sufficient to reimburse the United States for maintenance work necessarily done by it. U.S. v. Fort Belknap Irrigation District, 197 F. Supp. 812 (D.C. Mont. 1961).

85-7-1906. Relations with United States.

Case Notes

Maintenance Done by United States: Section 85-7-1904(3) does not prevent an irrigation district from levying an assessment sufficient to reimburse the United States for maintenance work necessarily done by it. U.S. v. Fort Belknap Irrigation District, 197 F. Supp. 812 (D.C. Mont. 1961).

85-7-1907. Board power to provide sufficient water.

Compiler's Comments

1989 Amendment: In two places inserted references to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-1908. Board powers over district property.

Compiler's Comments

1989 Amendment: In two places inserted references to subdistrict; and in (2), after "United States", deleted "insofar as the same may be needed"; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-1909. Rights-of-way for irrigation works.

Collateral References

Eminent Domain *key* 47(1), 50; Waters and Water Courses *key* 228, 242.

29A C.J.S. Eminent Domain §§75, 80, 84; 94 C.J.S. Waters §§786 through 793, 862 through 864.

85-7-1910. Board power to dispose of district property.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), in first sentence after "owners of lands within the subdistrict", deleted "to" and in last sentence, before "sufficient", deleted "good and"; and made minor changes in style. Amendment effective March 12, 1997.

1989 Amendment: In (1), near beginning and at end of first sentence, inserted clause referring to leased property benefiting subdistrict, in second sentence, after "district", inserted reference to subdistrict and after "declare" inserted "the availability of the lease", and near end of third sentence inserted clause relating to lease substantially benefiting subdistrict; and made minor changes in punctuation and phraseology. Amendment effective April 4, 1989.

85-7-1911. Apportionment of water by board.

Compiler's Comments

1989 Amendment: In (1) inserted reference to subdistrict; at end of (3) inserted clause relating to sale for benefit of subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

Case Notes

Punitive Damages for Intentional Denial of Water: This section's provision that "the board of commissioners shall apportion the water for irrigation among the lands in the district in a just and equitable manner" sets out a statutory duty that was clearly violated when defendant irrigation district, through two individual (defendant) employees of the district, failed to provide water to plaintiffs. The failure was arguably intentional and therefore unjustifiable. Therefore, it was impliedly malicious and thus constituted justification for punitive damages. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Sovereign Immunity Denied: Irrigation district, a state government entity, was subject to punitive damages in tort action where action arose in and was limited to summer of 1974. The 1972 Montana Constitution provided that the state, counties, cities, towns, and all other local governmental entities have no immunity from suit for injury to person or property except as may be specifically provided by law by a two-thirds vote of each house of the Legislature, and the Legislature did not provide immunity for certain governmental entities until 1977 when it enacted 2-9-104 (now repealed) and 2-9-105, which cannot be retroactively applied. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Injunction to Prevent Diversion Outside District: In a proceeding to enjoin water users in an irrigation district from interfering with the right of a like user, a plaintiff, to convey water from the district to lands owned by him outside the district, where plaintiff in so diverting water was injuring owners within the district and depriving them of water in which they had a vested right, the court correctly enjoined him, without passing on his right of assignment because none of his land in the district was unirrigated and there was nothing for him to assign within the meaning of this section. Koch v. Colvin, 110 M 594, 105 P2d 334 (1940).

Collateral References

Waters and Water Courses *key* 228 ½, 254.
94 C.J.S. Waters §§786 through 793.

85-7-1912. Exchange of water by board.

Case Notes

Historic Recognition of Right to Exchange or Substitute Water Upheld: In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the State and its predecessors in interest, the Supreme Court found that the District Court did not err in holding that the newly organized district had an obligation to provide certain landowners with water from the Bitterroot River free of charge in exchange for water from Skalkaho Creek. The District Court found that the State and its predecessors in interest had for 81 years recognized the right of each of those exchange users to the other water. Thus, the Supreme Court found the existence of an obligation to provide exchange waters and further found that the applicable statutes contemplated exactly what the District Court had ordered. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

85-7-1913. Board to maintain records.

Compiler's Comments

2001 Amendment: Chapter 483 in (1) at end of first sentence and near beginning of second sentence after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 179 in (1), at end of second sentence, deleted "and examine them as provided by law for the examination of the affairs of county officers"; in (2) substituted "books and records of irrigation districts are subject to audit in accordance with 2-7-503" for "department of commerce shall notify the secretaries of the districts of the time of presenting the books and records at the courthouse for examination"; and made minor changes in style. Amendment effective July 1, 1995.

1983 Amendment: Substituted references to department of commerce for references to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (1) and (2).

85-7-1921. Distribution system defined.

Compiler's Comments

1989 Amendment: Near end inserted reference to subdistricts; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-1922. Regulation, supervision, apportionment, and control of water distribution.

Compiler's Comments

1993 Amendment: Chapter 136 inserted (2) clarifying irrigation district requirements regarding internal delivery systems and division of water after delivery; and made minor changes in style. Amendment effective March 19, 1993.

Case Notes

No Negligence by Irrigation District for Failure to Warn of Unforeseeable Flood: Plaintiffs' property was damaged by an unprecedented flood caused by an ice jam on the Clark Fork River. Plaintiffs alleged that the local irrigation district was liable for breaching its duty to construct and maintain an irrigation system that would protect the property and for failing to warn of the flooding conditions to allow plaintiffs the opportunity to protect their property. The District Court held that the irrigation district had no duty to prevent the flood or to warn of the impending natural disaster, and the Supreme Court affirmed. The first element that plaintiffs must establish in a negligence action is the existence of a duty of care, and the measure of a duty of care owed is the scope of the risk that the negligent conduct foreseeably entails. Thus, the primary factor in determining whether the irrigation district owed a duty of care was whether it was foreseeable, as a matter of law, that the district's acts or omissions would pose a risk of injury to plaintiffs. Here, substantial evidence supported the conclusion that the risk that flooding would damage plaintiffs' property was unforeseeable, so the district had no duty to erect or maintain flood control structures to prevent the unforeseeable event. The district also exercised reasonable care in the maintenance of the irrigation system that was in place. Further, plaintiffs failed to advance any applicable authority that would impose upon the district a duty to warn of the unforeseeable flood because mere knowledge of the dangerous situation, of which plaintiffs themselves had become aware the night of the flood, did not impose a legal duty to warn. Gaudreau v. Clinton Irrigation District, 2001 MT 164, 306 M 121, 30 P3d 1070 (2001), following Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

Importance of Control of Distribution by District: The most important function of an irrigation district is the control, to the mutual advantage of all the members, of the irrigation system. Water rights remain with the private appropriator, but control lies exclusively with the district. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

Purpose of Section: This section does two things: first, it gives an irrigation district the exclusive right to regulate and control its distribution system; and second, it prohibits a district from controlling its distribution system in a manner that detrimentally affects water rights over which the district has no control. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

Relationship Between District Rights and Nondistrict Rights: A portion of the Fosses' ranch is included in the irrigation district and a portion is not. The part of the ranch not in the district has water rights, which precede the district rights, in two creeks, which during part of the year spill into the district's system. Further, a segment of the district's ditch follows the natural channel of one of the creeks. The Fosses habitually have conveyed their nondistrict water through the ditch, and the district has delivered water to Foss land not included within the district through a district headgate. In 1979, a dispute arose over control of the headgate. The District Court ruled that the Fosses had no legal right to use of the district's distribution system. The Supreme Court reversed and remanded the case for further proceedings in accordance with its ruling that the Fosses may convey their nondistrict water rights to the district and that the district has the obligation to deliver that water. If the ditch is too small to service the district and other water rights, the Fosses should not be required to bear any burden of expansion. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

Collateral References

Waters and Water Courses *key* 227, 228.

94 C.J.S. Waters §§781 through 785.

85-7-1924. Interference with commissioners or distribution system — penalty.

Collateral References

Waters and Water Courses *key* 228, 266.
94 C.J.S. Waters §920.

85-7-1925. Installing and assessing costs of distributing or measuring devices.

Case Notes

Applicability of Section: This section applies only to lands included within an irrigation district. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

Collateral References

Waters and Water Courses *key* 231.
94 C.J.S. Waters §806, et seq.

85-7-1931. Use of water for irrigation a public use.

Collateral References

Waters and Water Courses *key* 228, 248, et seq.
94 C.J.S. Waters §§874 through 877.
45 Am. Jur. 2d Irrigation §§2, 62.

85-7-1932. Noninterference with navigation or water rights.

Compiler's Comments

2001 Amendment: Chapter 125 in last sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

85-7-1933. Diversion of waters.

Collateral References

Waters and Water Courses *key* 78 ½, 256.
93 C.J.S. Waters §142.

85-7-1934. Lands under irrigation — inclusion in district.

Collateral References

Waters and Water Courses *key* 226, et seq.
94 C.J.S. Waters §§775 through 777.

85-7-1935. Lands under irrigation — limits on charges for costs.

Collateral References

Waters and Water Courses *key* 231.
94 C.J.S. Waters §§806 through 812.

85-7-1941. Contracts.

Compiler's Comments

1981 Amendment: In (1), substituted clause requiring works over $5,000 to be by contract for clause permitting works to be done by the district, private owners, or contract; substituted "provide surveys" for "employ competent engineers to make surveys" near the beginning of (2).

85-7-1951. United States contracts — loans, sinking fund, and investment.

Compiler's Comments

1987 Amendment: Substituted last sentence concerning Board's power and authority to invest surplus in sinking fund in legal investments for "The board shall also have the power and authority to invest any surplus in the sinking fund herein provided for in interest-bearing securities of the United States or of the states approved by the secretary of the interior and to deposit said securities with the federal reserve bank or branch thereof."

85-7-1953. Amount owed United States — lien and special tax.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

85-7-1955. Liquidation of indebtedness with federal funds.

Collateral References

Waters and Water Courses *key* 230.

94 C.J.S. Waters §794, et seq.

85-7-1956. Majority vote or petition necessary to contract with United States.

Compiler's Comments

1983 Amendment: In first sentence, inserted clause beginning with "upon approval" providing for an election to ratify authority to contract.

85-7-1961. Districts organized prior to certain date — authority to continue electrical power operations.

Compiler's Comments

1983 Amendment: In (2), inserted "subsection (1) of" before "this section"; and inserted (3) authorizing irrigation districts or projects to construct, install, operate, and maintain facilities to generate, transmit, and sell electricity using the water power potential of irrigation projects or federally owned water impoundment projects where generation facilities have not been installed and licensed.

85-7-1973. Amount owed state — lien and special tax.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Part 20
Indebtedness, Bonds, and Bankruptcy

85-7-2001. Limitations on debt-incurring power.

Compiler's Comments

1989 Amendment: At end of (2) substituted "subsection (4)" for "subsection (2)"; inserted (3) relating to limitation on debt for subdistrict; in (4)(b) substituted "limitations of subsections (2) and (3)" for "limitation of subsection (1)"; in (4)(c) substituted "limitations of subsections (1) through (3) do not apply" for "limitation of subsection (1) does not apply"; in (4)(d) substituted "limitations of subsections (1) through (3) do not apply" for "limitation of subsection (1) does not apply" and at end inserted clause relating to obligations issued to government entities; inserted (4)(d)(i) relating to legislatively authorized loan programs; inserted (4)(d)(ii) relating to legislatively authorized projects; in (4)(e) substituted reference to subsections (1) through (3) for reference to subsection (1); deleted former (4) that read: "(4) The limitation of subsection (1) does not apply to state or federal bonds used for a project authorized by the legislature"; and made minor changes in phraseology. Amendment effective April 4, 1989.

1987 Amendment: Inserted (4) providing exemption from debt limitation for state or federal bonds for project authorized by Legislature.

1981 Amendment: Increased 15% to 18.75% in (1) and (2)(b); and increased 10% to 12.5% in (2)(b).

Validation: Section 64, Ch. 614, L. 1981, provided: "Notwithstanding any provisions of this act, any outstanding indebtedness or bond issue on January 1, 1982, of any governmental subdivision is not invalidated because of any changes in the taxable valuation of the subdivision

due to removal of automobiles and trucks having a rated capacity of three-quarters of a ton or less from the tax base."

Effect of 1981 Amendment: The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

Case Notes

Federal Court Required to Follow Montana Supreme Court Decisions: The federal courts, in determining whether bonds issued by Montana irrigation district were general obligations of the district, were required to follow decisions of the Supreme Court of Montana holding that such bonds, issued pursuant to Montana statutes, were not general obligations of irrigation district but merely a charge against land within the district. Toole County Irrigation District v. Moody, 125 F2d 498 (9th Cir. 1942).

Subsequent Agreement Void as to Making Bonds General Obligations of District: Recovery could not be had against district in action on irrigation district bonds on ground that bonds, even if not general obligations of district when issued, had become so by reason of a subsequent agreement, where action was not based on the agreement and agreement, insofar as it purported to make the bonds general obligations of district, was void. Toole County Irrigation District v. Moody, 125 F2d 498 (9th Cir. 1942).

85-7-2011. Exemption of irrigation district property.

Compiler's Comments

1987 Amendment: Near end of section, after "municipal purposes", inserted remainder of sentence prohibiting the assessment of costs for improvement or maintenance district created under Business Improvement District Act.

Case Notes

Subdivision of State: Although the authority of the Legislature to declare by this section that irrigation districts shall not be taxed for state, county, or municipal purposes may be questioned, there is no doubt that the Legislature was dealing with a district as a part of the state itself rather than an enterprise fostered by the state. Crow Creek Irrigation District v. Crittenden, 71 M 66, 227 P 63 (1924), explained in Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

Attorney General's Opinions

Irrigation District Property: Irrigation district property that is not related to or used in irrigation work is not exempt from taxation under the general irrigation district exemptions in 15-6-201 and 85-7-2011. 41 A.G. Op. 17 (1985).

Collateral References

Taxation *key* 234.

84 C.J.S. Taxation §259.

85-7-2012. Purposes for which bonds may be issued.

Compiler's Comments

1989 Amendment: In introductory clause, before "coupon bonds", inserted "fully registered bonds or negotiable"; in (5), before "bonds", deleted "negotiable coupon"; in (6) inserted "overdue claims for interest"; inserted (7) relating to establishment of a reserve for payment of bond principal and interest; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2013. Petition requirements.

Compiler's Comments

1989 Amendment: In (1) inserted clause relating to bonds issued on behalf of subdistrict; at end of (1)(a) and (1)(b) inserted clause referring to bonds or contract relating to subdistrict; in (2), at end of first sentence after "board", deleted "of commissioners"; and made minor changes in form and phraseology. Amendment effective April 4, 1989.

Case Notes

Maintenance Done by United States: This section is clearly limited to authorization for the original bond issue or contract with the United States and does not preclude the district from

levying assessments to reimburse the United States for maintenance work necessarily done by it. U.S. v. Fort Belknap Irrigation District, 197 F. Supp. 812 (D.C. Mont. 1961).

Effect of Federal Court's Application of Montana Decisions: The federal courts, in determining whether bonds issued by Montana irrigation district constituted general obligations of district, were required to give effect to decisions of Montana Supreme Court holding that bonds, which had been issued prior to decisions, were not general obligations of district as against contention that such action would amount to giving the decisions a "retroactive" effect. Such application did not constitute an "impairment of obligation of contract", since the court's decision was merely that the obligation allegedly impaired did not exist, notwithstanding that those decisions were in conflict with earlier decisions of the Montana court. Toole County Irrigation District v. Moody, 125 F2d 498 (9th Cir. 1942).

Extent of Liability: Bonds issued by an irrigation district are not a general obligation of the district but are a charge against the lands within the district. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), overruling Cosman v. Chestnut Valley Irrigation District, 74 M 111, 238 P 879, 40 ALR 1344 (1925).

Remedy for Enforcement: While the law under which public bonds are issued becomes as much a part of the contract with the bondholders as though incorporated in the bonds, the Legislature may by subsequent statutes change the remedy given them to enforce payment, provided the new remedy is as efficacious as the one afforded under the original act. Otherwise the obligations of the contract would be impaired contrary to the provisions of Art. I, sec. 10, U.S. Const. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930).

Refunding Bonds: In June 1929, proceedings for the refunding of irrigation district bonds were held under section 7210, R.C.M. 1921, as amended by Ch. 157, L. 1923, providing for the authorization of such bonds in the mode prescribed by section 7226, R.C.M. 1921, as amended by the same chapter. Section 7210, R.C.M. 1921, was amended by Ch. 185, L. 1929, which did not become effective until July 1, 1929. Since section 7226, R.C.M. 1921, was repealed by Ch. 155, L. 1929, and was not in effect when the bonds were authorized, the repeal of section 7226, incorporated by reference in section 7210, did not affect the latter section and the injunction was properly denied in an action to enjoin issuance of bonds. Gustafson v. Hammond Irrigation District, 87 M 217, 287 P 640 (1930).

Effect of Final Judgment: Upon its creation an irrigation district becomes absolute as an entity and has the power of issuing bonds against the lands embraced in its confines for the purpose of carrying out the provisions of the act under which it was created, and if the Board of Commissioners orders bonds issued and no appeal is taken from the judgment of the District Court confirming and ratifying the proceedings of the Board, the judgment cannot thereafter be called in question in the absence of allegation and proof of fraud. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

Collection of Delinquent Assessments: In the collection of tax or assessment levied by an irrigation district for the payment of the interest on bonds issued by it, the County Treasurer is not authorized to seize and sell personal property of a delinquent owner of lands within the district but must proceed in the manner prescribed by Ch. 173, part III, R.C.M. 1921, as amended by Ch. 96, L. 1923 (15-16-101, et seq.), for the collection of state and county taxes made a lien upon real property. State ex rel. Spokane & E. Trust Co. v. Nicholson, 74 M 346, 240 P 837 (1925).

Collateral References

45 Am. Jur. 2d Irrigation §67.

85-7-2014. Procedure after petition filed.

Compiler's Comments

1989 Amendment: Near middle substituted "designate the place and method of payment of the bonds and the interest on the bonds" for "designate the place of payment of the bonds and the interest coupons"; after "prescribe the form of the bonds" deleted "and interest coupons to be attached thereto"; in clause relating to levies added two references to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2016. Confirmation by district court.

Case Notes

Effect of Confirmation:

In an action to have a contract of sale of lands included in an irrigation district which had issued bonds reformed and liens against the lands arising from the bond issues canceled, on the ground of fraud in the creation of the district, where most of the bonds had been issued before

plaintiffs made the purchase and no appeal had been taken from the judgment of the District Court confirming their validity, their legality cannot, under this section, be called in question thereafter, the bonds then constituting a lien upon all the lands in the district. Krueger v. Morris, 110 M 559, 107 P2d 142 (1940).

Under 85-7-2012 through 85-7-2018, a decree confirming bond proceedings, from which no appeal was taken, could not be set aside in an independent equitable action on the ground that the court exceeded its power in deciding that the tax levy was authorized by 85-7-2012 through 85-7-2015. Midland Dev. Co. v. Cove Irrigation District, 102 M 479, 58 P2d 1001 (1936).

Upon its creation an irrigation district becomes absolute as an entity and has the power of issuing bonds against the lands embraced in its confines for the purpose of carrying out the provisions of the act under which created, and if the Board of Commissioners orders bonds issued and no appeal is taken from the judgment of the District Court confirming and ratifying the proceedings of the Board, the judgment cannot thereafter be called in question in the absence of allegation and proof of fraud. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

In the absence of fraud in the proceedings, the order of the District Court establishing the district and that directing the issuance of bonds are, unless appeals are taken from the orders within the prescribed time, res judicata and constitute an estoppel against thereafter litigating the validity of district bonds. O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912).

Appearance by Objectors: In a proceeding by the Commissioners of an irrigation district to secure confirmation of a contemplated contract with the United States to take over irrigation works constructed by the federal government and to raise the necessary funds by assessments upon the irrigable lands in the district, verified objections of objecting owners, which in effect were answers by way of confession and avoidance, were properly treated as answers. In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927).

Collateral References

45 Am. Jur. 2d Irrigation §67.

85-7-2018. District court findings and order — appeal.

Case Notes

Effect of Failure to Appeal: Landowners and mortgagees of land in district, who did not appeal from order and decree ratifying, approving, and confirming issuance of bonds for irrigation district under 85-7-2012 through 85-7-2018, could not question a decree in a suit to enjoin payment of bonds and collection of taxes for payment thereof. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

Effect of Failure to Object or Contest: Landowner, whose land was described in a petition for organization of irrigation district under 85-7-104 through 85-7-109, 85-7-1501, 85-7-1502, and 85-7-1504(2), and for issuance of bonds under 85-7-2012 through 85-7-2018, and who had notice of proceedings but did not appear at hearing and object to inclusion of his land, could not question court's conclusion collaterally in a suit to enjoin collection or payment of bonds issued and to enjoin collection of taxes for payment. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

Questions Considered on Appeal: In a proceeding for the confirmation of a resolution passed by the Commissioners of an irrigation district for the execution of a contract with the United States to take over federal irrigation works, instituted pursuant to the provisions of this section, the question whether nonirrigable lands were subject to the contemplated tax levy was not one presented for determination and may not be considered on appeal, it being presumed that when the levy is made only irrigable lands will be included within the assessment. In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927).

Pleading: Plaintiff's allegations that there existed an encumbrance on land within an irrigation district by virtue of a bond issue and that such issue had been regularly made, levied, and issued were mere legal conclusions. To show the validity of the bond issue, proper pleading required a showing that the District Court had made an order of confirmation, which, if made, may be alleged as "having been duly given and made", under section 93-3806, R.C.M. 1947 (since repealed). Clark v. Demers, 78 M 287, 254 P 162 (1927).

85-7-2019. Refunding bonds.

Compiler's Comments

1989 Amendment: In (2), near end of introductory clause, inserted language relating to petition requirements for subdistrict; near middle of (3) inserted clause relating to bonds or contract on behalf of subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

Section Not Codified: Section 89-1711, R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 3, Ch. 71, L. 1933.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§222 through 226.

Power of municipality or other governmental body to issue refunding bonds to retire obligation in respect of which the creation and maintenance of a sinking fund by taxation is required by constitutional or statutory provision. 157 ALR 794.

85-7-2020. Details relating to bonds.

Case Notes

Straight Maturity Bonds to Share Pro Rata in Funds Available for Payment: Straight maturity bonds were issued by an irrigation district under section 7212, R.C.M. 1921, prior to amendment by Ch. 157, L. 1923. The fund from which they were payable was insufficient to make payment in full and could not be replenished by assessment. The money remaining in the fund was held properly distributed pro rata among the outstanding bonds, without regard to their numbering, since they were not to mature serially and neither Ch. 157, L. 1923, nor Ch. 155, L. 1929, indicates legislative intent that the bonds as issued did not rank equally in order of payment. State ex rel. Cent. Auxiliary Corp. v. Rorabeck, 111 M 320, 108 P2d 601 (1940).

85-7-2021. Liens of bonds.

Compiler's Comments

1989 Amendment: In (1), in three places, inserted references to subdistrict; in (2) substituted language relating to discharge of bond obligations for "All liens herein created remain upon the lands for a period of 8 years after the date of maturity of the obligation. Thereafter, the lands and the titles thereto shall be free from any such liens"; and made minor changes in phraseology. Amendment effective April 4, 1989.

Case Notes

Statutory Provision Part of Bondholders' Contract: The provision of section 7229, R.C.M. 1921 (now repealed), in force in 1919 when district organized, that issued bonds and any assessment made for payment thereon should be a lien upon the lands in the district against which levied, became a part of the bondholders' contract with the district, the same as though it had been incorporated in the bonds. Toole County Irrigation District v. St., 104 M 420, 67 P2d 989 (1937).

Encumbrance: This section, making bonds issued by an irrigation district a lien upon all the lands in the district, created a lien which constituted an encumbrance against them, within the meaning of the term "encumbrance" as used in 15-18-403 (now repealed), providing that a tax deed conveys to the grantee absolute title "free of all encumbrances". State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), explained in U.S. v. Christensen, 218 F. Supp. 722 (D.C. Mont. 1963).

Extinguishment of Lien:

Under this section the lien of irrigation district bonds against the lands in the district for delinquent taxes is extinguished by the tax deed issued to the county. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), explained in U.S. v. Christensen, 218 F. Supp. 722 (D.C. Mont. 1963).

Where lands in an irrigation district were sold for delinquent taxes and tax deed was issued to the county, the purchaser from the county took title free of the lien of the bonds. Delinquent assessments for the payment of the bonds and interest may not be included in future assessments made against other lands in the district. The lands sold, however, remain liable to assessments for maintenance and repairs. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), explained in U.S. v. Christensen, 218 F. Supp. 722 (D.C. Mont. 1963).

Charge Against Lands: Bonds issued by an irrigation district are not a general obligation of the district but are a charge against the lands within the district. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), overruling Cosman v. Chestnut Valley Irrigation District, 74 M 111, 238 P 279 (1925).

85-7-2022. Sale of bonds.

Case Notes

Unearned Interest: Transfer of bonds of irrigation district, in which interest coupons remained on bond, not canceled, and unearned portion of them was repaid to district by transferee, was

proper procedure under this section, requiring that irrigation district bonds should never be sold at less than 90% of value "and accrued interest thereon to date of delivery". Am. Sur. Co. of New York v. Cove Irrigation District, 24 F2d 18 (9th Cir. 1928).

Amortization Bonds: Chapter 38, L. 1923 (now repealed), providing that the state, municipal corporations, or districts in issuing bonds shall give preference to amortization bonds and accept serial bonds only when the former cannot be negotiated to good advantage, is inapplicable to the issuance of irrigation district bonds, and the provisions of the irrigation law dealing with the subject specially are controlling. Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§222 through 226.

85-7-2023. Notice of sale of bonds.

Compiler's Comments

1989 Amendment: At beginning of first sentence inserted exception clause; at end of second sentence substituted "and the notice may be published in any other newspaper at the board's discretion" for "and in any other newspaper within or without the state at its discretion"; and made minor changes in punctuation and phraseology. Amendment effective April 4, 1989.

85-7-2027. Disposition of bond proceeds.

Compiler's Comments

1987 Amendment: Near end of third sentence, after "portion thereof", substituted language relating to legal investments backed, insured, or guaranteed by federal or state government for "in interest-bearing securities of the United States or of the state of Montana or in interest-bearing certificates of deposit of national or state banks approved by the department of commerce"; deleted former fourth sentence that read: "A bank shall furnish an indemnity bond to be approved by the board of commissioners and the department of commerce"; and near end of last sentence substituted "investments" for "money or securities".

1983 Amendment: Substituted references to department of commerce for references to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in two places.

85-7-2033. Private sale of bonds to certain governmental entities.

Compiler's Comments

Saving Clause: Section 34, Ch. 439, L. 1989, was a saving clause.

Severability: Section 35, Ch. 439, L. 1989, was a severability clause.

Effective Date: Section 36, Ch. 439, L. 1989, provided that this section is effective April 4, 1989.

85-7-2041. Bankruptcy proceedings by irrigation districts.

Compiler's Comments

Sections Not Codified: Sections 89-1902 and 89-1903 (last part), R.C.M. 1947, validation clauses, were not codified in the MCA. These clauses have not been repealed and are still valid law. Reference may be made to sec. 2, Ch. 44, L. 1915, reenacted by section 7252, R.C.M. 1921, and to sec. 1, Ch. 110, L. 1939.

Part 21
Taxes and Assessments

Part Attorney General's Opinions

Irrigation Districts Not Subject to Property Tax Freeze: Irrigation district special assessments and annual tax levies are not property taxes and are unrestricted by the property tax freeze instituted by Initiative No. 105. 42 A.G. Op. 21 (1987).

85-7-2101. Tax or assessment to pay bonds and interest.

Compiler's Comments

1989 Amendment: In (1), in three places, inserted references to subdistrict; in (2) inserted clause relating to bonds issued on behalf of subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

Collateral References

Waters and Water Courses *key* 231.

94 C.J.S. Waters §806, et seq.

45 Am. Jur. 2d Irrigation §70; 70C Am. Jur. 2d Special or Local Assessments §§4 through 8.

85-7-2102. Added lands to pay proportional share of bonded indebtedness.

Compiler's Comments

1989 Amendment: Throughout section inserted references to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2103. All irrigable lands chargeable alike.

Compiler's Comments

2001 Amendment: Chapter 392 inserted (1)(b) allowing administrative charge to exceed $75 based upon actual costs; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 257 in second sentence of (1) increased maximum administrative charge from $25 to $75 and inserted third sentence clarifying that the administrative charge is additional to the annual tax levy; and made minor changes in style. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 257, L. 1993, provided: "WHEREAS, the development of subdivided farm units has greatly increased irrigation district costs to administer water, including the costs of splitting irrigated acres, establishing and operating new land and water accounts, revising maps and assessment lists, administering water in brief duration to multiple users who share a common point of delivery, instructing small tract landowners on policies and procedures, and settling disputes related to water delivery and accounting; and

WHEREAS, the $25 maximum administrative charge on irrigated property is not enough to make the delivery of water to a small acreage economically feasible; and

WHEREAS, the $25 maximum administrative charge was established in 1979, with no consideration given to the future rate of inflation."

1989 Amendment: Near beginning of (1) inserted reference to lands in each subdistrict; in (2), in two places, inserted reference to subdistrict and after "board" deleted "of commissioners"; in (3) inserted clause relating to contracts benefiting subdistrict and inserted reference to subdistrict; in (4) inserted clause relating to contracts benefiting subdistrict and inserted reference to subdistrict; in (6) inserted reference to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

1983 Amendment: In (1), inserted "an administrative" before "charge of $5 to $25"; deleted from end of (2) "However, a separately owned tract of land of 1 acre or less and unable to receive water may be charged not more than the $5 minimum."; inserted (4) requiring payment by lands within an irrigation district in compliance with any contract made between the state and landowners and in compliance with a contract between the district and the state; and inserted (7) requiring that the costs to construct a gravity system installed to irrigate lands within a district be apportioned among and levied upon the lands irrigated by the system.

Case Notes

Historic Recognition of Right to Exchange or Substitute Water Upheld: In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the State and its predecessors in interest, the Supreme Court found that the District Court did not err in holding that the newly organized district had an obligation to provide certain landowners with water from the Bitterroot River free of charge in exchange for water from Skalkaho Creek. The District Court found that the State and its predecessors in interest had for 81 years recognized the right of each of those exchange users to the other water. Thus, the Supreme Court found the existence of an obligation to provide exchange waters and further found that the applicable statutes contemplated exactly what the District Court had ordered. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

Collateral References

45 Am. Jur. 2d Irrigation §71.

Discrimination between property within and that outside governmental districts as to rates. 4 ALR 2d 595.

85-7-2104. Annual tax levy — apportionment when tracts divided.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (1)(b) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Amendment: Chapter 257 in last sentence of (1)(b) and (2)(b), after "may", inserted "also" and after "charge" substituted "the administrative charge authorized in 85-7-2103(1)" for language allowing a charge of $5 to $25 against each separately owned tract of land, regardless of its size; and made minor changes in style. Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 257, L. 1993, provided: "WHEREAS, the development of subdivided farm units has greatly increased irrigation district costs to administer water, including the costs of splitting irrigated acres, establishing and operating new land and water accounts, revising maps and assessment lists, administering water in brief duration to multiple users who share a common point of delivery, instructing small tract landowners on policies and procedures, and settling disputes related to water delivery and accounting; and

WHEREAS, the $25 maximum administrative charge on irrigated property is not enough to make the delivery of water to a small acreage economically feasible; and

WHEREAS, the $25 maximum administrative charge was established in 1979, with no consideration given to the future rate of inflation."

1989 Amendment: In (1)(a)(ii), after "district", substituted "for" for "including any indebtedness incurred under any contract between the district and the United States, accompanying"; in first sentence of (1)(b), after "United States", substituted "government survey" for "public survey", before "bears" substituted "any tract or lot" for "any such tract", at end inserted "by the board", and near beginning of second sentence substituted "The board may charge" for "The board of commissioners may make a charge of"; inserted (1)(c) relating to exclusion of indebtedness incurred on behalf of a subdistrict; inserted (2) relating to special levies on property owners within a subdistrict; near beginning of (3) substituted "district or subdistrict is divided" for "district shall be divided"; and made minor changes in form and phraseology. Amendment effective April 4, 1989.

1983 Amendment: At end of both (1) and (2), deleted "However, a separately owned tract of land of 1 acre or less and unable to receive water may be charged not more than the $5 minimum."

Case Notes

Amount of Levy: The limitation on the amount of the levy set out in subsection (2) refers only to administrative expenses and the cost of maintenance and repairs incurred by the district, and it does not limit the amount that may be levied to reimburse the United States for maintenance necessarily undertaken by it pursuant to the original contract. U.S. v. Fort Belknap Irrigation District, 197 F. Supp. 812 (D.C. Mont. 1961).

Authority to Tax: The provision made by this section for the raising of revenue for the maintenance and operation of irrigation districts is sufficiently broad to enable them to meet exactions of the taxing power of the state. Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

Apportionment of Assessments: The apportionment of assessments for administrative expenses, maintenance, repairs, etc., of an irrigation district on the basis of the irrigable area in each tract of land of 40 acres or less, prescribed by this section, is neither unreasonable nor arbitrary in view of the fact that that method has had the benefit of long experience in other states and the consensus of opinion is that no fairer method has been devised. Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

Ordinary Running Expenses: Ordinary overhead or running expenses of a district are to be met by an annual levy of taxes. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

Attorney General's Opinions

Board of Commissioners — Authority to Directly Assess Irrigation Tax or Receive Direct Payment Prohibited: The Board of Commissioners of an irrigation district may not, even with the consent of all water users within the district, bypass the annual tax levy procedure in 85-7-2104 and directly assess the water users' lands for amounts otherwise subject to levy under such provision. The County Treasurer may issue receipts of payment for amounts levied under 85-7-2104 but remitted directly to the Board of Commissioners of an irrigation district upon appropriate certification by the district of such payments. However, the practice of direct

payments to the Commissioners must terminate, and all unexpended money so received must be remitted to the County Treasurer for deposit and supervision. 42 A.G. Op. 14 (1987).

85-7-2107. Procedure for the determination of irrigable area.

Compiler's Comments

1989 Amendment: Throughout section inserted references to subdistrict; in (1), near beginning of first sentence after "United States", substituted "government survey" for "public survey" and near middle of second sentence inserted clause relating to irrigable area of a subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2108. Taxes to be lien upon land.

Compiler's Comments

1989 Amendment: Near beginning, after "United States", substituted "government survey" for "public survey" and near end inserted "or subdistrict"; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2109. List of all lands in district or subdistrict to be prepared.

Compiler's Comments

1989 Amendment: In two places inserted references to subdistrict; in second sentence, after "United States", substituted "government survey" for "public survey"; in third sentence, after "board", deleted "of commissioners"; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2110. Nonirrigable lands not to be taxed.

Compiler's Comments

1989 Amendment: At end inserted "or subdistrict"; and made minor changes in phraseology. Amendment effective April 4, 1989.

Case Notes

Application: The provisions of this section that no special assessment shall be levied for irrigation district purposes against any 40-acre tract found by the Board of Commissioners not to contain any irrigable land, etc., apply only to bonds issued after the irrigable area of the district has been determined and do not have reference to bonded obligations incurred prior to the order excluding nonirrigable lands from the district as organized. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

85-7-2112. Confirmation of board actions by district court.

Compiler's Comments

1989 Amendment: In (1), in middle of second sentence, inserted clause relating to review of irrigable area of subdistrict, substituted "determined" for "ascertained", after "board" deleted "of commissioners", and at beginning of fourth sentence deleted "Upon such proceeding"; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2114. Apportionment of costs when bonds issued.

Compiler's Comments

1989 Amendment: Throughout section inserted reference to subdistrict; in (1), near end of first sentence, inserted clause relating to land in a subdistrict and near beginning of third sentence, after "interest on the bonds", deleted "so authorized"; in (3), near beginning of first sentence, substituted "shall prepare a list of the irrigable area for filing" for "shall cause a list of such irrigable area to be made and filed", near beginning of third sentence, after "levied", deleted "for such purposes", and in fifth sentence, after "may not thereafter", deleted "be permitted to" and at end, after "board", deleted "of commissioners"; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2115. Objection by landowner.

Compiler's Comments

1989 Amendment: Inserted reference to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2116. Restrictions on reduction of taxable acreage.

Compiler's Comments

1989 Amendment: In two places inserted reference to subdistrict; near middle, after "bonds", deleted "thereafter authorized"; and made minor changes in phraseology. Amendment effective April 4, 1989.

85-7-2117. Conclusiveness of tax or assessment.

Compiler's Comments

1999 Amendment: Chapter 584 inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

85-7-2133. Role of the county officers in collection of tax or assessment.

Compiler's Comments

1987 Amendment: In (2), at end of second sentence after "invest the same in", substituted language concerning backed, insured, or guaranteed federal or state investments for "state or federal bonds or in savings certificates of institutions insured by the federal deposit insurance corporation".

Case Notes

County Debtor of District: When funds of an irrigation district are deposited with the County Treasurer they become county funds for which the district has a credit on the books of the Treasurer, i.e., the relation of debtor and creditor is created between the county and the district. State ex rel. Blenkner v. Stillwater County, 104 M 387, 66 P2d 788 (1937).

Power to Levy Taxes:

Authority to issue irrigation bonds implies an authority to levy a tax to pay them. Judith Basin Irrigation District v. Malott, 73 F2d 142, 97 ALR 504 (9th Cir. 1934).

An irrigation district organized under the laws of this state exercises some governmental functions; for example, it may levy taxes (this section), which is the exercise of one of the highest prerogatives of sovereignty. Crow Creek Irrigation District v. Crittenden, 71 M 66, 227 P 63 (1924).

Collateral References

Waters and Water Courses *key* 227, 230(6).

94 C.J.S. Waters §806.

85-7-2134. Levy of taxes and assessments by county commissioners.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

85-7-2135. Transmission of funds from other counties.

Compiler's Comments

1987 Amendment: Substituted "the 10th day of each month except June and December" for "January 1 of each year".

85-7-2136. Collection of taxes or assessment.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Special Session Amendment: Chapter 27 in first sentence of (1), after "furnish", deleted "the agent of" and after "revenue" deleted "in each county in which any of the lands of the district

are situated" and in second sentence, before "department", deleted "agent of the", after "revenue" deleted "in each county", after "list" deleted "and prior to the delivery of the assessment book to the county treasurer", and near end substituted "property tax record" for "assessment book"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1993 Amendment: Chapter 485 inserted (3) requiring County Treasurer during water delivery season to make available to commissioners of irrigation district notice of receipt of payments of district assessments by 9 a.m. of day following receipt of payment; and made minor changes in style.

1993 Amendment: Chapter 485 inserted (3) requiring County Treasurer during water delivery season to make available to commissioners of irrigation district notice of receipt of payments of district assessments by 9 a.m. of day following receipt of payment; and made minor changes in style.

1989 Amendment: Inserted (3) relating to receipt by a County Treasurer of assistance from an irrigation district employee or commissioner for certain district-related tax functions; and made minor changes in phraseology and punctuation.

Case Notes

Collection of Taxes: In the collection of tax or assessment levied by an irrigation district for the payment of the interest on bonds issued by it, the County Treasurer is not authorized to seize and sell personal property of a delinquent owner of lands within the district but must proceed in the manner prescribed by Ch. 173, part III, R.C.M. 1921, as amended by Ch. 96, L. 1923 (15-16-101, et seq.), for the collection of state and county taxes made a lien upon real property. State ex rel. Spokane & E. Trust Co. v. Nicholson, 74 M 346, 240 P 837 (1925).

Collateral References

Waters and Water Courses *key* 231.

94 C.J.S. Waters §§813 through 818.

85-7-2138. Surplus in construction fund.

Collateral References

Waters and Water Courses *key* 228 ½, 230(6).

94 C.J.S. Waters §§786 through 793.

85-7-2140. Investment of funds.

Compiler's Comments

1987 Amendment: In first sentence, after "sinking fund", substituted language concerning backed, insured, or guaranteed federal or state investments for "in interest-bearing securities whenever in their judgment the investment may be to the best interest of the district"; and near beginning of second sentence substituted "investments" for "securities".

Case Notes

Distribution Pro Rata When Funds Insufficient — When Interest Should Be Retired First: Where the bonds issued by an irrigation district were straight maturity and not serial bonds and the fund out of which they were payable was insufficient to make full payment of them all and could not be replenished by further assessments, the money remaining was properly distributed pro rata, irrespective of the fact that other holders had been paid in full. If the fund is insufficient to pay the principal but is sufficient to pay the only remaining unpaid coupon holder, his coupons should be paid first, placing all holders on a parity in that respect. State ex rel. Cent. Auxiliary Corp. v. Rorabeck, 111 M 320, 108 P2d 601 (1940).

85-7-2152. Proceeds of sale.

Compiler's Comments

1987 Amendment: Near middle substituted "15-17-214" for "15-17-207".

85-7-2154. Redemption of lands sold.

Compiler's Comments

1987 Amendment: Near middle substituted "Title 15, chapter 18" for "15-18-101".

85-7-2155. Sale by county commissioners when land not redeemed.

Compiler's Comments

1987 Amendment: Near beginning substituted "15-18-111" for "15-18-101".

85-7-2156. Proceedings where land struck off to county and not redeemed.

Compiler's Comments

1987 Amendment: Near middle, after "in that event", deleted "(whether said lands and premises be again sold by the county treasurer of said county or the sale thereof adjourned as provided for by 15-17-304 and 15-17-305)".

Section Not Codified: Section 89-1821, R.C.M. 1947, a temporary clause pertaining to duties of a County Treasurer, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 2, Ch. 127, L. 1913, reenacted in section 7248, R.C.M. 1921.

85-7-2159. Issuance of tax deed.

Compiler's Comments

1997 Amendment: Chapter 42 near middle, after "within the time allowed", deleted "by 85-7-2163"; and made minor changes in style. Amendment effective March 12, 1997.

Collateral References

Waters and Water Courses *key* 231.
94 C.J.S. Waters §§826 through 834.

85-7-2163. Granting of tax deed.

Compiler's Comments

1987 Amendment: Substituted language concerning requirements for granting a tax deed for former section that read: "The holder of such certificate of tax sale of such land, whether said holder be an irrigation district or individual, may, at any time after the expiration of 2 years from the date of sale of said property for delinquency, if same has not been redeemed within said period of 2 years from date of sale of said lands for delinquency, apply to the county treasurer, as provided by law for the issuance of a tax deed to said property, and upon such application, the county treasurer shall issue such tax deed, in the manner and form provided by law, to said holder."

85-7-2166. Liability of county treasurers.

Case Notes

Limitation to Compel Payment of District Warrant: The County Treasurer, by law custodian of the funds of an irrigation district the office of which is located in his county and therefore charged with duty not to pay out funds on claims believed by him to be invalid, could properly assert the defense of the 5-year limitation in a proceeding to compel payment of a registered district warrant under 27-2-215 (renumbered 27-2-231). State ex rel. DeKalb v. Ferrell, 105 M 218, 70 P2d 290 (1937).

Right of Warrant Holder to Writ of Mandamus: To entitle a registered warrant holder to a Writ of Mandate to compel payment thereon by the County Treasurer out of the funds of an irrigation district, he must show Treasurer's clear legal duty to pay and ability to comply with the Writ, with sufficient money on hand in the fund to pay outstanding unpaid prior registered warrants with interest (7-6-2605 and 7-6-2606). State ex rel. DeKalb v. Ferrell, 105 M 218, 70 P2d 290 (1937).

Collateral References

Waters and Water Courses *key* 227.
94 C.J.S. Waters §§826 through 834.

85-7-2167. Sale or transfer of lands.

Case Notes

Highway Condemnation: The state Highway Commission (now Transportation Commission) acquiring land for highway purposes is not liable for assessment and taxes by irrigation district since land taken will no longer benefit from services provided by district, notwithstanding the contention of district that takings so reduced total irrigable acreage of district as to increase per-acre cost of operation and maintenance of remainder. Helena Valley Irrigation District v. St. Highway Comm'n, 150 M 192, 433 P2d 791 (1967).

Collateral References

Waters and Water Courses *key* 153 through 158 ½, 231, 253.

94 C.J.S. Waters §§439, 826 through 834, 887.

Part 22
Miscellaneous Provisions

85-7-2201. Limitation on actions attacking decrees.

Compiler's Comments

Section Not Codified: Section 89-1715 (part), R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 2, Ch. 54, L. 1923.

85-7-2203. Nonsubstantial errors disregarded — rules of practice — costs.

Case Notes

Final Judgment: Under 25-1-111 (since repealed), providing that the final determination of the rights of a party to a special proceeding is a judgment, an order of the District Court directing the exclusion of the lands of a protestant from a proposed extension of an irrigation district is a final judgment. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923), distinguished in In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927), and State ex rel. Bole v. Lay, 89 M 541, 300 P 238 (1931), explained in Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

Absence of Bill of Exceptions: Where in a proceeding for the extension of an irrigation district, the evidence heard at the trial was not taken and preserved by the court stenographer as it should have been and the evidence was not incorporated in a bill of exceptions duly settled and allowed as it might have been as far as obtainable, it will be presumed on appeal, in the absence of the evidence, that the District Court heard and determined the question whether appellant's lands were benefited or not. In re Crow Creek Irrigation District, 63 M 293, 207 P 121 (1922).

85-7-2212. Irrigation ditches — nonliabilities.

Case Notes

No Negligence by Irrigation District for Failure to Warn of Unforeseeable Flood: Plaintiffs' property was damaged by an unprecedented flood caused by an ice jam on the Clark Fork River. Plaintiffs alleged that the local irrigation district was liable for breaching its duty to construct and maintain an irrigation system that would protect the property and for failing to warn of the flooding conditions to allow plaintiffs the opportunity to protect their property. The District Court held that the irrigation district had no duty to prevent the flood or to warn of the impending natural disaster, and the Supreme Court affirmed. The first element that plaintiffs must establish in a negligence action is the existence of a duty of care, and the measure of a duty of care owed is the scope of the risk that the negligent conduct foreseeably entails. Thus, the primary factor in determining whether the irrigation district owed a duty of care was whether it was foreseeable, as a matter of law, that the district's acts or omissions would pose a risk of injury to plaintiffs. Here, substantial evidence supported the conclusion that the risk that flooding would damage plaintiffs' property was unforeseeable, so the district had no duty to erect or maintain flood control structures to prevent the unforeseeable event. The district also exercised reasonable care in the maintenance of the irrigation system that was in place. Further, plaintiffs failed to advance any applicable authority that would impose upon the district a duty to warn of the unforeseeable flood because mere knowledge of the dangerous situation, of which plaintiffs themselves had become aware the night of the flood, did not impose a legal duty to warn. Gaudreau v. Clinton Irrigation District, 2001 MT 164, 306 M 121, 30 P3d 1070 (2001), following Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

Failure to Allege Error — Denial of New Trial: Plaintiffs appealed from directed verdict and order by the District Court denying a new trial, claiming that the court erred in determining that plaintiffs had failed to establish a prima facie case against defendants for the overflow of a drainage ditch near plaintiffs' residence. The Supreme Court affirmed the lower court decision, holding that because subsection (2) of this section is an independent, sufficient, and clearly articulated ground for granting defendants' direct verdict motion, plaintiffs' failure to allege error under the subsection constituted a waiver of plaintiffs' claim. Schaubel v. Iversen, 257 M 164, 848 P2d 489, 50 St. Rep. 213 (1993).

No Liability for Damage From Irrigation Ditch Seepage: Home owners appealed a District Court order granting the irrigation ditch owners summary judgment, alleging that the ditch

owners negligently diverted water through the ditch, resulting in ground saturation and subsequent flood damage to the home owner's property. Although the home owners asserted that no seepage occurred before the ditch owners overused the ditch, the undisputed facts established that the damage occurred either because of weather conditions or from the same kind of seepage from the ditch that had existed for at least 53 years before the home owners arrived or obtained an interest in the land. Alexander v. McCauley, 250 M 216, 819 P2d 176, 48 St. Rep. 798 (1991).

CHAPTER 8
DRAINAGE DISTRICTS

Chapter Law Review Articles

Changing the River's Course: Western Water Policy Reform, Getches, 26 Envtl. L. 157 (1996).

State Watershed Adjudications: Approaches and Alternatives, Thorson, 42 Rocky Mtn. Min. L. Inst. CH22 (1996).

The Watershed Protection Approach: Is the Promise About to Be Realized?, Taylor & Gerath, 11 Nat. Resources & Env't 16 (1996).

Watershed Initiatives: Effectuating Voluntary Cleanup, Simon, 1996 Min. L. Series: Rocky Mtn. Min. L. Found. CH4B (1996).

Conservation Districts as the Foundation for Watershed-Based Programs to Prevent and Abate Polluted Agricultural Runoff, Farey, Jones & Pratt, 18 Hamline L. Rev. 151 (1994).

Section 404(f) of the Clean Water Act: Trench Warfare Over Maintenance of Agricultural Drainage Ditches, Grumbles, 17 Wm. Mitchell L. Rev. 1021 (1991).

The Legal Regulation of Diffused Surface Water, Dellapenna, 2 Vill. Envtl. L.J. 285 (1991).

Part 1
Creation of Districts

85-8-101. Petition for creation of district.

Case Notes

County Subject to Assessment for Benefits: A drainage district created in 1921 under the provisions of 85-8-101, et seq., could recover assessments made against the county for benefits accruing to its highways from its system, since the act, as it existed prior to amendment by Ch. 169, L. 1929 (85-8-307, 85-8-341, 85-8-350, and 85-8-351), was broad enough to authorize such assessments, as against contention that the county could not be held for costs unless it owned lands in the district. State ex rel. Valley Center Drain District v. Bd. of County Comm'rs, 100 M 581, 51 P2d 635 (1935), explained in Burke v. Sullivan, 127 M 374, 265 P2d 203 (1954).

Collateral References

Drains *key* 14(1), (2); 15.

28 C.J.S. Drains §§9 through 11, 13, 26, 27, 30, 31, 44, 51.

25 Am. Jur. 2d Drains and Drainage Districts §§2 through 7, 10, 19.

Constitutionality and construction of statute which leaves to determination of private individuals the boundaries of territory to be erected into a drainage district. 70 ALR 1062.

Constitutionality of statute for formation or change of drainage district as affected by objection that it confers nondelegable powers, or imposes nonjudicial functions, on a court. 69 ALR 285.

85-8-102. Amendment and circulation of petition — court consideration.

Collateral References

Drains *key* 14(2).

28 C.J.S. Drains §§28 through 30, 32 through 35.

85-8-111. Notice of hearing.

Collateral References

Drains *key* 14(3).

28 C.J.S. Drains §§36, 41 through 50.

25 Am. Jur. 2d Drains and Drainage Districts §§12 through 14.

Sufficiency of statutory provisions for notice and hearing in drainage proceedings. 145 ALR 1196; 84 ALR 1098.

85-8-115. Insufficient service.

Case Notes

Defective Service: Where the bill of exceptions prepared by appellant himself recited that the notice of an adjourned hearing pertaining to the organization of a drainage district had been given and served as provided by law, his contention that the service was defective did not merit consideration. In re Valley Center Drain District, 64 M 545, 211 P 218 (1922).

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §§12 through 14.

Sufficiency of statutory provisions for notice and hearing in drainage proceedings. 145 ALR 1196; 84 ALR 1098.

85-8-117. Contest by landowners.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §15.

Failure of property owner to avail himself of remedy provided by statute or ordinance as precluding attack based on improper inclusion of property in, or exclusion of property from, assessment. 100 ALR 1292.

85-8-118. Determination of sufficiency of petition.

Case Notes

Writ of Supervisory Control: The Writ of Supervisory Control does not lie to review an intermediary order made by the District Court pursuant to this section relating to determination of the sufficiency of a petition opposing the creation of a drainage district, where every question raised by the application for the Writ may be reviewed on appeal from the final order establishing the district. State ex rel. Hall v. District Court, 109 M 228, 95 P2d 438 (1939).

Collateral References

Drains *key* 14(2).

28 C.J.S. Drains §§28 through 30, 32 through 35.

25 Am. Jur. 2d Drains and Drainage Districts §§17, 19, 23.

85-8-120. Fraudulent deeds.

Collateral References

Drains *key* 14(1), (3).

28 C.J.S. Drains §§26, 27, 30, 31, 36, 41 through 51.

85-8-121. Court determination.

Case Notes

Disqualification: Since drainage District Commissioners act only in an advisory capacity and their assessments of benefits and damages are reviewable on appeal after notice to all interested parties, the provision of this section that the fact that a person owns land in the proposed district shall not disqualify him from acting as Commissioner does not violate the principle that no one shall be the judge of his own cause. In re Valley Center Drain District, 64 M 545, 211 P 218 (1922).

Collateral References

Drains *key* 14(3), 17, 32.

28 C.J.S. Drains §§14, 36 through 39, 41, 50.

25 Am. Jur. 2d Drains and Drainage Districts §§16, 17, 19, 23.

Personal liability of officers of drainage districts for negligence of subordinates or employees causing damage to person or property. 61 ALR 300.

Part 2
Dissolution of Districts

85-8-201. Dissolution of districts.

Collateral References

Drains *key* 16.

28 C.J.S. Drains §12.

25 Am. Jur. 2d Drains and Drainage Districts §26.

Part 3
Organization and Operation

85-8-302. Election of commissioners — regular term of office.

Compiler's Comments

1981 Amendment: Added "and 13-1-401" at end of first sentence; substituted "first Tuesday in May" for "first Monday in January" throughout section.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §11.

85-8-304. Results of election.

Compiler's Comments

1981 Amendment: Substituted "secretary" for "clerk" and "commissioners" for "directors"; substituted "first Tuesday in May" for "first Monday in January".

Composite Section: This section was amended by Ch. 171 and Ch. 571, L. 1979, and a composite section has been prepared by the Code Commissioner, 1979. Ch. 171 extended the closing time for the polls to 8 p.m., while Ch. 571 rewrote the section as part of a general revision of the election laws. Under this revision, drainage district elections are subject to the general election laws, including a provision for polls remaining open until 8 p.m. Consequently the language in Ch. 171, which is covered in 13-1-106, is not incorporated into the composite.

85-8-306. Nominations.

Compiler's Comments

1985 Amendment: In first sentence substituted "75 days" for "30 days".

1981 Amendment: Deleted "under the provisions of this part", substituted "election administrator or deputy" for "county", and inserted "at least 30 days before the election" in the first sentence.

85-8-311. Record and vouchers.

Collateral References

Drains *key* 17, 18, 32.
28 C.J.S. Drains §§14 through 23, 37 through 39.

85-8-314. Court control and compensation of commissioners.

Collateral References

Drains *key* 17, 18, 32.
28 C.J.S. Drains §§14 through 23, 37 through 39.

85-8-315. Presumption of regularity of commissioners' acts.

Collateral References

Drains *key* 18, 34; Evidence *key* 83(2).
28 C.J.S. Drains §§15 through 23, 41; 31A C.J.S. Evidence §§138, 146.

85-8-323. Hearing and notice on preliminary report.

Collateral References

Drains *key* 14, 18, 30, et seq.
28 C.J.S. Drains §§15 through 23, 32 through 35.

85-8-324. Adjournment of hearing or trial of issues.

Collateral References

Drains *key* 14, 18, 34.
28 C.J.S. Drains §§15 through 23, 41.

85-8-325. Remonstrance by interested parties.

Collateral References

Drains *key* 14, 18, 33.
28 C.J.S. Drains §§15 through 23, 40.

85-8-326. Service of owners of added lands.

Collateral References

Drains *key* 14, 18, 30.

28 C.J.S. Drains §§15 through 23, 32 through 35.

85-8-327. Procedure at court hearing and order.

Collateral References

Drains *key* 14(4), 18, 35.

28 C.J.S. Drains §§15 through 23, 25, 42 through 44, 53.

85-8-328. Corporate nature of drainage district.

Collateral References

Drains *key* 14.

28 C.J.S. Drains §8.

25 Am. Jur. 2d Drains and Drainage Districts §§2, 24.

85-8-329. Necessity of preliminary proceedings.

Collateral References

Drains *key* 14.

85-8-341. Preparation of report — contents.

Case Notes

Improvements: Special assessments for flood control purposes are limited to land exclusive of improvements. In re W. Great Falls Flood Control & Drainage District, 159 M 277, 496 P2d 1143 (1971). (Decision prior to 1973 amendment.)

Commission Property: A flood control district could assess property and improvements consisting of graded land, drainage culverts, highway bridges, roadbeds, and pavement, within the district's exterior boundaries, that were owned or under lease by State Highway Commission (now Transportation Commission). State ex rel. St. Highway Comm'n v. W. Great Falls Flood Control & Drainage District, 155 M 157, 468 P2d 753 (1970), explained in In re W. Great Falls Flood Control & Drainage District, 159 M 277, 496 P2d 1143 (1971).

County Subject to Assessment for Benefits: This section, both before and after amendment by Ch. 169, L. 1929, was broad enough to authorize assessments against a county for benefits to highways resulting from the system of a drainage district although the county did not own land within the district. State ex rel. Valley Center Drain District v. Bd. of County Comm'rs, 100 M 581, 51 P2d 635 (1935), explained in Burke v. Sullivan, 127 M 374, 265 P2d 203 (1954).

Collateral References

Drains *key* 18, 32, 76.

28 C.J.S. Drains §§15 through 23, 37 through 39, 94, 95.

Sufficiency of statutory provisions for notice and hearing in drainage proceedings. 145 ALR 1196; 84 ALR 1098.

Failure of property owner to avail himself of remedy provided by statute as precluding attack based on improper inclusion of property in, or exclusion of property from, assessment. 100 ALR 1292.

Loss of right to contest an assessment in drainage proceedings. 9 ALR 842.

Validity of rule of assessment for drainage improvement. 2 ALR 625.

85-8-345. Notice of hearing of report.

Collateral References

Drains *key* 18, 34.

28 C.J.S. Drains §§15 through 23, 41.

85-8-347. Confirmation of report — appeals.

Collateral References

Validity of rule of assessment for drainage improvement. 2 ALR 625.

85-8-350. Judgment on dismissal of proceedings — assessment of costs.

Compiler's Comments

1987 Amendment: In (2), near beginning of first sentence before "85-8-327", deleted "subsections (1) and (2) of".

85-8-361. Contracts.

Compiler's Comments

1999 Amendment: Chapter 96 in first sentence substituted "$10,000" for "$2,500"; and made minor changes in style. Amendment effective July 1, 1999.

Applicability: Section 3, Ch. 96, L. 1999, provided: "[This act] applies to contracts awarded after July 1, 1999."

Collateral References

Drains *key* 49, 54.
28 C.J.S. Drains §§61 through 68, 74.
25 Am. Jur. 2d Drains and Drainage Districts §27.

85-8-363. Commissioners' right of entry.

Collateral References

Drains *key* 18, 19, 42 through 55.
28 C.J.S. Drains §§15 through 23, 36, 58 through 74.

85-8-364. Payment or tender of damages.

Case Notes

Constitutionality: The fact that the drainage statute by this section permits the Commissioners to go upon a landowner's property, in advance of an award, for the purpose of necessary investigation to determine the special benefits received or damages suffered by it does not render it violative of the constitutional provision that private property shall not be taken or damaged for public use without compensation having been first made to or paid into court for the owner. In re Valley Center Drain District, 64 M 545, 211 P 218 (1922).

Collateral References

Drains *key* 56 through 58.
28 C.J.S. Drains §76.
25 Am. Jur. 2d Drains and Drainage Districts §29.

85-8-365. Location of drains.

Collateral References

Drains *key* 41.
28 C.J.S. Drains §58.
25 Am. Jur. 2d Drains and Drainage Districts §§27, 28.

85-8-366. Drains on railroad lands.

Collateral References

Drains *key* 45, 60.
28 C.J.S. Drains §§51, 59, 76.
Sufficiency of statutory provisions for notice and hearing in drainage proceedings. 145 ALR 1196; 84 ALR 1098.

Part 4
Alteration of District

85-8-401. Alterations or additions to district — petition required.

Collateral References

Drains *key* 50.
28 C.J.S. Drains §§70, 71.
25 Am. Jur. 2d Drains and Drainage Districts §21.

85-8-421. Procedure to bring other drained lands into district.

Collateral References

Drains *key* 15, 83.

28 C.J.S. Drains §§9 through 11, 13, 114, 115.

85-8-423. Assessments against annexed lands.

Collateral References

Right of landowner to recover back benefit assessments, upon ground of abandonment of improvement project. 145 ALR 1129.

Failure of property owner to avail himself of remedy provided by statute as precluding attack based on improper inclusion of property in, or exclusion of property from, assessment. 100 ALR 1292.

Assessment of right-of-way other than that of railroad or street railway for street or local improvement. 58 ALR 127.

Loss of right to contest an assessment in drainage proceedings. 9 ALR 842.

Validity of rule of assessment for drainage improvement. 2 ALR 625.

Part 5
Bonds and Revenue

85-8-501. Authority to borrow money and issue notes or bonds.

Collateral References

Drains *key* 18.

28 C.J.S. Drains §§15 through 23.

64 Am. Jur. 2d Public Securities and Obligations §101.

Sale of public bonds at less than par or face value. 162 ALR 396; 91 ALR 7.

Priority as between successive issues of obligations of permanently organized local improvement district. 99 ALR 1488.

Part 6
Taxes and Assessments

85-8-601. Certification and collection of district taxes.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Special Session Amendment: Chapter 27 in (1), near beginning of first sentence after "certify to", deleted "the agent of" and after "revenue" deleted "in each county wherein the lands of the district are situate" and in second sentence, before "department", deleted "agent of the", after "revenue" deleted "in each county", and after "assessment roll" substituted "in the property tax record of the county for each year" for "to be entered in the assessment book of said county for each year and prior to the delivery of the assessment book to the county treasurer"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Collateral References

Drains *key* 85, 87 through 91; Waters and Water Courses *key* 231.

28 C.J.S. Drains §§109 through 113, 119 through 129; 94 C.J.S. Waters §793.

25 Am. Jur. 2d Drains and Drainage Districts §48.

85-8-603. Rules of law applicable to tax collection.

Collateral References

Drains *key* 87 through 91.

28 C.J.S. Drains §§109 through 113, 119 through 129.

25 Am. Jur. 2d Drains and Drainage Districts §§48, 49.

85-8-612. Lien of assessments — payment of assessments against state lands.

Compiler's Comments

1995 Amendment: Chapter 325 in (2), near beginning, substituted "state treasurer" for "state auditor", after "certified" substituted "the department of administration" for "the auditor", and after "warrant on the" substituted "treasury" for "treasurer"; and made minor changes in style. Amendment effective July 1, 1995.

Case Notes

Commission Property: Flood control district could assess property and improvements consisting of graded land, drainage culverts, highway bridges, roadbeds, and pavement, within exterior boundaries of district, that were owned or under lease by state Highway Commission (now Transportation Commission). State ex rel. St. Highway Comm'n v. W. Great Falls Flood Control & Drainage District, 155 M 157, 468 P2d 753 (1970), explained in In re W. Great Falls Flood Control & Drainage District, 159 M 277, 496 P2d 1143 (1971).

Legislature's Authority to Include State Lands: The Legislature has authority to include state lands not used for governmental purposes within special improvement or drainage districts and to make them subject to assessments to the extent they are benefited. Such assessments are not "taxes" within the meaning of constitutional and statutory provisions. State ex rel. Freebourn v. Yellowstone County, 108 M 21, 88 P2d 6 (1939).

Collateral References

Drains *key* 70, 84.

28 C.J.S. Drains §§83 through 85, 116.

25 Am. Jur. 2d Drains and Drainage Districts §§37, 49.

85-8-613. Assessments against certain corporations.

Collateral References

Drains *key* 85.

28 C.J.S. Drains §119.

85-8-614. Procedure on failure to certify assessments.

Collateral References

Drains *key* 76.

28 C.J.S. Drains §§94, 95.

85-8-615. Procedure to levy additional assessments.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §38; 70 Am. Jur. 2d Special or Local Assessments §132.

Necessity that additional assessment in proceeding for local improvement precede incurring liability in excess of the original assessment. 63 ALR 1179.

85-8-618. Assessment of unassessed, benefited lands.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

85-8-619. Assessments to have effect of judgment.

Case Notes

Liquidated Claims Against County: Under this section assessments made by a drainage district, levied against a county for benefits accruing to its highways, are liquidated claims that do

not require an audit by the Board of County Commissioners, but in their payment, provisions of the budget law must be observed, under 7-6-2311 through 7-6-2319 and 7-6-2303 (all sections now repealed). State ex rel. Valley Center Drain District v. Bd. of County Comm'rs, 100 M 581, 51 P2d 635 (1935), explained in Burke v. Sullivan, 127 M 374, 265 P2d 203 (1954).

Collateral References
Drains *key* 87 through 91.
28 C.J.S. Drains §§37, 38, 121 through 129.
25 Am. Jur. 2d Drains and Drainage Districts §49.

85-8-622. Agreement of landowners to omitted assessments.

Collateral References
Drains *key* 74, 76.
28 C.J.S. Drains §§94, 95, 99.

85-8-623. Assessments not to be obstructed by preliminary defects.

Compiler's Comments
Section Not Codified: Section 89-2820, R.C.M. 1947, a validation clause for holders of bonds, warrants, or other evidence of indebtedness, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 100, Ch. 129, L. 1921.

Collateral References
Drains *key* 39.
28 C.J.S. Drains §53.

85-8-624. Assessments on improvements — taxpayers' approval, limitations, and election procedures.

Compiler's Comments
1987 Amendment: At end of (3)(a) and (3)(c) and second sentence of (3)(d) changed "13-1-401(3)" to "13-1-401(4)"; and in (3)(b) changed "85-8-304" to "85-8-302".
1985 Amendment: In (3) changed "85-8-303" to "13-1-401(3)" in three places; near end of (3)(c) before "give them notice", inserted "the election administrator or deputy election administrator shall"; and in (3)(d) in second sentence substituted "and the summary must be included in the notice" for "and shall include the summary as part of the notice".
1981 Amendment: Deleted brackets around "85-8-303" in (3)(a); deleted "except that the form of the ballot shall be as hereinafter provided" at the end of (3)(a); in (3)(b), deleted brackets around "85-8-304" and following the reference inserted language relating to the applicability of state general election laws.

Part 7
Flood Control and Planning

85-8-704. Organization of areas not within existing districts.

Collateral References
28 C.J.S. Drains §§9 through 11, 13, 26, 27, 30, 31, 44, 51.

Part 8
Miscellaneous Provisions

85-8-801. Continuation of existing districts.

Collateral References
Drains *key* 13.
28 C.J.S. Drains §§8, 30, 31.

85-8-803. Waiver of defective service.

Collateral References
Drains *key* 14(2), et seq.
28 C.J.S. Drains §§28 through 30, 32 through 35.

CHAPTER 9
CONSERVANCY DISTRICTS

Chapter Law Review Articles

Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest (Symposium on Northwest Water Law), Sterne, 27 Envtl. L. 203 (1997).

Wasting Water in the Northwest: Eliminating Waste as a Way of Restoring Streamflows (Symposium on Northwest Water Law), Russell, 27 Envtl. L. 151 (1997).

Federal Guidance: A Middle of the River Approach to Water Conservation, Delaney, 76 B.U.L. Rev. 375 (1996).

Application of Difference-in-Difference Techniques to the Evaluation of Drought-Tainted Water Conservation Programs, Bamezai, 19 Evaluation Rev. 559 (1995).

Conservation Districts as the Foundation for Watershed-Based Programs to Prevent and Abate Polluted Agricultural Runoff, Farey, Jones, & Pratt, 18 Hamline L. Rev. 151 (1994).

Part 1
General Provisions

85-9-104. Limitations.

Compiler's Comments

2001 Amendment: Chapter 7 at end of (1) substituted "electrical energy" for "electric energy". Amendment effective October 1, 2001.

1995 Amendment: Chapter 418 in (2) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Part 2
Creation of Districts

85-9-202. Action by department upon receipt of request.

Compiler's Comments

1995 Amendment: Chapter 418 in (1)(g) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-9-204. Feasibility study and report — adjustment of proposed boundaries.

Compiler's Comments

1995 Amendment: Chapter 418 in second sentence substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

85-9-206. Court hearing on petition — election — limits on court jurisdiction.

Compiler's Comments

1997 Amendment: Chapter 234 in (2), in second sentence, inserted "conducted by mail ballot, as provided in Title 13, chapter 19, or must be". Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (2), at end, inserted "The election must be held in conjunction with a regular or primary election"; and made minor changes in style.

Part 4
Organization and Procedure

85-9-406. Directors' powers over finance.

Compiler's Comments

2001 Amendment: Chapter 29 in (2) after "exceed" substituted "0.23% of the total assessed value of taxable real property, determined as provided in 15-8-111, within the district, as ascertained by the last assessment for state and county taxes prior to the issuance of the bonds" for "5% of the taxable valuation of real property in the district"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

85-9-410. Condemnation authorized.

Compiler's Comments

2001 Amendment: Chapter 125 in first sentence substituted "Title 70, chapter 30" for "the law to take private property for public use, with just compensation"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Part 6
Finance

85-9-603. Directors to provide financial information.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1), in introductory clause, substituted "department of revenue" for "county assessor" and before "treasurer" inserted "county"; in (2) substituted "department of revenue and each of the affected county treasurers" for "each of the county assessors and treasurers"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

85-9-604. Collection and investment of assessments.

Compiler's Comments

1993 Amendment: Chapter 10 in (3), in first sentence, deleted reference to Federal Savings and Loan Insurance Corporation; and made minor changes in style.

1985 Amendment: In (3), in first sentence, after "bank", inserted "savings and loan association, or credit union", and after "federal deposit insurance corporation", inserted "federal savings and loan insurance corporation, or national credit union administration".

85-9-623. Issuance of bonds — resolution and election.

Compiler's Comments

1997 Amendment: Chapter 234 in (2), at end, inserted "unless the election is conducted by mail ballot, as provided in Title 13, chapter 19"; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (2), after "places", deleted "and hours when the polls will be open"; and made minor changes in style.

85-9-629. Disposition and investment of sale proceeds.

Compiler's Comments

1993 Amendment: Chapter 10 in (3), in first sentence, deleted reference to Federal Savings and Loan Insurance Corporation; and made minor changes in style.

1985 Amendment: In (3), in first sentence, after "bank", inserted "savings and loan association, or credit union", and after "federal deposit insurance corporation", inserted "federal savings and loan insurance corporation, or national credit union administration".

CHAPTER 15
DAM SAFETY ACT

Chapter Administrative Rules

Title 36, chapter 14, ARM Safety of dams program — administration.

Chapter Law Review Articles

Approaching a Gordian Knot: The Ongoing State/Federal Conflict Over Hydropower (The Park City Principles: A New Paradigm for Managing Western Water), Sherk, 31 Land & Water L. Rev. 349 (1996).

Coping With Change: Energy, Fish, and the Bonneville Power Administration, Johnson, 26 Envtl. L. 589 (1996).

Paying for the Change: Can the FERC Force Dam Decommissioning at Relicensing?, Swiger, Southwick, & Mairs, 17 Energy L.J. 163 (1996).

Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers, Pyle, 14 Stanford Envtl. L.J. 97 (1995).

Chapter Collateral References

19 Am. Jur. POF2d Negligent Design or Maintenance, Dam Failure as a Result of, p. 75.

Dam failure: applicability of rule of strict or absolute liability to overflow or escape of water caused by dam failure. 51 ALR 3d 965.

Part 1
General Provisions

85-15-106. Definitions.

Compiler's Comments

1993 Amendment: Chapter 418 in definition of dam, after "or divert water", deleted "with an impounding capacity of 50 acre-feet or greater measured at maximum normal operating pool"; in definition of high-hazard dam inserted reference to impounding capacity at maximum normal operating pool; in definition of reservoir, after "that contains", deleted "50 acre-feet or more of" and after "impounded water" deleted "measured at maximum normal operating pool"; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

1991 Amendment: At end of definitions of dam and reservoir inserted "measured at maximum normal operating pool". Amendment effective April 6, 1991.

Administrative Rules

ARM 36.14.101 Definitions.

ARM 36.14.801 Jurisdictional size of dam or reservoir.

85-15-107. Exemptions.

Compiler's Comments

Coordination Instruction: Section 11, Ch. 418, L. 1993, provided: "If House Bill No. 121 is passed and approved and if it includes a section amending 85-15-107 and instituting a civil penalty for a violation of the dam safety act, then [sections 2 [85-15-107] and 8 of this act] are void." House Bill No. 121 was passed and approved as Ch. 612, L. 1993.

1993 Amendment: Chapter 612 in (1), after "of", deleted "85-15-105, 85-15-106", after "85-15-401" deleted "85-15-501, and", and after "85-15-502" inserted "and 85-15-503"; in (1)(b), at beginning, deleted "The provisions of 85-15-108 through 85-15-110, 85-15-209 through 85-15-216, 85-15-305, 85-15-401, 85-15-501, and 85-15-502 do not apply to" and after "reservoirs" deleted "to nonfederal dams and reservoirs located on federal lands if they are subject to a dam safety review by a federal agency, or to"; in (1)(c), after "commission", deleted language that read: "The provisions of 85-15-105, 85-15-106, 85-15-108 through 85-15-110, 85-15-209 through 85-15-216, 85-15-305, 85-15-401, 85-15-501, and 85-15-502 do not apply to"; deleted former last

sentence of (1)(d) that read: "In addition, the provisions of 85-15-108 through 85-15-110, 85-15-209 through 85-15-216, 85-15-305, 85-15-401, 85-15-501, and 85-15-502 do not apply until July 1, 1990, to high-hazard dams that have been inspected by the U.S. army corps of engineers pursuant to P.L. 92-367 and for which resultant dam safety reports have been submitted to the owner"; inserted (2) relating to inapplicability of provisions to nonfederal dams and reservoirs on federal lands; inserted (3) relating to dams and reservoirs at national priority list site; and made minor changes in style.

Applicability: Section 8, Ch. 612, L. 1993, provided: "[This act] applies to causes of action accruing on or after October 1, 1993."

1991 Amendment: Near middle of second sentence inserted "to nonfederal dams and reservoirs located on federal lands if they are subject to a dam safety review by a federal agency". Amendment effective April 6, 1991.

Retroactive Applicability: Section 3, Ch. 366, L. 1991, provided: "[Section 2] [85-15-107] applies retroactively, within the meaning of 1-2-109, to all nonfederal dams and reservoirs located on federal lands if a federal agency provides a dam safety review for the nonfederal dams or reservoirs."

1987 Amendment: Inserted third sentence concerning certificate of environmental compatibility.

1985 Amendment: Substituted language concerning provisions of state law inapplicable to dams, dikes, and reservoirs licensed and subject to inspections by the Federal Energy Regulatory Commission for "The provisions of 85-15-102 and 85-15-103 shall not apply to dams, dikes, and reservoirs which are subject to federal power commission inspections under federal laws."

Administrative Rules

ARM 36.14.103 Exemptions.

85-15-110. Rules.

Compiler's Comments

Statement of Intent: The statement of intent attached to Ch. 501, L. 1985, which enacted this section, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the department of natural resources and conservation in section 20 [85-15-110].

It is the intent of the legislature that the department adopt rules relating to the classification of dams and reservoirs to determine whether dams and reservoirs are to be classified as high-hazard under the bill; rules governing the content, form, and procedure for applications for dam and reservoir classification and permits to be issued under the bill; rules governing criteria to be used by the owners of dams and reservoirs when conducting inspections of the high-hazard dams and reservoirs and submitting reports to the department; rules establishing safety standards for the design, construction, operation, and maintenance of high-hazard dams and reservoirs; rules establishing emergency preparedness and warning procedures to be implemented by owners of high-hazard dams and reservoirs in cases of danger to people or property; and other rules as may be necessary for the department to implement the bill."

Chapter Administrative Rules

Title 36, chapter 14, ARM Safety of dams program — administration.

85-15-115. Purpose.

Compiler's Comments

Applicability: Section 8, Ch. 612, L. 1993, provided: "[This act] applies to causes of action accruing on or after October 1, 1993."

Part 2
Construction, Inspection, and Repair of Dams

85-15-207. Dams and reservoirs — how constructed.

Compiler's Comments

1985 Amendment: Inserted "dam or" before "reservoir".

Case Notes

Common-Law Negligence: An instruction in the precise language of this section should not be given where the plaintiff is suing on the theory of common-law negligence. Richland County v. Anderson, 129 M 559, 291 P2d 267 (1955).

Measurement of Water in Reservoir: Devices for measuring the water in a storage reservoir should be such that at a glance anyone may tell the exact number of acre-feet therein at any time, thus obviating the necessity of calling in engineers or others to measure it. The details of operation present a practical or engineering problem rather than a judicial one, and therefore should properly be left to the parties interested. If the court's intervention or assistance is required in that behalf, a motion for modification of the decree should suffice. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

Rights of Person Reservoiring Water: Briefly stated, the rights of a person to reservoir water are as follows: He may, in any one year, store for use in that or succeeding years what he has a right to use and also any additional amounts which others would not have the right to use and which otherwise would go to waste. The appropriation and use of water, as well as the sites for reservoirs for collecting it, constitute a public use under Art. III, sec. 15, 1889 Mont. Const. (Art. IX, sec. 3, 1972 Mont. Const.), since it is in the interest of the public that water be conserved rather than wasted, so that arid lands may be made productive. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

Storage of Flood Water: Under Title 85, ch. 15, et seq., reservoirs may be constructed for the purpose of storing flood water, in the course or at the headwaters of an adjudicated stream, provided their construction does not interfere with the use by prior appropriators of the natural flow in the stream to the extent of their appropriations. Donich v. Johnson, 77 M 229, 250 P 963 (1926).

Collateral References

Waters and Water Courses *key* 159, et seq.
93 C.J.S. Waters §325, et seq.
78 Am. Jur. 2d Waters §257.

85-15-208. Construction in a secure manner.

Compiler's Comments

1985 Amendment: After "person" deleted "association, or corporation"; after "dam" deleted "dike"; and deleted former (2) and (3) that read: "(2) The department of natural resources and conservation may at any time on its own motion, and it shall, upon complaint on oath being made to the department by three or more persons residing or having property in such location that their homes or property would be in danger of destruction or damage in event of flood occurring on account of the breaking of any dam, dike, or reservoir within the state and that they have reason to believe said dam, dike, or reservoir is in an unsafe condition or that it is diverting or is being filled with water to such an extent as to render it unsafe, immediately examine or cause to be examined the dam, dike, or reservoir. If, upon the examination, the department finds that the dam, dike, or reservoir is unsafe or is diverting or is being filled with water to such an extent as to render it unsafe, it shall notify the county attorney of the county in which the dam, dike, or reservoir is located, setting forth its findings, and the county attorney shall immediately take the necessary steps to abate the danger and make the structure safe.

(3) If either party is dissatisfied with the findings of the department, it may appeal to the district court of the district wherein the dam, dike, or reservoir is located, and the court shall hear and determine the matter at the earliest practical time, subject to the right of either party to appeal as in other civil cases; however, the judgment of the department shall control until the final determination of the case."

85-15-209. High-hazard dam — determination.

Compiler's Comments

1993 Amendment: Chapter 418 near beginning inserted reference to impounding capacity measured at maximum normal operating pool; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

Administrative Rules

Title 36, chapter 14, subchapter 2, ARM Hazard classification.

85-15-210. Preparation and approval of plans.

Administrative Rules

Title 36, chapter 14, subchapter 3, ARM Dam safety — construction application and permit.

Title 36, chapter 14, subchapter 5, ARM Dam safety — design and construction criteria.

85-15-211. Inspection and reports during construction.

Compiler's Comments

1993 Amendment: Chapter 418 in (4), before "dam", inserted "high-hazard".

1993 Statement of Intent: The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

Administrative Rules

Title 36, chapter 14, subchapter 3, ARM Dam safety — construction application and permit.

85-15-212. Operating permit.

Compiler's Comments

1993 Amendment: Chapter 418 in three places, before "dam", inserted "high-hazard".

1993 Statement of Intent: The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

Administrative Rules

Title 36, chapter 14, subchapter 4, ARM Dam safety — operation application and permit.

85-15-213. Periodic inspections after construction.

Compiler's Comments

1993 Amendment: Chapter 418 in four places, before "dam", inserted "high-hazard"; inserted (1)(b) regarding Department determination of inspection frequency; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

Administrative Rules

ARM 36.14.503 Instrumentation.

ARM 36.14.504 Breach or removal of earth dam.

Title 36, chapter 14, subchapter 6, ARM Periodic owner inspections.

85-15-214. Requested inspections — costs — limitations against unsafe structures.

Administrative Rules

Title 36, chapter 14, subchapter 8, ARM Complaints to Department of unsafe or dangerous dams.

85-15-215. Emergency repairs or breaching.

Administrative Rules

Title 36, chapter 14, subchapter 7, ARM Emergency measures.

Title 36, chapter 14, subchapter 8, ARM Complaints of unsafe or dangerous dams.

85-15-216. High-hazard dam permit cancellation.

Compiler's Comments

1993 Amendment: Chapter 418 at end of first sentence, before "dam", inserted "high-hazard".

1993 Statement of Intent: The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

Administrative Rules

ARM 36.14.104 Cancellation of permits.
ARM 36.14.302 Department inspection costs during construction.
ARM 36.14.312 Notice, order, and revocation for noncompliance.
ARM 36.14.407 Operating permit — conditions and terms.

Part 3
Court Proceedings

85-15-305. Liability of owners for damage.

Compiler's Comments

1993 Amendment: Chapter 612 in (1), after "(2)", inserted "and (3)" and near end, after "failure", deleted "or rupture"; in (2), after "chapter", inserted "or that was designed and constructed under the supervision of an engineer and properly maintained", after "damages" inserted "to persons or property", after "water from" inserted "failure of", and at end, after "reservoir", deleted "which are of sufficient magnitude to exceed the limits of the 100-year floodplain as defined in 76-5-103"; in (3), after "chapter", inserted "or that was designed and constructed under the supervision of an engineer and properly maintained"; and made minor changes in style.

Two-Thirds Vote Required: Section 7, Ch. 612, L. 1993, provided that if [this act] received a two-thirds vote, then the bracketed language in [section 3(4)] [85-15-305(4)] that read: "(4) The limitation on liability provided in subsection (2) does not apply to a nonpermitted state-owned dam" was void. House Bill No. 121 (Ch. 612, L. 1993) received the required two-thirds vote of each house; therefore, the bracketed language in 85-15-305(4) was void.

Applicability: Section 8, Ch. 612, L. 1993, provided: "[This act] applies to causes of action accruing on or after October 1, 1993."

Administrative Rules

ARM 36.14.105 Liability.

Part 5
Penalties

85-15-502. Deposit of penalties and costs.

Compiler's Comments

1987 Amendment: After "chapter" inserted "other than those collected in a justice's court".

85-15-503. Civil penalty.

Compiler's Comments

Applicability: Section 8, Ch. 612, L. 1993, provided: "[This act] applies to causes of action accruing on or after October 1, 1993."

CHAPTER 16
WHARVES AND DOCKS

Part 1
Wharves and Docks

85-16-101. Who may build wharves and docks.

Collateral References

Wharves *key* 7.
94 C.J.S. Wharves §19, et seq.

85-16-102. Public use of wharves and docks.

Collateral References
Wharves *key* 10.
94 C.J.S. Wharves §20, et seq.

85-16-103. Revocation of license.

Collateral References
Wharves *key* 7.
94 C.J.S. Wharves §19.

85-16-104. Land under navigable water.

Collateral References
Wharves *key* 5, et seq.
94 C.J.S. Wharves §18.

CHAPTER 20
WATER COMPACTS

Chapter Law Review Articles
The Yellowstone River Compact: An Overview, 3 Pub. Land L. Rev. 179 (1982).
Crying a River and Other Approaches to Water Resource Development, Ellis, 11 Nat. Resources & Env't 21 (1996).
Wrestling With the Bear: A Compact Approach to Water Allocation, Boyce, 10 B.Y.U. J. Pub. L. 301 (1996).

Part 1
Yellowstone River Compact

Part Case Notes
Commerce Clause Immunity: The Yellowstone River Compact was approved by Congress. Because it was approved by Congress, it is federal, not state, law for purposes of Commerce Clause objections. Therefore, the Compact cannot by definition be a state law impermissibly interfering with commerce but is instead a federal law, immune from attack. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).
Compact Applies to All Waters of Yellowstone River Basin: A diversion of water from the Yellowstone River at a point on the river that is not specifically apportioned by Article V of the Yellowstone River Compact is subject to the terms of the Compact because the proposed diversion is within the Yellowstone River Basin and is on the Yellowstone River system. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).
Compact Not in Violation of Equal Protection: In a suit for declaratory and injunctive relief, Intake Water Company challenged the Yellowstone River Compact, claiming that it was a violation of equal protection under the Fourteenth Amendment for the Compact to restrict interbasin transfer of Yellowstone River water, while other water appropriations from other river basins in Montana do not require consent of all the signatory states to the compact. A three-judge panel (required under 28 U.S.C. §2281 repealed by Act of August 12, 1976, 90 Stat. 1119) upheld the Compact, ruling: (1) it is well settled that the Fourteenth Amendment does not prohibit legislation that operates on a limited geographical area within a state; (2) differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment; and (3) Intake cannot meet its required heavy burden to show that the Compact is not rationally related to a legitimate government purpose. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).
Jurisdiction of Federal and State Courts Concurrent: Where the defendant private corporation appropriating water from the Yellowstone River in Wyoming for use in Montana brought an action in state court in Montana to compel certain actions of the Department of Natural Resources and Conservation under the Yellowstone River Compact and the plaintiff subsequently brought an

action in the federal District Court in Montana under 28 U.S.C. §§1331(2) and 2201 to declare the rights of the parties under the Yellowstone River Compact, both the state courts of Wyoming and Montana had subject matter jurisdiction to construe the terms of the Compact and enforce its provisions. Utah Int'l, Inc. v. Intake Water Co., 484 F. Supp. 36, 36 St. Rep. 2270 (D.C. Mont. 1979).

Jurisdiction of Federal Court — Abstention in Favor of State Court Proceedings: Where the defendant private corporation had instituted an action in state District Court to compel certain actions of the Department of Natural Resources and Conservation under the Yellowstone River Compact and the plaintiff water company subsequently brought an action in federal District Court under 28 U.S.C. §§1331(2) and 2201 to declare the rights of the parties to waters appropriated by each under the Compact, the assumption of jurisdiction of the federal court was discretionary and the court should, in accordance with the principles of abstention announced in Colorado River Water Conservation District v. U.S., 424 US 800 (1976), abstain from exercising its jurisdiction, as there were significant questions of state policy which would appropriately be determined in the case pending before the state District Court. Utah Int'l, Inc. v. Intake Water Co., 484 F. Supp. 36, 36 St. Rep. 2270 (D.C. Mont. 1979).

Jurisdiction of Federal Court — Compact Law as Federal Question: Where the defendant private corporation had instituted an action in state District Court to compel certain action of the Department of Natural Resources and Conservation and where the plaintiff subsequently brought an action in federal District Court for a declaratory judgment under 28 U.S.C. §§1331(2) and 2201 to declare the rights of the parties to waters appropriated by each under the Yellowstone River Compact, the Compact constituted a law of the United States under 28 U.S.C. §1331(2), giving the federal District Court jurisdiction to declare its terms and enforce its provisions. Utah Int'l, Inc. v. Intake Water Co., 484 F. Supp. 36, 36 St. Rep. 2270 (D.C. Mont. 1979).

85-20-101. Approval of compact.

Compiler's Comments

Commissioner Correction: The Code Commissioner, 1979, has restored the numbering system and paragraph nomenclature used in the Yellowstone River Compact to avoid confusion with the compact as adopted by the other signatory states and the United States.

Administrative Rules

Title 36, chapter 26, subchapter 1, ARM Yellowstone River Compact — dispute resolution.

Case Notes

Commerce Clause Immunity: The Yellowstone River Compact was approved by Congress. Because it was approved by Congress, it is federal, not state, law for purposes of Commerce Clause objections. Therefore, the Compact cannot by definition be a state law impermissibly interfering with commerce but is instead a federal law, immune from attack. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).

Compact Applies to All Waters of Yellowstone River Basin: A diversion of water from the Yellowstone River at a point on the river that is not specifically apportioned by Article V of the Yellowstone River Compact is subject to the terms of the Compact because the proposed diversion is within the Yellowstone River Basin and is on the Yellowstone River system. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).

Compact Not in Violation of Equal Protection: In a suit for declaratory and injunctive relief, Intake Water Company challenged the Yellowstone River Compact, claiming that it was a violation of equal protection under the Fourteenth Amendment for the Compact to restrict interbasin transfer of Yellowstone River water, while other water appropriations from other river basins in Montana do not require consent of all the signatory states to the compact. A three-judge panel (required under 28 U.S.C. §2281 repealed by Act of August 12, 1976, 90 Stat. 1119) upheld the Compact, ruling: (1) it is well steeled that the Fourteenth Amendment does not prohibit legislation that operates on a limited geographical area within a state; (2) differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment; and (3) Intake cannot meet its required heavy burden to show that the Compact is not rationally related to a legitimate government purpose. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).

Diversion in Wyoming — Use in Montana — Priority Dates: Corporation filed a Wyoming application to appropriate water, as required by the Yellowstone River Compact, because

Wyoming was the state of diversion (Montana being the state of ultimate use of the water). Corporation then filed the same information in Montana, which assigned the date of the Wyoming filing as the priority date in conformity with Wyoming law. Water company did not attack the Wyoming filing but claimed mandamus should issue requiring Montana to assign the Montana filing date as the priority date. Montana correctly assigned the Wyoming filing date as the priority date, as required by the Compact, and mandamus would not issue, since there was no clear legal duty for Montana to assign the Montana filing date as the priority date. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

Appropriation Filing — Correction of Defect — Priority Date: Corporation filed application in Wyoming, as required by the Yellowstone River Compact, to appropriate water in Wyoming for use in Montana. Montana notified corporation that it should also file the same information on Montana forms and that if it did so the corporation would retain the priority date of the date it filed in Wyoming. The corporation filed in Montana within 18 months of its Wyoming filing. Since 85-2-302 gives Montana discretion of allowing up to 18 months for a correction of a defective filing without the applicants losing the original filing date as the priority date, corporation was entitled to have Montana, in its discretion, assign as a priority date the date of the Wyoming filing. Montana had no clear legal duty to do otherwise and was not subject to a mandate that it assign as the priority date the date of the Montana filing. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

Compact as Treaty — State Law Subordinate: The Yellowstone River Compact, signed by Wyoming, North Dakota, and Montana and ratified by Congress, has the status of a treaty; and state law, including Montana's water law statutes, is subordinate to it. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

Attorney General's Opinions

Yellowstone River Compact: Article X of the Yellowstone River Compact requires the consent of the states of Montana and North Dakota before water from the Little Bighorn River in Wyoming may be exported from the Yellowstone River Basin by a coal slurry pipeline. 38 A.G. Op. 18 (1979).

85-20-102. Purpose of the part.

Compiler's Comments

Section Not Codified: Section 89-904, R.C.M. 1947, a temporary clause pertaining to congressional approval and legislative approval of other states, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 2, Ch. 39, L. 1951.

85-20-104. Filing written statement with department.

Case Notes

Diversion in Wyoming — Use In Montana — Priority Dates: Corporation filed a Wyoming application to appropriate water, as required by the Yellowstone River Compact because Wyoming was the state of diversion (Montana being the state of ultimate use of the water). Corporation then filed the same information in Montana, which assigned the date of the Wyoming filing as the priority date in conformity with Wyoming law. Water company did not attack the Wyoming filing but claimed mandamus should issue requiring Montana to assign the Montana filing date as the priority date. Montana correctly assigned the Wyoming filing date as the priority date, as required by the Compact, and mandamus would not issue, since there was no clear legal duty for Montana to assign the Montana filing date as the priority date. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

Appropriation Filing — Correction of Defect — Priority Date: Corporation filed application in Wyoming, as required by the Yellowstone River Compact, to appropriate water in Wyoming for use in Montana. Montana notified corporation that it should also file the same information on Montana forms and that if it did so the corporation would retain the priority date of the date it filed in Wyoming. The corporation filed in Montana within 18 months of its Wyoming filing. Since 85-2-302 gives Montana discretion of allowing up to 18 months for a correction of a defective filing without the applicants losing the original filing date as the priority date, corporation was entitled to have Montana, in its discretion, assign as a priority date the date of the Wyoming filing. Montana had no clear legal duty to do otherwise and was not subject to a mandate that it assign as the priority date the date of the Montana filing. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

85-20-109. Department to make rules.

Compiler's Comments

1995 Amendment: Chapter 418 at beginning substituted "department" for "board" and after "adopt and" deleted "the department shall". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 36, chapter 26, subchapter 1, ARM Yellowstone River Compact — dispute resolution.

Part 2
Fort Peck-Montana Compact

85-20-201. Fort Peck-Montana compact ratified.

Compiler's Comments

Resolution Submitted to Congress: Article XII. B. Petition to Congress provides in paragraph 2 that ". . . this compact shall have no force and effect until the resolution set forth in paragraph 1 of this section is approved by the Montana Legislature and submitted to Congress." Senate Joint Resolution 41 entitled: "A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA URGING CONGRESS TO ADOPT LEGISLATION AUTHORIZING THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION TO ENTER WATER AGREEMENTS FOR THE DELIVERY, USE, OR TRANSFER OF WATER WITHIN OR OUTSIDE THE RESERVATION" was approved by the Montana Legislature and filed with the Secretary of State on April 30, 1985, who then submitted copies to Montana's Congressional Delegation, the Committee on Indian Affairs of the United States Senate, and the Committee on Interior and Insular Affairs of the United States House of Representatives on June 12, 1985.

Law Review Articles

Water Use Efficiency: The Value of Water in the West, Getches, 8 Pub. Land L. Rev. 1 (1987).

Part 3
Northern Cheyenne-Montana Compact

85-20-301. Northern Cheyenne-Montana compact ratified.

Compiler's Comments

Effective Date: Section 2, Ch. 812, L. 1991, provided that this section is effective on passage and approval. Approved May 17, 1991.

85-20-302. Consent to federal act and modification of compact.

Compiler's Comments

Preamble: The preamble attached to Ch. 7, Sp. L. November 1993, provided: "WHEREAS, in accordance with section 85-2-702, MCA, the 52nd Montana Legislature ratified the Northern Cheyenne-Montana Compact as Chapter 812, Laws of 1991; and

WHEREAS, by its terms, the Compact required the participation of the United States in the project to repair and rehabilitate the Tongue River Dam in southeastern Montana, which required certain authorizations and appropriations by the Congress of the United States; and

WHEREAS, in the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, referred to in this preamble as the federal act (Public Law 102-374, 106 Stat. 1186), Congress approved the Compact and obligated, under certain terms and conditions, the federal government and the state to provide funding for the project; and

WHEREAS, because of a clerical error in the federal act Montana may lose some of the federal funding for the project, and accordingly, Congress, in S. 1654 (103d Cong. 1st Sess.), is considering an amendment to correct that error; and

WHEREAS, some of the terms of the federal act and the pending amendment vary from the Compact, thereby creating uncertainty in efforts to obtain federal funding for the project and secure judicial approval of the Compact; and

WHEREAS, the Northern Cheyenne Tribe, the Montana Reserved Water Rights Compact Commission, and the Montana Department of Natural Resources and Conservation have given

their consent to, adopted, and ratified the terms of the federal act and the pending amendment; and

WHEREAS, the judicial confirmation of the Compact and timely completion of the project is of high priority to the State of Montana, the Northern Cheyenne Tribe, and the United States.

THEREFORE, the 53rd Legislature of the State of Montana, meeting in special session, finds it appropriate to give its consent to, adopt, and ratify the terms and conditions of the federal act and the pending amendment and to modify the Compact to the extent necessary to conform therewith."

Effective Date: Section 3, Ch. 7, Sp. L. November 1993, provided: "[This act] is effective on passage and approval." Approved December 17, 1993.

Part 4
United States Park Service-Montana Compact

85-20-401. United States National Park Service-Montana compact ratified.

Compiler's Comments

1995 Amendment: Chapter 149 after Compact title inserted second paragraph relating to Bighorn Canyon National Recreation Area and Little Bighorn Battlefield National Monument; in Article I DEFINITIONS, in definition of abstract, inserted "[and] the copy of the document entitled "Abstract of National Park Service Water Rights - BCNRA and LBBNM" referenced in this Compact as Appendix 2", in definition of consumptive use adjusted subsection reference, in definition of current consumptive use inserted "[with respect to BHNB, GNP, or YNP and] on or before the effective date of the compact [with respect to BCNRA and LBBNM]", in definition of future consumptive use inserted "[with respect to BHNB, GNP, or YNP and] after the effective date of the compact [with respect to BCNRA and LBBNM]", inserted definition of Crow Tribal water rights, inserted definition of curtailment, at end of definition of Little Bighorn Battlefield National Monument inserted "and by Act of March 22, 1946, 60 Stat. 59", in definition of non-consumptive use, in three places, inserted "[with respect to BHNB, GNP, or YNP and]" and reference to the effective date of this Compact with respect to BCNRA and LBBNM, inserted definition of Parkman sandstone, inserted definition of quaternary alluvium, and inserted definition of quaternary terrace deposits; in Article II IMPLEMENTATION, under "Abstract" near middle of first sentence, inserted "[for Big Hole National Battlefield, Glacier National Park, and Yellowstone National Park, and] Appendix 2, which is a specific listing of all of the United States' water rights for Bighorn Canyon National Recreation Area and the Little Bighorn Battlefield National Monument"; in II, B. Method of Allocation of Water on Category 3 and 4 Streams and of Determining Rights Subject to Curtailment on the Little Bighorn River and its Tributaries, in catchline, inserted "and of Determining Rights Subject to Curtailment on the Little Bighorn River and its Tributaries" and at end of second sentence inserted "and whether a water right on the Little Bighorn River and its tributaries upstream from the LBBNM shall be subject to curtailment to satisfy the reserved instream flow water right for LBBNM"; in II, B., 1. Allocation to Instream Flow, at beginning of introductory paragraph, inserted "With the exception of the reserved instream flow rights for LBBNM"; in II, B., 2., b. Groundwater inserted introductory paragraph, inserted iv. relating to calculation of total future consumptive use on Category 3 or 4 streams at BCNRA, and inserted v. relating to determination of whether an appropriation of groundwater after effective date of Compact is subject to curtailment to satisfy the instream flow water right at LBBNM; in II, C. Subordination of Instream Flow Right, in 1. at end, substituted "sections I and K" for "section I" and in 2. inserted reference to 85-2-212 and at end inserted "provided that water allocated to future consumptive use pursuant to Article III [B.] of this Compact may be used to satisfy claims filed pursuant to 85-2-221(3), MCA in order of priority"; in II, F. Prohibition on Future Impoundments, near end of first sentence, inserted "[and] no new impoundments may be permitted on the mainstem of the Little Bighorn River in Montana upstream of the LBBNM"; in II, G. Management to Maximize Use by Montana Water Users of the Water Allocated to Consumptive Use Rights Recognized Under State Law, near middle after "January 1, 1993", inserted "[with respect to BHNB, GNP, and YNP and] before the effective date of this compact [with respect to BCNRA and LBBNM]"; in II, H. Basin Closure inserted "Big Horn Canyon National Recreation Area: Dry Head, Deadman, Davis and Layout Creeks"; in II, I. Enforcement of Water Right, in 5. at end, inserted last four sentences requiring United States to install and maintain rated gauge to measure instream flows in Little Bighorn River and restricting curtailment of junior water uses; inserted II, K. Administration of Little Bighorn Instream Flow relating to administration of instream flow rights of United States on

Little Bighorn River; in Article III WATER RIGHT, in introductory paragraph, inserted second sentence recognizing that water rights for certain NPS Units are junior to Crow Tribal water rights; in III, B. Bighorn Canyon National Recreation Area substituted current Compact language relating to Bighorn Canyon National Recreation Area water rights, including Table 3 and Table 4, for former language that read: "B. Bighorn Canyon National Recreation Area

The parties were unable to finalize agreement on quantification of the water rights for BCNRA prior to the effective date of this Compact. The parties agree to continue to pursue, in good faith, quantification of water rights, and further agree that all other relevant provisions of this Compact apply to a settlement of this water right through this process. In the event the parties are unable to agree on quantification, the United States retains its right to have the quantity of any reserved water right for BCNRA adjudicated in a state or federal court of competent jurisdiction"; in III, E. Little Bighorn Battlefield National Monument substituted current Compact language relating to Little Bighorn Battlefield National Monument water rights, including Table 7, for former language that read: "E. Little Bighorn Battlefield National Monument

The parties were unable to finalize agreement on quantification of the water rights for LBBNM prior to the effective date of this Compact. For the purposes of settlement of the reserved water rights for land administered by the National Park Service in Montana, the parties agree that a water right for instream flow is necessary for the historic purposes of LBBNM. The parties agree to continue to pursue, in good faith, quantification of water rights and further agree that all other relevant provisions of this Compact apply to a settlement of this water right through this process. In the event the parties are unable to agree on quantification, the United States retains its right to have the quantity of any reserved water right for LBBNM adjudicated in a state or federal court of competent jurisdiction"; and throughout Article III WATER RIGHT renumbered existing Tables to reflect insertion of new Tables and changed internal references to Tables, as appropriate; in Article V GENERAL PROVISIONS, in V, A. No Effect on Tribal Rights or Other Federal Reserved Water Rights, in 1. near middle of first sentence, inserted "[with respect to BHNB, GNP, and YNP or] the nature or extent of the rights to water or the right to administer water [with respect to BCNRA and LBBNM]" and inserted last sentence recognizing seniority of Crow Tribal water rights; in V, C. General Disclaimers inserted 10. relating to alteration or amendment of Yellowstone River Compact; in V, G. Severability, at end, inserted "provided that for the purposes of Sec. 85-2-702(3) MCA, the water rights described in this Compact for the LBBNM and BCNRA Units shall be considered as separate Compacts"; in VI FINALITY OF COMPACT AND DISMISSAL OF PENDING CASES, in B., 2. Disposition of Federal Suits, at end of first sentence, inserted "and any claims made by the United States for LBBNM or BCNRA in federal court"; in VI, C. Settlement of Claims, in first paragraph in second sentence, substituted "retained in Article III, sections D. and F. in the Compact for YNP, GNP, and BHNM" for "retained in Article III, sections B., D., E, and F." and inserted last paragraph exempting water rights Claims No. 43P-W-162354-00 and 43P-W-162348-00, relating to Big Horn Canal and Pete's Spring, from this Compact; adjusted internal references to reflect codification of new material within existing compact; and made minor changes in style.

Codification Instruction — Explanation: Section 2, Ch. 149, L. 1995, provided: "[Section 1] is intended to be codified as an integral part of the United States National Park Service-Montana Water Rights Compact, as provided in 85-20-401, and the provisions of the United States National Park Service-Montana Water Rights Compact, as provided in 85-20-401, apply to [section 1]." Accordingly, the Code Commissioner has inserted portions of [this act] into 85-20-401, and those changes are reported in the 1995 amendment note.

Effective Date — Applicability: Section 3, Ch. 149, L. 1995, provided: "(1) [This act] is effective upon signature by the parties as provided in [this act].

(2) Because [this act] requires Montana and United States approval and incorporates provisions of the existing water rights compact between the United States National Park Service and the State of Montana as provided in 85-20-401, [this act] applies only to the Bighorn Canyon National Recreation Area and the Little Bighorn Battlefield National Monument. The provisions of the existing compact, as provided in 85-20-401, continue in effect and are not affected by [this act] and are incorporated into [this act]."

Administrative Rules

Title 36, chapter 12, subchapter 12, ARM Yellowstone controlled ground water area.

85-20-402. Accounting for federal funds.

Compiler's Comments

1999 Amendment: Chapter 389 in (2) following "accounts" deleted "are statutorily appropriated, as provided in 17-7-502, and". Amendment effective July 1, 1999.

Part 5
United States Bureau of Land Management-Montana Compact

Part Compiler's Comments

Ratification Date: This compact was ratified upon filing with the Secretary of State on March 28, 1997.

Part 6
Chippewa Cree Tribe-Montana Compact

85-20-601. Chippewa Cree Tribe-Montana compact ratified.

Compiler's Comments

Ratification Date: This compact was ratified upon filing with the Secretary of State on April 15, 1997.

Provision Exception: Section 2, Ch. 265, L. 1997, provided: "Notwithstanding the provisions of 7-6-204, Hill County may apply the interest accrued on the $50,000 water purchase contract with the state of Montana toward operation, maintenance, and future repairs to the Lower Beaver Creek reservoir. The Department is authorized to execute a contract with Hill County for the purchase of 800 acre-feet of water stored in Lower Beaver Creek Reservoir. The Department is authorized to assist the Tribe, Hill County, and any appropriate federal agency in drafting an Operating Agreement for coordination of release of the purchased water from Lower Beaver Creek Reservoir with reductions in the natural flow of Beaver Creek due to diversion and impoundment of water on the Reservation."

85-20-801. United States Fish and Wildlife Service, Red Rock Lakes-Montana compact ratified.

Compiler's Comments

2001 Amendment: Chapter 187 in Article II.A.1. substituted text of chart for former text (see 2001 Session Law for former text) and in II.A.4. in second sentence at end after "East Bench Irrigation District" inserted "and state water right permit number 65254-S41A". Amendment effective April 3, 2001.

Effective Date: This section is effective October 1, 1999.

Part 9
Crow Tribe-Montana Compact

85-20-901. Crow Tribe-Montana compact ratified.

Compiler's Comments

Effective Date: Section 3, Ch. 3, Sp. L. June 1999, provided that this section is effective on passage and approval. Approved June 22, 1999.

85-20-902. Findings and purpose.

Compiler's Comments

Nonseverability: Section 7, Ch. 1, Sp. L. June 1999, was a nonseverability clause.

Effective Date: Section 9, Ch. 1, Sp. L. June 1999, provided that this section is effective upon the later of passage and approval of [this act] or passage and approval of Senate Bill No. 1. Both bills were approved June 22, 1999.

85-20-903. Definitions.

Compiler's Comments

Nonseverability: Section 7, Ch. 1, Sp. L. June 1999, was a nonseverability clause.

Effective Date: Section 9, Ch. 1, Sp. L. June 1999, provided that this section is effective upon the later of passage and approval of [this act] or passage and approval of Senate Bill No. 1. Both bills were approved June 22, 1999.

85-20-904. Payment of settlement funds into escrow — requirements for escrow agreement — notice from attorney general.

Compiler's Comments

Appropriation of Settlement Funds — Timing of Payments: Section 5, Ch. 1, Sp. L. June 1999, provided: "(1) There is appropriated to the department of natural resources and conservation from the general fund $1.5 million in fiscal year 2000 and $1.5 million in fiscal year 2001, together with any interest earned on the amounts appropriated between July 1, 1999, and the date the funds are paid into escrow as provided in subsection (2) at the rate of interest earned on the permanent coal severance tax trust fund, for the purpose of funding the first 2 years' payments under the compact and the completion of the settlement provided for in [section 4] [85-20-905].

(2) On July 1, 1999, or as soon after that date as the escrow agreement provided for in [section 3] [85-20-904] is reached, the department of natural resources and conservation shall pay the funds appropriated for fiscal year 2000, together with any interest on the appropriated funds, into the escrow account established pursuant to [section 3] [85-20-904]. On July 1, 2000, or as soon after that date as the escrow agreement provided for in [section 3] [85-20-904] is reached, the department of natural resources and conservation shall pay the funds appropriated for fiscal year 2001, together with any interest on the appropriated funds, into the escrow account established pursuant to [section 3] [85-20-904]."

Nonseverability: Section 7, Ch. 1, Sp. L. June 1999, was a nonseverability clause.

Effective Date: Section 9, Ch. 1, Sp. L. June 1999, provided that this section is effective upon the later of passage and approval of [this act] or passage and approval of Senate Bill No. 1. Both bills were approved June 22, 1999.

85-20-905. Settlement of litigation — disposition of production taxes collected on coal owned in trust for Crow Tribe.

Compiler's Comments

Nonseverability: Section 7, Ch. 1, Sp. L. June 1999, was a nonseverability clause.

Effective Date: Section 9, Ch. 1, Sp. L. June 1999, provided that this section is effective upon the later of passage and approval of [this act] or passage and approval of Senate Bill No. 1. Both bills were approved June 22, 1999.

Part 10
Fort Belknap-Montana Compact

Part Compiler's Comments

Effective Date: This part is effective on the date of filing.

85-20-1008. Economic development plan.

Compiler's Comments

Appropriation: Section 9, Ch. 256, L. 2001, provided: "There is appropriated to the department of natural resources and conservation from the general fund $50,000 in the 2003 biennium for the purpose of facilitating the development of the economic development plan provided for in [section 8] [85-20-1008]."

TITLE 86

RESERVED

TITLE 87
FISH AND WILDLIFE

CHAPTER 1
ORGANIZATION AND OPERATION

Part 1
General Provisions

87-1-101. Definitions.

Compiler's Comments

1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

Redundant Language Not Codified: The language contained in section 26-1802(1), (2), R.C.M. 1947, was not codified in the MCA because it is redundant with 87-1-101. The language not codified is still valid law. Citation may be made to sec. 2, Ch. 461, L. 1973. See 1-2-208.

87-1-102. Penalties — violation of state law.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 499 in (1) near beginning after "fish and game" deleted "or the orders or rules of the commission or department"; inserted (6) establishing penalties for second offenses within 10 years; inserted (7) establishing penalties for third offenses within 10 years; inserted (8) requiring payment of costs of imprisonment; inserted (9) exempting juveniles from mandatory forfeiture of privileges; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 502 throughout section substituted "county detention center" for "county jail"; at beginning of (2)(a) and (2)(b) inserted exception clause; inserted (2)(f) establishing penalty for taking, killing, possessing, or transporting trophy wildlife; inserted (3) banning fishing or hunting in state for additional 5 years if person convicted of illegally taking certain wildlife or trophy wildlife and requiring person to complete hunter education course; in (5) after "87-1-111" inserted "or 87-1-115"; inserted (12) defining knowingly, negligently, and purposely; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 10, Ch. 499, L. 1999, was a saving clause.

1997 Amendment: Chapter 552 inserted (6) relating to suspension of a license or permit, notice to the person, and surrender of the license or permit. Amendment effective July 1, 1997.

1995 Amendments — Composite Section: Chapter 101 in (4) inserted second sentence concerning violation involving a moose, a bighorn sheep, or a mountain goat; and made minor changes in style.

Chapter 417 at end of (1), (2)(a), (2)(b), and (2)(d) inserted sentence concerning notice to person losing privileges and inserted sentence concerning surrender of licenses; in (1), near beginning of first sentence after "knowingly", inserted "or negligently" and near middle increased maximum fine from $500 to $1,000 and at end of second sentence substituted "set by the court" for "of not less than 24 months from the date of conviction or forfeiture"; in (2)(a), in first sentence after "transporting", deleted "or wasting", substituted "wild buffalo" for "wild bison", inserted "black bear", and increased maximum fine from $1,000 to $2,000 and in second sentence, after "state for", deleted "not less than" and at end inserted "unless the court imposes a longer forfeiture period"; in (2)(b), in first sentence after "mountain lion", deleted "or black bear" and after "animals" deleted "or wasting a deer, antelope, or elk" and in second sentence, after "state for", deleted "not less than" and at end inserted "unless the court imposes a longer forfeiture period"; in (2)(c) substituted "trap or hunt" for "trap, take, shoot, or kill"; deleted former (2)(d) that read: "(d) A person convicted of unlawfully taking, killing, possessing, transporting, shipping, labeling, packaging, or wasting or unlawfully attempting to take, kill, or possess any game bird, wild turkey, or fish or any part of any such bird or fish or of failure to tag a game animal or game bird as prescribed by law shall be fined not less than $50 or more than $200 or imprisoned in the

county jail for not more than 30 days, or both"; in (2)(d), in first sentence after "knowingly", inserted "or negligently", after "killing" inserted "trapping", and increased minimum fine from $50 to $100 and in second sentence, after "trap", substituted "in this state for" for "not less than" and after "forfeiture" inserted "unless the court imposes a longer forfeiture period"; in (2)(e), (3), and (4) increased maximum fine from $1,000 to $2,000; in (4), in first sentence, substituted "this section" for "subsection (2)"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1991 Amendments: Chapter 277 in (1), near beginning of first sentence, substituted "who purposely or knowingly violates" for "violating", after "misdemeanor" inserted "except if a felony is expressly provided by law", in second sentence, after "person", inserted "upon conviction or forfeiture of bond or bail", and at end, after "conviction", inserted "or forfeiture"; in (2)(a), (2)(b), and (2)(e), in second sentence after "person", inserted "upon conviction or forfeiture of bond or bail" and near end, after "conviction", inserted "or forfeiture"; inserted (3) prohibiting acquisition of license during period of forfeiture and providing a penalty; in (4) inserted second sentence providing a penalty for unlawfully applying for or entering a drawing for a special license; and made minor change in style. Amendment effective July 1, 1991.

Chapter 609 in (1), near end of second sentence after "this state", inserted "or to use state lands, as defined in 77-1-101, for recreational purposes"; in (2)(a), in second sentence after "fishing", inserted "recreational use"; and made minor change in style. Amendment effective March 1, 1992.

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resouces and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

1989 Amendment: Inserted (3) prohibiting application for special licenses after certain convictions.

1987 Amendment: In (2)(d), after "fish", deleted "or fur-bearing animal" and after "any such" substituted "bird" for "animal"; and inserted (2)(e) relating to the illegal taking, possession, or disposing of a fur-bearing animal.

Administrative Rules

ARM 12.3.405 Revoked hunting licenses.

Case Notes

Appeal to District Court Allowed Only After Trial in Lower Court, Not After Forfeiture of Bond — Exclusive Statutory Remedy for Appeals From Courts of Limited Jurisdiction: Kempin was charged in Justice's Court with seven fish and game violations but failed to appear for trial, so the appearance bonds that Kempin had posted were forfeited and Kempin's hunting, fishing, and trapping privileges were suspended for 10 years. Kempin appealed to the District Court within 10 days of the Justice's Court judgment, but the appeal was dismissed for lack of jurisdiction and because Kempin had no statutory right to appeal the forfeitures as a matter of law, so Kempin appealed to the Supreme Court. Under Art. VII, sec. 4, Mont. Const., District Courts must hear appeals from inferior courts as trials de novo unless otherwise provided by law, and appeal of a criminal conviction from a court of limited jurisdiction is governed exclusively by 46-17-311, which provides three circumstances under which a criminal defendant may appeal to District Court for a trial de novo: (1) when a defendant pleads guilty or nolo contendere but preserves legal issues raised by pretrial motion for appeal; (2) when a defendant files written notice of intention to appeal within 10 days after a judgment is rendered following a trial; and (3) when a defendant appeals revocation of a suspended sentence. Here, Kempin claimed that denial of a District Court trial by jury following forfeiture in Justice's Court violated his due process rights. However, Kempin raised no appealable pretrial issues, nor was the case an appeal of a suspended sentence, so the first and third circumstances did not apply. Kempin did appeal the judgment within 10 days, but there was no trial, so Kempin was not constitutionally entitled to a trial de novo when there had been no trial initially, nor is 46-17-311 unconstitutionally vague for not explicitly proscribing an appeal following a forfeiture. The Supreme Court agreed with the District Court's explanation in declining jurisdiction—that if a defendant was automatically entitled to a trial de novo on appeal without first having a trial in Justice's Court, a defendant could avoid Justice's Court

altogether by not appearing and forfeiting the Justice's Court bonds and then pursuing a trial in District Court, which would render the Justice's Court system meaningless. Kempin's other due process arguments were also not compelling because Kempin waived his trial rights by failing to appear in Justice's Court to assert any constitutional rights and in light of his stated intention to forfeit the bonds and the advance notice of the suspension of the hunting, fishing, and trapping privileges. Absent any statutory basis for an appeal, dismissal of the appeal by the District Court was affirmed. St. v. Kempin, 2001 MT 313, 308 M 17, 38 P3d 859 (2001). See also St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001).

Exclusivity of Title 87 as Remedy for Fish and Game Violations:

Subsection (1) of this section (1993) provided in part that a "person who purposely or knowingly violates any provision of this title, any other state law pertaining to fish and game, or the orders or rules of the commission or department is guilty of a misdemeanor, except if a felony is expressly provided by law, and shall be fined not less than $50 or more than $500, imprisoned in the county jail for not more than 6 months, or both, unless a different punishment is expressly provided by law for the violation". This provision limits penalties for fish and game violations to those provided in this title and precludes the charging of appellant with felony criminal mischief under Title 45. The portion of St. v. Fertterer, 255 M 73, 841 P2d 467 (1992), holding that this title does not provide the exclusive remedy for fish and game violations and allowing defendant to be charged with felony criminal mischief under Title 45, is manifestly wrong and is expressly overruled. St. v. Gatts, 279 M 42, 928 P2d 114, 53 St. Rep. 1042 (1996). (See 1997 enactment of 87-1-110 and 1999 amendment.)

Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that because of the differences in misdemeanor penalties under Title 87 and felony penalties under Title 45, it is manifestly unjust for them to be convicted under 45-6-101 and is contrary to the intent of the Legislature. Citing the language of this section, the Supreme Court held that the Legislature did not intend Title 87 to constitute the exclusive penalties for fish and game violations because the penalties under 45-6-101 constitute the "different punishment" contemplated by this section. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Hours of Hunting Sufficiently Clear to Withstand Due Process Challenge: After he shot a bull elk half an hour before sunrise, Johnston was arrested for hunting before the allowed time. Johnston challenged the rules of the Department of Fish, Wildlife, and Parks as being inconsistent, ambiguous, vague, and factually erroneous. The Supreme Court held that the rules establishing the time of sunrise within the hunting district where Johnston shot the elk were clear in that they precisely defined the time of sunrise on the day Johnston shot the elk, leaving no room to guess at what time a hunter could begin shooting. St. v. Johnston, 263 M 179, 867 P2d 1090, 51 St. Rep. 5 (1994).

Jurisdiction — Hunting and Fishing: Flathead Tribe had jurisdiction to regulate fishing upon Crow Creek Reservoir, and violation of tribal ordinance requiring permit for fishing constituted federal offense. U.S. v. Zempel, 32 St. Rep. 1130 (D.C. Mont. 1975). (Annotator's Comment: This case was not published in F. Supp.)

Seasons on Indian Reservation: Conviction of non-Indian for killing two bull elk on Crow Indian Reservation during season closed by state fish and game laws was not in conflict with act of Congress providing penalty for trespass to possessory rights of reservation Indians or in conflict with The Enabling Act providing that Indian lands shall remain under the absolute jurisdiction and control of Congress of United States. State ex rel. Nepstad v. Danielson, 149 M 438, 427 P2d 689 (1967), followed in U.S. v. Sanford, 547 F2d 1089 (9th Cir. 1976).

Failure to Tag Deer: When plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass, the deer was not unlawfully possessed and the Game Warden was without authority to seize and confiscate the carcass when he arrested plaintiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P2d 300 (1957).

Collateral References

Fish *key* 13(1); Game *key* 7.

36A C.J.S. Fish §29; 38 C.J.S. Game §§41, 55 through 58.

35 Am. Jur. 2d Fish and Game §52, et seq.

Validity, construction, and application of state wildlife possession laws. 50 ALR 5th 703.

Validity of roadblocks by state or local officials for purpose of enforcing fish or game laws. 87 ALR 4th 981.

87-1-103. Fines, bonds, and penalties.

Attorney General's Opinions

Fines by District Court in Game Violation Case: A court imposing a fine in a fish and game violation case must pay the money collected to the Fish and Game Commission (now Fish, Wildlife, and Parks Commission). 36 A.G. Op. 39 (1975).

Collateral References

Fish *key* 14; Game *key* 8.
36A C.J.S. Fish §41; 38 C.J.S. Game §§82 through 85.
35 Am. Jur. 2d Fish and Game §52, et seq.

87-1-104. Payment of cost bill to county.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Attorney General's Opinions

Payment of Medical Expenses Incurred by Fish and Game Violator: Medical expenses incurred by a prisoner incarcerated in a county jail for a violation of state fish and game laws are not chargeable against the state or county, with two exceptions: (1) if the medical condition threatens the health or well-being of other prisoners or persons present in the jail and the county incurs expenses pursuant to section 16-2822, R.C.M. 1947 (7-32-2204, MCA), such expenses are "costs" as defined in section 26-1002, R.C.M. 1947 (87-1-104, MCA), and should be borne by the state; and (2) if a prisoner is financially unable to provide such necessities for himself, in which case the provisions of Title 71, ch. 3, R.C.M. 1947 (Title 53, ch. 3, part 3, MCA), apply. 30 A.G. Op. 36 (1964). (Annotator's note: An amendment to section 16-2818, R.C.M. 1947 (7-32-2222, MCA), by sec. 1, Ch. 179, L. 1965, provided that medical expenses "shall be borne by the agency or authority at whose instance the prisoner is detained". The applicability of this provision to fish and game violations was affirmed in 34 A.G. Op. 24 (1971). An amendment to 7-32-2222 by sec. 1, Ch. 768, L. 1991, provided that medical expenses must be borne by the arresting agency and made an exception for arrests by the Department of Corrections and Human Services (now Department of Corrections).)

Collateral References

Costs *key* 294.
20 C.J.S. Costs §442.

87-1-105. Duty of attorney general and county attorneys.

Collateral References

Attorney General *key* 6.
7A C.J.S. Attorney General §7.

87-1-106. Fish and game offices.

Compiler's Comments

1985 Amendment: Deleted former second and third sentences that read: "Rental shall be charged therefor at a rate not to exceed $4 per square foot per year for the total space occupied. Such rental collected shall be deposited to the credit of the state general fund".

87-1-108. Suspension of privileges for failure to comply with citation or sentence.

Compiler's Comments

1997 Amendment: Chapter 552 in (1), near beginning, inserted "the terms of an administrative suspension"; in (2), in first sentence, inserted "or through an administrative process" and inserted "or by the administrative authority"; and made minor changes in style. Amendment effective July 1, 1997.

Effective Date: Section 11, Ch. 277, L. 1991, provided: "[This act] is effective July 1, 1991."

87-1-109. Fish and game violation as inchoate offense.

Compiler's Comments

Effective Date: Section 11, Ch. 277, L. 1991, provided: "[This act] is effective July 1, 1991."

87-1-110. Fish and wildlife code not to supersede criminal code — statute of limitations.

Compiler's Comments

Preamble: The preamble attached to Ch. 161, L. 1997, provided: "WHEREAS, the Montana Supreme Court decision in *State v. Gatts*, No. 95-402 (1996), limited penalties for fish- and game-related crimes to those specified in the fish and game code, precluding the state from bringing charges under the state criminal code; and

WHEREAS, it is the intent of the Legislature that the charging for and punishment of fish- and game-related violations be authorized under the criminal code as well as the fish and game code and that the fish and game code not be considered the exclusive remedy for fish and game violations to the exclusion of the criminal code; and

WHEREAS, it is the intent of the Legislature that if fish- and game-related violations constitute an offense under both the criminal code and the fish and game code, the prosecution has the discretion to bring charges under either or both codes."

Effective Date: Section 3, Ch. 161, L. 1997, provided: "[This act] is effective on passage and approval." Approved March 26, 1997.

Case Notes

Exclusivity of Title 87 as Remedy for Fish and Game Violations: Section 87-1-102(1) (1993) provided in part that a "person who purposely or knowingly violates any provision of this title, any other state law pertaining to fish and game, or the orders or rules of the commission or department is guilty of a misdemeanor, except if a felony is expressly provided by law, and shall be fined not less than $50 or more than $500, imprisoned in the county jail for not more than 6 months, or both, unless a different punishment is expressly provided by law for the violation". This provision limits penalties for fish and game violations to those provided in this title and precludes the charging of appellant with felony criminal mischief under Title 45. The portion of St. v. Fertterer, 255 M 73, 841 P2d 467 (1992), holding that this title does not provide the exclusive remedy for fish and game violations and allowing defendant to be charged with felony criminal mischief under Title 45, is manifestly wrong and is expressly overruled. St. v. Gatts, 279 M 42, 928 P2d 114, 53 St. Rep. 1042 (1996). (See 1997 enactment of this section.)

87-1-111. Restitution for illegal killing or possession of certain wildlife.

Compiler's Comments

1999 Amendment: Chapter 502 at beginning of (1) inserted exception clause; and in (1)(b) after "elk" deleted "mountain goat". Amendment effective October 1, 1999.

1995 Amendment: Chapter 417 in (1) inserted "taking"; in (1)(b) inserted "black bear"; in (1)(c) deleted "black bear" and inserted "bull trout longer than 18 inches"; in (1)(d) inserted "river-dwelling grayling"; and at beginning of (1)(e) deleted "grayling"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Extension of Termination Date: Section 2, Ch. 196, L. 1993, amended sec. 5, Ch. 409, L. 1989, by extending the termination date imposed by that chapter. Amendment effective March 25, 1993.

1991 Amendment: In (1)(a), schedule of reimbursement, increased value for bighorn sheep, grizzly bear, and endangered species from $1,000 to $2,000; in (1)(b) increased value of elk from $500 to $1,000 and set value for bald eagle at $1,000; in (1)(c) decreased value of buffalo from $1,000 to $500 and set value for golden eagle, osprey, falcon, and certain antlered deer and buck antelope at $500; in (1)(d) set value for other deer, antelope, and raptors at $300 and deleted reference to pallid sturgeon; in (1)(e) substituted "fur-bearing animals, as defined in 87-2-101, and" for "furbearers" and inserted reference to subsection (1)(d); and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendments: Chapter 142 near beginning of (1), after "convicted", inserted "or forfeiting bond or bail upon a charge"; inserted (2) allowing forfeited bond or bail to be paid as restitution; corrected internal references; and made minor changes in form. Amendment effective March 18, 1989.

Chapter 409 in (1)(c) inserted reference to paddlefish; and in (1)(d) deleted reference to paddlefish. Amendment effective July 1, 1989, and terminates June 30, 1993.

Collateral References

Validity, construction, and application of state wildlife possession laws. 50 ALR 5th 703.

87-1-112. Finding required.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 395 near middle of first sentence inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 502 in first sentence after "87-1-111" inserted "or 87-1-115"; and made minor changes in style. Amendment effective October 1, 1999.

1989 Amendment: Inserted second sentence that read: "This finding is not required for state reimbursement under 87-1-111 when bond or bail is forfeited." Amendment effective March 18, 1989.

87-1-113. Payment — penalty for nonpayment.

Compiler's Comments

1999 Amendment: Chapter 502 in (1) after "87-1-111" inserted "or 87-1-115". Amendment effective October 1, 1999.

87-1-114. Disposition of proceeds.

Compiler's Comments

2001 Amendment: Chapter 257 in (1) and (2) substituted references to department of revenue for references to state treasurer. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1999 Amendments — Composite Section: Chapter 499 in (1) at beginning inserted exception clause and at end substituted "in the state special revenue fund account to the credit of the department for hunter education purposes or for enforcement" for "in the state general fund"; inserted (2) requiring excess funds to be deposited in state general fund; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 502 after "87-1-113" inserted "and 87-1-115". Amendment effective October 1, 1999.

Saving Clause: Section 10, Ch. 499, L. 1999, was a saving clause.

1995 Amendment: Chapter 509 substituted "state general fund" for "state special revenue fund" and after "fund" deleted "as provided in 87-1-601(1). If restitution is ordered out of a forfeited bond or bail, any balance of bond or bail money must be disposed of as provided in 87-1-601(4)." Amendment effective July 1, 1995.

1989 Amendment: Inserted second sentence that read: "If restitution is ordered out of a forfeited bond or bail, any balance of bond or bail money must be disposed of as provided in 87-1-601(4)." Amendment effective March 18, 1989.

87-1-115. Restitution for illegal killing or possession of trophy wildlife.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

87-1-120. Remedial hunter education program.

Compiler's Comments

Saving Clause: Section 10, Ch. 499, L. 1999, was a saving clause.

Effective Date: Section 11, Ch. 499, L. 1999, provided that this section is effective July 1, 1999.

87-1-121. Remedial hunter education program — sentencing.

Compiler's Comments

Saving Clause: Section 10, Ch. 499, L. 1999, was a saving clause.

Effective Date: Section 11(2), Ch. 499, L. 1999, provided that this section is effective July 1, 2001.

87-1-125. Violation of orders or rules — penalties.

Compiler's Comments

Saving Clause: Section 10, Ch. 499, L. 1999, was a saving clause.

Effective Date: Section 11, Ch. 499, L. 1999, provided that this section is effective July 1, 1999.

Part 2
Department of Fish, Wildlife, and Parks

Part Collateral References

Report and Recommendations, Joint Subcommittee on Fish and Game, published by Montana Legislative Council (November 1982).

87-1-201. Powers and duties.

Compiler's Comments

1999 Amendment: Chapter 369 inserted (9) requiring department programs that manage fish and wildlife so as to prevent the need for listing under 87-5-107 or the Endangered Species Act and that manage listed, sensitive, or potentially listed species under 87-5-107 or the Endangered Species Act so as to assist in their maintenance or recovery, requiring department to balance maintenance or recovery with social and economic impacts of maintenance or recovery, and providing that subsection (9) does not affect ownership or possession of a privately held listed, sensitive, or potentially listed species; and made minor changes in style. Amendment effective April 20, 1999.

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

1995 Amendment: Chapter 459 in temporary version in (1), at end of first sentence, inserted clause authorizing implementation of voluntary programs to encourage hunting access and to promote harmonious relations between landowners and public; and made minor changes in style. Amendment terminates October 1, 2001.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: The statement of intent attached to Ch. 459, L. 1995, provided: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks

commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Study of Recreational User Fees — 1992 Report: Section 5, Ch. 659, L. 1991, provided for a study by the Department of Fish, Wildlife, and Parks, in cooperation with the Department of Natural Resources and Conservation, of the feasibility of charging recreational beneficiaries of water storage projects fees to assist in the repayment of a portion of those project costs. A written report must be submitted to the Water Policy Committee by July 1, 1992.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Seasonal Rules Adopted Annually: Section 2-4-102 excludes from the Montana Administrative Procedure Act seasonal rules adopted annually relating to hunting, fishing, and trapping if the rules are published in accordance with statutory requirements. Section 87-1-202 sets out those requirements. Although the rules do not appear in the Administrative Register of Montana, they are published and copies are available in state and regional offices of the Department.

Administrative Rules

ARM 12.1.101 Organization of department.

Title 12, chapter 2, subchapter 4, ARM Rules implementing the Montana Environmental Policy Act.

Title 12, chapter 3, subchapter 2, ARM License agents.

ARM 12.3.209 Regulations for issuance of fish and game licenses.

ARM 12.3.210 Discount sale of hunting and fishing licenses prohibited.

Title 12, chapter 5, subchapter 1, ARM Resource statements.

Title 12, chapter 6, subchapter 1, ARM Ice fishing shelters.

ARM 12.6.301 Tagging of carcasses of game animals.

Title 12, chapter 6, subchapter 11, ARM Falconer license regulations.

Title 12, chapter 7, subchapter 1, ARM Commercial fishing permit.

Title 12, chapter 7, subchapter 9, ARM Sale of excess fish eggs.

Title 12, chapter 7, subchapter 11, ARM River restoration program.

Title 12, chapter 7, subchapter 12, ARM Future fisheries program.

Title 12, chapter 7, subchapter 13, ARM Scientific collectors permit.

Title 12, chapter 9, subchapter 1, ARM Wildlife management policies.

ARM 12.9.301 Wild bird permits.

Title 12, chapter 10, subchapter 1, ARM Shooting range development grants.

Case Notes

Hours of Hunting Sufficiently Clear to Withstand Due Process Challenge: After he shot a bull elk half an hour before sunrise, Johnston was arrested for hunting before the allowed time. Johnston challenged the rules of the Department of Fish, Wildlife, and Parks as being inconsistent, ambiguous, vague, and factually erroneous. The Supreme Court held that the rules establishing the time of sunrise within the hunting district where Johnston shot the elk were clear in that they precisely defined the time of sunrise on the day Johnston shot the elk, leaving no room to guess at what time a hunter could begin shooting. St. v. Johnston, 263 M 179, 867 P2d 1090, 51 St. Rep. 5 (1994).

Evidence Sufficient to Support Conviction for Game Farm (now Alternative Livestock Ranch) Violations: Evidence of the presence of wild elk on Brogan's game farm (now alternative livestock ranch), gathered by wardens through direct observation and supported by circumstantial evidence, such as animal tracks, the presence of hay near gates, the absence of electric power in the game farm (now alternative livestock ranch) fence, and Brogan's evasive conduct, was sufficient to support Brogan's conviction for capturing wild elk for use on the game farm (now alternative livestock ranch) and for failure to maintain fences. St. v. Brogan, 261 M 79, 862 P2d 19, 50 St. Rep. 1204 (1993).

Removal Proceedings: Summary dismissal of employee by the State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) (holder of such authority under former law) without prior charges by the Commission, reasonable notice and hearing thereon, and without affording the employee an opportunity to refute the charges was prohibited. State ex rel. Ford v. St. Fish & Game Comm'n, 148 M 151, 418 P2d 300 (1966), distinguished in Steer v. Missoula, 169 M 398, 547 P2d 843 (1976).

Construction and Application: The power of discharge must be "for cause" and there is no distinction between officers and employees, and removal may be effected only after notice of the charges made has been given and the person involved has been given an opportunity to be heard in his defense. State ex rel. Opheim v. St. Fish & Game Comm'n, 133 M 362, 323 P2d 1116 (1958), distinguished in Steer v. Missoula, 169 M 398, 547 P2d 843 (1976), and State ex rel. Hollibaugh v. St. Fish & Game Comm'n, 139 M 384, 365 P2d 942 (1961).

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Fines by District Court in Game Violation Case: A court imposing a fine in a fish and game violation case must pay the money collected to the Fish and Game Commission (now Fish, Wildlife, and Parks Commission). 36 A.G. Op. 39 (1975).

Department Regulation of Ice Fishing: The State Fish and Game Department (now Department of Fish, Wildlife, and Parks) has authority to regulate the use and abandonment of ice fishing facilities after proper findings of fact and pursuant to an agreement with the owner of the private waters involved. 28 A.G. Op. 45 (1959).

Law Review Articles

Federal Dominance as to Dams and Fisheries: Federal Power Commission v. Oregon, 349 US 435, 99 L Ed 1215, 75 S Ct 832 (1955), evidenced that the federal government can disregard the wishes of a state concerning its fisheries wherever it believes that the interests of the nation are best served by permitting a dam to be built, and this applies even where the waters are nonnavigable, provided only that the powersite is on reserved lands of the United States. Jasperson, 18 Mont. L. Rev. 118 (1956).

Collateral References

38 C.J.S. Game §§9, 45 through 49.

35 Am. Jur. 2d Fish and Game §§31, 38 through 54.

Validity, construction, and application of state wildlife possession laws. 50 ALR 5th 703.

Governmental liability for failure to post highway deer crossing warning signs. 59 ALR 4th 1217.

Availability of Writ of Prohibition as means of controlling action of Fish and Game Commission. 159 ALR 627; 115 ALR 18.

Constitutionality of statutes licensing or otherwise regulating business of breeding and dealing in game or undomesticated animals. 62 ALR 473.

Constitutionality and construction of statutes for prevention of waste of food products. 38 ALR 1196.

Necessity and sufficiency of environmental impact statements under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.S. §4332(2)(C)) in cases involving hunting, fishing, and related projects. 74 ALR Fed. 852.

Standing of private citizen, association, or organization to maintain action in federal court for injunctive relief against commercial development or activities, or construction of highways, or other governmental projects, alleged to be harmful to environment in public parks, or similar recreational areas, or wildlife refuges. 11 ALR Fed. 556.

87-1-202. Posting and publication of orders, rules, and regulations.

Compiler's Comments

Seasonal Rules Adopted Annually: Section 2-4-102 excludes from the Montana Administrative Procedure Act seasonal rules adopted annually relating to hunting, fishing, and trapping if the rules are published in accordance with statutory requirements. Section 87-1-202 sets out those requirements. Although the rules do not appear in the Administrative Register of Montana, they are published and copies are available in state and regional offices of the Department.

87-1-205. Grievance procedure.

Case Notes

District Court Bound by Factual Findings of Board of Personnel Appeals — Wrongful Discharge — Reinstatement — No Backpay: An employee of the state was discharged from employment because he used a state-owned vehicle for private purposes. He appealed the decision of the Department of Fish, Wildlife, and Parks, and the Board of Personnel Appeals ruled that

though his discharge was properly justified, the Department had never adopted a policy regarding such use of vehicles and had not punished similar usage; thus, the discharge was wrongful and he was entitled to reinstatement. He was offered a substantially equivalent position but appealed the Board's denial of backpay and benefits and, upon losing the District Court appeal, pursued the issues before the Supreme Court. The court upheld the District Court on all issues, observing that both courts were bound by factual findings of the Board and stipulations by the parties. The District Court was not obligated to hold a hearing on the facts. Hutchin v. St., 213 M 15, 688 P2d 1257, 41 St. Rep. 1916 (1984).

87-1-206. Bounty claims for wild animals.

Compiler's Comments

1995 Amendment: Chapter 325 in (3) substituted language requiring the Department to draw a warrant for former language requiring that a claim be sent to the Auditor and requiring the Auditor to draw a warrant; and made minor changes in style. Amendment effective July 1, 1995.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

87-1-207. Establishment of checking stations.

Collateral References

38 C.J.S. Game §65.

Validity of roadblocks by state or local officials for purpose of enforcing fish or game laws. 87 ALR 4th 981.

87-1-209. Acquisition and sale of lands or waters.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 7 at end of (1)(a) substituted "alternative livestock ranches" for "game farms". Amendment effective October 1, 2001.

Chapter 125 in (1)(a) substituted "alternative livestock ranches" for "game farms"; in (2) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1997 Amendment: Chapter 184 in (3)(a) inserted second and third sentences allowing the conveyance of certain Department interests in land and waters to governmental entities through direct sale rather than through a bidding process; and made minor changes in style. Amendment effective April 1, 1997.

1993 Amendment: Chapter 110 in third sentence of (3)(c), before "certified", deleted "registered or"; inserted (5) allowing the Department to enter into leases of land in exchange for services to be provided by the lessee; and made minor changes in style. Amendment effective March 18, 1993.

1987 Amendment: Near middle of (3)(a) substituted "public notice as required by subsection (3)(b)" for "that public notice".

1985 Amendment: In (3)(c) extended period for submission of cash bids from 30 to 60 days; and in (3)(d) inserted second and third sentences relating to the price on private sale and the method of conveyance.

1983 Amendment: At beginning of (4), deleted "Notwithstanding the provisions of 18-4-102".

1981 Amendments: Chapter 230 deleted "condemnation" after "may acquire by purchase" in the introductory clause of (1) and added subsection (2) relating to condemnation for historical or archaeological sites.

Chapter 418 inserted "and, in the case of land acquisition involving more than 100 acres or $100,000 in value, the approval of the board of land commissioners" near the beginning of (1).

Severability: Section 3, Ch. 379, L. 1979, was a severability section.

Case Notes

Nature of Road to Fishing Access Site — Easement — No Deprivation of Landowner's Property: A landowner brought an action to prevent the state from opening a fishing access site and from paving a road to the site, based on a claimed fee title to the roadway. The District Court granted the state a summary judgment as a matter of law. The Supreme Court found the landowner's interest was an ordinary easement. The words "private road" did not clearly indicate intent to create in him an "exclusive" easement. The state's use of the road cannot be declared inconsistent

with the landowner's on the basis of speculation. Furthermore, under various statutory provisions, the state obtained its land lawfully. The plaintiff had not yet been deprived of his property interest. Any damages remained speculative at the time of the decision. The summary judgment was accordingly affirmed. Titeca v. St., 194 M 209, 634 P2d 1156, 38 St. Rep. 1533 (1981).

Attorney General's Opinions

Department of Fish, Wildlife, and Parks Subject to Local Review in Creation of Recreational Vehicle Camping Area: The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing with a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area that will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

Law Review Articles

Judicial Recognition of the Public Interest in Water Recreation: Nebraska and United States Supreme Court Realities, Longo & Elder, 15 Pub. Land L. Rev. 199 (1994).

Collateral References

Recreational Use of Montana's Waterways, Report to the 49th Legislature, Joint Interim Subcommittee No. 2, Montana Legislative Council (1984).

Water Resources Oversight Committee, Report to the Legislature, Montana Legislative Council (1983).

Report and Recommendations, Joint Subcommittee on Fish and Game, published by Montana Legislative Council (November 1982).

87-1-216. Wild buffalo or bison as species in need of management — policy — department duties.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 346, L. 1995, provided: "A statement of intent is required for this bill because the department of livestock is authorized in [section 1] [81-2-120] to adopt rules with regard to management of publicly owned wild buffalo or bison that enter Montana on private or public land and that are from a herd that is infected with a contagious disease that may spread to persons or livestock and may jeopardize compliance with federally administered livestock disease control programs. The department may determine that rulemaking is necessary with regard to feasible methods of taking wild buffalo or bison allowed within [section 1(1)] [81-2-120(1)] or with regard to disposal of the carcasses of wild buffalo or bison as provided for in [section 1(2) and (3)] [81-2-120(2) and (3)].

A statement of intent is also required because [section 2] [87-1-216] authorizes the department of fish, wildlife, and parks to adopt rules with regard to wild buffalo or bison that have not been exposed to or infected with a contagious disease but are in need of management because of potential damage to person or property. The department may determine that rulemaking is necessary if management of wild buffalo or bison under the provisions of [section 2] [87-1-216] includes public hunting."

Effective Date: Section 5, Ch. 346, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 10, 1995.

Case Notes

Federal Court Action Against State Barred Absent State Consent to Be Sued: The Fund for Animals alleged that federal and state officials violated the National Environmental Policy Act of 1969 (NEPA) and the Montana Environmental Policy Act (MEPA) by failing to prepare an environmental impact statement before adopting a plan to kill bison leaving Yellowstone National Park. The District Court properly denied a preliminary injunction to halt implementation of the plan in light of public support of the plan, given the serious threat of brucellosis to Montana cattle, the large number of excess bison, and the lack of feasible alternatives to control bison migrating out of the park. Although nonfederal actors may be enjoined under NEPA if their proposed action cannot proceed without prior approval of a federal agency, state actors may not be enjoined simply because the state project involves major federal action. Penalizing the State of Montana for

consenting to participate in a plan with the federal government, designed to limit the killing of bison, would be inequitable. Further, the 11th amendment to the U.S. Constitution barred the organization from proceeding in federal court against either the State of Montana or its officers for violations of MEPA, absent a demonstration that the state had consented to be sued in federal court for alleged MEPA violations. Fund for Animals, Inc. v. Lujan, 962 F2d 1391 (9th Cir. 1992).

Law Review Articles

Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem, Keiter & Froelicher, 28 Land & Water L. Rev. 1 (1993).

87-1-221. Acquisition, importation, and propagation of fish and game — waterfowl food.

Compiler's Comments

2001 Amendment: Chapter 7 near middle of (3) substituted "alternative livestock ranches" for "game farms"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

35 Am. Jur. 2d Fish and Game §§42, 49.

87-1-222. Construction and maintenance of fish hatcheries and fish ladders.

Case Notes

Fish Ladder Construction: Mandamus to compel fish pond licensee, in compliance with a statute, to construct fish ladder on diversion dam installed 7 years before with approval of State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) would be denied on theory that individuals who have put water to beneficial use should not have their rights arbitrarily diluted under claim of sovereign right. Paradise Rainbow v. Fish & Game Comm'n, 148 M 412, 421 P2d 717 (1966).

Law Review Articles

Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers, Pyle, 14 Stan. Envtl. L.J. 97 (1995).

The One That Got Away: An Analysis of Federal Regulation of the Release of Genetically Engineered Fish, Gorski, 3 U. Balt. J. Envtl. L. 1 (1993).

Preserving the Genetic Diversity of Salmonid Stocks: A Call for Federal Regulation of Hatchery Programs, Goodman, 20 Envtl. L. 111 (1989).

87-1-223. Control of state waters for propagation of fish.

Compiler's Comments

1995 Amendment: Chapter 418 in first sentence, twice in second sentence, and twice in last sentence, after "department", deleted "of fish, wildlife, and parks"; in second, third, and fourth sentences substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Law Review Articles

The Background on Recreational Use of Montana Waters, Stone, 32 Mont. L. Rev. 1 (1971).

Judicial Recognition of the Public Interest in Water Recreation: Nebraska and United States Supreme Court Realities, Longo & Elder, 15 Pub. Land L. Rev. 199 (1994).

Collateral References

Recreational Use of Montana's Waterways, Report to the 49th Legislature, Joint Interim Subcommittee No. 2, Montana Legislative Council (1984).

Water Resources Oversight Committee, Report to the Legislature, Montana Legislative Council (1983).

87-1-224. Destruction of beaver and beaver dams for protection of public health.

Compiler's Comments

1995 Amendment: Chapter 418 in (1), in two places, substituted "department of environmental quality" for "department of health and environmental sciences"; at end of (1) and at beginning of (2) and (3), after "department", deleted "of fish, wildlife, and parks"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

87-1-225. Regulation of wild animals damaging property — public hunting requirements.

Compiler's Comments

1989 Amendment: Inserted (1) relating to eligibility of landowners to receive game damage assistance; and inserted (2) relating to the authority of Department to provide game damage assistance to landowners denying public hunting.

1987 Amendment: At beginning substituted "Within 48 hours after receiving a" for "Upon the", after "complaint" substituted "from" for "of", and near end of first sentence, before "study", inserted "arrange to".

Administrative Rules

Title 12, chapter 9, subchapter 8, ARM Damage hunts.

Case Notes

Discretion of Commission: State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) cannot be mandated to permit landowner to kill elk to protect his property since, although former statute compelled Commission to investigate property damage upon complaint, it conferred discretion to act, one exercise of which is taking no action. State ex rel. Sackman v. St. Fish & Game Comm'n, 151 M 45, 438 P2d 663 (1968).

Law Review Articles

The Right to Kill Wild Animals in Defense of Person or Property, Bender, 31 Mont. L. Rev. 235 (1970).

Collateral References

35 Am. Jur. 2d Fish and Game §37.

The Economic Problems of Agriculture in Montana, Interim Report, Montana Legislative Council (1987).

Wildlife Damage to Agriculture, Interim Report, Montana Legislative Council (1986).

87-1-226. Disposition of meat of animals damaging property.

Compiler's Comments

1995 Amendment: Chapter 546 in two places substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1985 Amendment: In (1) at end of first sentence, inserted "charitable institutions"; and inserted (2) relating to the sale of meat not accepted by state institutions, school lunch programs, Department of Social and Rehabilitation Services, or charitable institutions.

87-1-227. Hunting rights on adjoining federal wildlife preserve.

Collateral References

35 Am. Jur. 2d Fish and Game §32.

87-1-228. Agreement with Indians concerning hunting and fishing — Indian treaty of 1855.

Compiler's Comments

1993 Amendment: Chapter 266 in (1)(c) inserted second sentence providing: "These joint licensing and permit requirements supersede the general licensing and permit requirements set forth in this title"; and made minor changes in style.

1989 Amendment: Substituted language relating to cooperation in matters involving hunting and fishing on Flathead Reservation for former text that read: "(1) Whereas, by treaty of July 16, 1855, between the United States of America, represented by Isaac I. Stephens, governor and superintendent of Indian affairs for the territory of Washington, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend Oreille Indians, the said Indians were given the exclusive right to fish and hunt on the Flathead Indian reservation and the privilege of hunting in their usual hunting grounds on large areas of Montana; and whereas, nonmembers of such tribes have the right to hunt and fish on Indian lands by sufferance

of such tribes only; and whereas, it appears to be to the common advantage of the state and such Indian tribes that hunting and fishing regulations and privileges on other lands of the state and on Indian lands shall be uniform and that hunting and fishing on such Indian lands shall be in common with the public, now, therefore, the department may negotiate and conclude an agreement with the council of the Confederated Salish and Kootenai tribes of the Flathead Indian reservation for the purpose of:

(a) obtaining and establishing for the citizens of Montana, regularly licensed to hunt and fish in the state, the privileges of hunting and fishing on Indian lands on the Flathead Indian reservation;

(b) the conservation and protection of fish and game and fur-bearing animals on such Indian lands and on lands adjacent thereto;

(c) setting dates for the opening and closing of seasons for hunting and fishing on such lands for Indians and non-Indians alike, opening and closing of streams and land areas for hunting and fishing;

(d) doing what in its judgment is necessary by way of granting to such tribal Indians state permits to hunt and fish, to be issued without charge to such Indians;

(e) stocking streams and land areas of such Indian lands for the common benefit;

(f) policing such Indian lands for the protection of fish and game; and

(g) in general carrying out the purposes of this section.

(2) If any part of such agreement provides for the payment of money to the tribes, that part must first have the approval of the state legislature.

(3) Any agreement entered into under subsection (1) must also satisfy the requirements of Title 18, chapter 11."

1981 Amendment: Added (3) requiring any agreement entered under subsection (1) to also satisfy the requirements of Title 18, chapter 11.

Case Notes

Summary of Holdings in Litigation Over Hunting and Fishing Rights on Crow Indian Reservation: "The explicit holdings of the Supreme Court in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and of the 9th Circuit Court of Appeals in United States v. State of Montana, 604 F.2d 1162 (9th Cir. 1979), to the extent not reversed by the Supreme Court, are as follows:

1. The Crow Tribe can proscribe all hunting and fishing by non-members on those lands described in 18 U.S.C. §1165. Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254.

2. The Crow Tribe, within 18 U.S.C. §1165 lands, has power to regulate hunting and fishing by non-members of the tribe (whether Indian or non-Indian) subject to the following conditions:

(a) That the Crow Tribe lacks the power to impose criminal sanctions on non-Indians who violate its hunting and fishing regulations,

(b) That the exercise by the Crow Tribe of its power to regulate hunting and fishing by non-Indians must be within the constraints recognized by this court in Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976). Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254; United States v. Montana, 604 F.2d at 1165, 1170.

3. The title to the bed and banks of the Big Horn is in the State of Montana. 450 U.S. at 556-57, 101 S.Ct. at 1253-54.

4. The Crow Tribe has no power to regulate hunting and fishing by non-members on non-member owned fee patent land located within the exterior boundaries of the Crow Reservation. Id. at 557, 101 S.Ct. at 1254.

5. The State of Montana cannot regulate hunting and fishing by members of the Crow Tribe within 18 U.S.C. §1165 lands. 604 F.2d at 1172.

6. The State of Montana has the power to regulate hunting and fishing by non-members of the Crow Tribe within the exterior boundaries of the Crow Reservation subject to the following limitations:

(a) That such regulations of the State of Montana not regulate indirectly the hunting and fishing by members of the Crow Tribe on 18 U.S.C. §1165 lands.

(b) That such regulations of the State of Montana must have as their purpose the conservation and proper management of game and fish and not to discriminate against, nor to impede, authorized regulation by the Crow Tribe. Id. at 1166.

7. Such rights as the State of Montana has to regulate fishing on the Big Horn River by the Crows and all others are not limited by either (a) the treaties of 1851 and 1868 (except to such extent as these treaties might acknowledge pertinent aboriginal title rights of the Crow Tribe not heretofore asserted or recognized in this litigation) or (b) the inherent sovereignty of the Crow

Tribe. 604 F.2d at 1170-71." (Quoting from U.S. v. Mont., 686 F2d 766 (9th Cir. 1982), at pp. 768-769.)

Tribal Regulation of Flathead Lake Usage: Confederated Salish and Kootenai Tribes of the Flathead Reservation have authority to regulate federal common-law riparian rights of non-Indians who own reservation land bordering the south half of Flathead Lake. The Circuit Court held that the decision in Mont. v. U.S., 450 US 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981), regarding ownership and control of the Bighorn River, was not controlling. The decision in Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), was given deference under the principle of stare decisis. Rochester held that the United States holds title to the bed and banks of the south half of Flathead Lake in trust for the tribes. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982), followed in In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002).

Airborne Hunting — Non-Indian Hunters on Indian Reservations: The Airborne Hunting Act, 16 U.S.C. §742j-1, was declared unconstitutional in a challenge by non-Indian hunters caught hunting on an Indian reservation. The statute was found to be an unlawful preemption of reserve state regulatory authority. The federal government is not empowered to displace Montana's regulation in this area. U.S. v. Helsley, 463 F. Supp. 1111 (D.C. Mont. 1979), reversed in U.S. v. Helsley, 615 F2d 784 (9th Cir. 1979).

Indians Hunting on Open and Unclaimed Land: Members of the Confederated Salish and Kootenai Tribes have a right to hunt free from the regulation of Montana game laws on "open and unclaimed lands" by virtue of Article II of the Treaty of Hell Gate and this includes National Forest Service land. St. v. Stasso, 172 M 242, 563 P2d 562 (1977).

Jurisdiction — Hunting and Fishing: Flathead Tribe had jurisdiction to regulate fishing upon Crow Creek Reservoir, and violation of tribal ordinance requiring permit for fishing constituted federal offense. U.S. v. Zempel, 32 St. Rep. 1130 (D.C. Mont. 1975). (Annotator's Comment: This case was not published in F. Supp.)

Treaty of 1855: Indians were not subject to state fish and game laws on reservation property since under the Treaty of 1855 between the Indians of Flathead Reservation and the United States, the exclusive right to hunt and fish within the boundaries of the Reservation was reserved by the Indians. St. v. McClure, 127 M 534, 268 P2d 629 (1954).

Law Review Articles

Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit, Isham, 43 Mont. L. Rev. 247 (1982).

Federal and Interstate Conflicts in Montana Water Law: Support for a State Water Plan, Ladd, 42 Mont. L. Rev. 267 (1981).

Comments on Indian Water Rights, Morrison, 41 Mont. L. Rev. 39 (1980).

Fishing Rights on the Crow Reservation (United States v. Finch), Jones, 37 Mont. L. Rev. 276 (1976).

The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking, Anderson, 16 Pub. Land L. Rev. 27 (1995).

The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations, Burnett, 19 Suffolk Transnat'l L. Rev. 389 (1996).

Abrogating Treaty Rights Under the Dion Test: Upholding Traditional Notions That Indian Treaties Are the Supreme Law of the Land, Diekemper, 10 J. Envtl. L. & Litigation 473 (1995).

Indian Fishing Rights Activists in an Age of Controversy: The Case for an Individual Aboriginal Rights Defense, Chapin, 23 Envtl. L. 971 (1993).

Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest, Nye, 67 Wash. L. Rev. 175 (1992).

Indian Hunting and Fishing Rights, Miller, 21 Envtl. L. 1291 (1991).

Conflicting Values: The Religious Killing of Federally Protected Wildlife, Boradiansky, 30 Nat. Resources J. 709 (1990).

Tribes, Wildlife, and Compensation, Mirande, 4 Nat. Resources & Env't 10(5) (1990).

Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination, Allen, 16 B.C. Envtl. Aff. L. Rev. 857 (1989).

Collateral References

Fishing rights—permissibility of action against a class of defendants under Rule 23(b)(2) of Federal Rules of Civil Procedure. 85 ALR Fed. 263.

United States District Court jurisdiction of action brought by Indian tribe under 28 USCS 1362. 65 ALR Fed. 649.

Proof and extinguishment of aboriginal title to Indian lands. 41 ALR Fed. 425.

Select Committee on Indian Affairs: 1983-84 Activities, Report to the 49th Legislature, Montana Legislative Council (1984).

Indian Jurisdiction, State Bar of Montana (May 1983).

Report and Recommendations of the Select Committee on Indian Affairs, Montana Legislative Council (November 1980).

Committee on Indian Legal Jurisdiction, published by Montana Legislative Council (January 1979).

87-1-229. Entry on private land — policy.

Law Review Articles

Property Rights and the Endangered Species Act: A Renascent Assault on Land Use Regulation, Heyman, 25 Pac. L.J. 157 (1994).

Where the Wild Things Are: The Endangered Species Act and Private Property, Meltz, 24 Envtl. L. 369 (1994).

Collateral References

38 C.J.S. Game §§5, 60.

87-1-231. Tattooing of bears, wolves, tigers, mountain lions, or coyotes — when required — penalty.

Administrative Rules

Title 12, chapter 6, subchapter 19, ARM Reporting and tattooing of bears, wolves, tigers, mountain lions, and coyotes captured or held in captivity.

Collateral References

Owner's or keeper's liability for personal injury or death inflicted by wild animal. 21 ALR 3d 603.

87-1-232. Tattoo records.

Compiler's Comments

Statement of Intent: The statement of intent attached to HB 611 (Ch. 566, L. 1985) provided: "This bill requires a statement of intent because section 4 [apparently section 2, 87-1-232 intended] requires the department of fish, wildlife, and parks to adopt a rule establishing a fee to be charged for receiving reports of the capture of animals listed in the bill and maintaining a record of such reports. It is the intent of the legislature that such fee shall reflect the actual administrative cost incurred by the department in carrying out its responsibility under the bill."

Administrative Rules

ARM 12.6.1903 Tattooing.

ARM 12.6.1904 Fees.

87-1-233. Compensation for damage caused by animal held in captivity.

Collateral References

Landlord's liability to third person for injury resulting from attack off leased premises by dangerous or vicious animal kept by tenant. 89 ALR 4th 374.

Landlord's liability to third person for injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant. 87 ALR 4th 1004.

87-1-234. Exceptions to tattoo and compensation requirements.

Administrative Rules

ARM 12.6.1903 Tattooing.

87-1-241. Acquisition of wildlife habitat — rules.

Compiler's Comments

Preamble: The preamble attached to Ch. 241, L. 1993, provided: "WHEREAS, the lease or purchase of land suitable for wildlife habitat and the acquisition of conservation easements to protect and enhance habitat are necessary; and

WHEREAS, the program instituted by the 1987 Legislature to allocate revenue from increased hunting license fees to fund the protection and enhancement of wildlife habitat has proved to be an effective and valuable tool in maintaining the quality of wildlife habitat in Montana; and

WHEREAS, it is in the interests of the people and the wildlife of the State of Montana to continue the wildlife habitat acquisition program on a permanent basis."

Extension of Termination Date: Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

Extension of Termination Date: Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

1989 Amendment: Inserted (1)(e) requiring analysis of significant potential social and economic impacts. Amendment effective April 12, 1989.

1987 Statement of Intent: The statement of intent attached to Ch. 598, L. 1987, provided: "House Bill No. 526 [Ch. 598, L. 1987] requires a statement of intent because section 1 [87-1-241] requires the fish and game commission [now fish, wildlife, and parks commission] to adopt rules establishing its policy regarding wildlife habitat acquisitions provided for by this act.

It is the intent of this act to provide a means for the department of fish, wildlife, and parks to acquire an interest in land for the purpose of protecting and enhancing wildlife habitat. Such interest in land must be gained by the purchase of leases, conservation easements, or fee title. While it is preferable to acquire such interest through lease or conservation easement, the legislature acknowledges that the willing seller will determine the manner by which such interest is obtained and thus provides for all three alternatives.

It is intended that the rules will address policy considerations for making acquisitions generally, as well as establishing procedures for determining in each case of a proposed acquisition whether the interest will be acquired.

It is intended that the commission identify habitat needs by administrative region and compile these needs in a consolidated statewide habitat acquisition plan. The rules must ensure that acquired interests in habitat lands are reasonably distributed around the state in accordance with the statewide habitat acquisition plan and that emphasis is placed upon those areas where important habitat is seriously threatened.

It is intended that the department exercise good land management practices on all land acquired, and multiple uses of such land when not detrimental to its value as wildlife habitat are specifically authorized. The department shall identify management objectives for each proposed acquisition, analyze potential impacts to adjacent private land resulting from those objectives, and develop plans to address such impacts.

A public hearing must be held in the area of each proposed acquisition after the required analysis has been completed by the department, for the purpose of obtaining comment from the interested public. The analysis and related public concerns are to be presented to the fish and game commission [now fish, wildlife, and parks commission] prior to its final action on any acquisition of interest and also to the board of land commissioners if that body is required to make a decision on the proposal under 87-1-209.

The policy and an analysis for each proposal acted upon in a biennium must be presented to the members of both the house and senate fish and game committees when they next meet in regular session."

Preamble: The preamble to Ch. 598, L. 1987, read: "WHEREAS, the lease or purchase of land suitable for wildlife habitat and the acquisition of conservation easements to protect and enhance habitat are necessary; and

WHEREAS, allocating revenue from increases in hunting license fees is appropriate to fund the protection and enhancement of wildlife habitat."

Administrative Rules

Title 12, chapter 9, subchapter 5, ARM Wildlife habitat acquisition.

87-1-242. Funding for wildlife habitat.

Compiler's Comments

2001 Amendment: Chapter 7 in (1)(i) after "Class AAA" substituted "combination sports" for "sportsman's". Amendment effective October 1, 2001.

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

1995 Amendment: Chapter 459 in version effective March 1, 1996, in (2) inserted variable pricing exception; deleted former (4)(a) that read: "(a) Until March 1, 1991, 20% of the money allocated by this section must be credited to the account created by 87-1-601(5) for use in the

manner prescribed therein for the development and maintenance of real property used for wildlife habitat"; in (4), at beginning, deleted "On and after March 1, 1991"; adjusted subsection references; and made minor changes in style. Amendment effective March 1, 1996, and terminates October 1, 2001.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Preamble: The preamble attached to Ch. 241, L. 1993, provided: "WHEREAS, the lease or purchase of land suitable for wildlife habitat and the acquisition of conservation easements to protect and enhance habitat are necessary; and

WHEREAS, the program instituted by the 1987 Legislature to allocate revenue from increased hunting license fees to fund the protection and enhancement of wildlife habitat has proved to be an effective and valuable tool in maintaining the quality of wildlife habitat in Montana; and

WHEREAS, it is in the interests of the people and the wildlife of the State of Montana to continue the wildlife habitat acquisition program on a permanent basis."

Extension of Termination Date: Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

1991 Amendment: At beginning of (4)(a) inserted "Until March 1, 1991"; and inserted (4)(b) reallocating 20% of the money collected under this section for development and maintenance of real property used for wildlife habitat. Amendment effective April 2, 1991.

Preamble: The preamble attached to Ch. 319, L. 1991, provided: "WHEREAS, wildlife is a major historical, social, and economic resource of Montana; and

WHEREAS, it is in the best interests of the people, the wildlife, and the State of Montana to have a permanent wildlife habitat and conservation easement acquisition program; and

WHEREAS, sportsmen and others have demonstrated their commitment to wildlife by supporting, through license fees, the acquisition of wildlife habitat; and

WHEREAS, private landowners provide significant habitat for Montana's wildlife resources and have legitimate concerns regarding the operation and maintenance of neighboring lands acquired by the Fish and Game Commission [now Fish, Wildlife, and Parks Commission] for wildlife habitat; and

WHEREAS, it is in the best interests of the people, the wildlife, and the State of Montana that relations between landowners and sportsmen be cooperative and mutually respectful in nature and that the concerns of both landowners and sportsmen be taken into consideration in the formulation of a wildlife habitat and conservation easement acquisition program; and

WHEREAS, an independent and detailed study is needed to determine the character and application of the state's permanent wildlife habitat and conservation easement acquisition program."

Study Required — Report to 1993 Legislature: Section 2, Ch. 319, L. 1991, provided: "(1) The department of fish, wildlife, and parks shall commission an independent comprehensive study of wildlife habitat acquisition, improvement, and development, to be funded in an amount up to $150,000 from money allocated under 87-1-242(3).

(2) The study must analyze the department's current wildlife habitat acquisition, improvement, operations, maintenance, and development program and develop a comprehensive plan for a permanent wildlife habitat acquisition, improvement, operations, maintenance, development, and land management program, including the use of conservation easements, leases, and fee title acquisition. The study must also include a comprehensive and detailed accounting of expenditures authorized by 87-1-242(4). The department shall ensure participation by the public, including landowners and sportsmen, in the development of the comprehensive plan. The study and plan must be completed by December 1, 1992, and presented to the 1993 legislature."

Effective Date — Contingent Retroactive Applicability: Section 4, Ch. 319, L. 1991, provided: "[This act] is effective on passage and approval and, if passed and approved on or after March 1, 1991, applies retroactively, within the meaning of 1-2-109, to funds allocated under 87-1-242(4) on and after March 1, 1991." Approved April 2, 1991.

Extension of Termination Date: Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

Coordination Instruction: Section 11, Ch. 598, L. 1987, a coordination section, in (1)(a) substituted $77 for $100; in (1)(i) substituted $7 for $9; and inserted (1)(j) relating to the Class B-11 license.

Administrative Rules

Title 12, chapter 9, subchapter 5, ARM Wildlife habitat acquisition.

87-1-246. Funding of upland game bird enhancement program.

Compiler's Comments

2001 Amendment: Chapter 7 in (3) after "Class AAA" substituted "combination sports" for "sportsman's". Amendment effective October 1, 2001.

1989 Amendment: Near middle of introductory clause, before "populations", substituted "upland game bird" for "pheasant". Amendment effective March 22, 1989.

87-1-247. Authorized use of funds.

Compiler's Comments

2001 Amendment: Chapter 365 in (1) substituted "15%" for "10%"; in (1)(b) substituted "upland game bird" for "pheasant"; deleted former (2)(a) that read: "(a) to share, at $3 a bird, in the cost of releasing pheasants in suitable habitat, in such numbers and under conditions determined by the department under 87-1-248(1)"; in (2) substituted "for releasing upland game birds in suitable habitat and for the development, enhancement, and conservation of upland game bird habitat in Montana" for "to revert, at the end of each fiscal year, all unexpended funds to the habitat portion of the program outlined in 87-1-248(2) for the development, enhancement, and conservation of upland game bird habitat in Montana"; inserted (3)(a) concerning use of 15% of

funds for upland game bird releases; inserted (3)(b) requiring 25% of funds to be spent each year; and made minor changes in style. Amendment effective July 1, 2001.

1989 Amendment: In (1)(a) and (1)(d) substituted "upland game bird" for "pheasant"; in (2)(a), near beginning, substituted "at $3" for "up to $3" and at end inserted reference to 87-1-248(1); inserted (2)(b) providing for reversion of funds for habitat enhancement; and made minor change in form. Amendment effective March 22, 1989.

Administrative Rules

ARM 12.9.604 Payment by Department.

87-1-248. Qualification of upland game bird enhancement projects.

Compiler's Comments

2001 Amendment: Chapter 365 in (1) in three places substituted "upland game bird" for "pheasant" and near end after "necessary" substituted "to provide for establishment of a viable" for "by the department to provide for a viable permanent"; in (2) in two places substituted "or" for "and", at beginning substituted "A project eligible for funding under the habitat enhancement program" for "Habitat enhancement efforts", and after "cost-sharing" deleted "programs"; inserted (5) concerning requirements for projects, equipment, construction of certain improvements on cost-share basis, shelterbelts, and supplemental feeding programs; and made minor changes in style. Amendment effective July 1, 2001.

1989 Amendment: Inserted (2) stating qualifications for habitat enhancement efforts; and made minor changes in phraseology and form. Amendment effective March 22, 1989.

Administrative Rules

Title 12, chapter 9, subchapter 6, ARM Upland game bird release program.

ARM 12.9.605 Effect of rule violations.

Title 12, chapter 9, subchapter 7, ARM Upland game bird habitat enforcement program.

ARM 12.9.706 Effect of rule violations.

87-1-249. Rules.

Compiler's Comments

2001 Amendment: Chapter 365 inserted (2) specifying required content of rules; and made minor changes in style. Amendment effective July 1, 2001.

1989 Amendment: Near middle substituted "upland game bird" for "pheasant". Amendment effective March 22, 1989.

1987 Statement of Intent: The statement of intent attached to Ch. 636, L. 1987, provided: "This bill requires a statement of intent because section 4 [87-1-249] requires the department of fish, wildlife, and parks to adopt rules to administer the pheasant enhancement program established by the bill. It is intended that the rules:

(1) provide for eligibility criteria for project applications consistent with the general requirements established in the bill;

(2) be consistent with general requirements of the conservation reserve program under the 1985 Food Security Act and the agricultural conservation program, so that landowners participating in those federal programs may also be eligible to participate in this program;

(3) specifically indicate conditions under which pheasants will be released on project areas under the program, including habitat requirements, number to be released, health requirements, banding requirements, time for release, age of pheasants to be released, and other matters determined necessary by the department; and

(4) establish procedures for application for project funding and review and approval or denial of such applications."

Administrative Rules

Title 12, chapter 9, subchapter 6, ARM Upland game bird release program.

Title 12, chapter 9, subchapter 7, ARM Upland game bird habitat enforcement program.

87-1-250. Report.

Compiler's Comments

1989 Amendment: Near middle substituted "upland game bird" for "pheasant". Amendment effective March 22, 1989.

87-1-255. Purpose.

Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 601, L. 1989, provided: "It is the intent of the legislature that the department of fish, wildlife, and parks conduct the river restoration program in coordination, communication, and cooperation with local landowners, lessees, and conservation district officials so that projects conducted under the program will benefit the river resource and all parties involved."

Effective Date: Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

87-1-256. Definitions.

Compiler's Comments

Effective Date: Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

87-1-257. River restoration program.

Compiler's Comments

1993 Amendment: Chapter 175 in (2), after "habitat", inserted "including but not limited to the leasing of water rights under 85-2-436"; and made minor changes in style. Amendment effective July 1, 1993.

Effective Date: Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

Administrative Rules

Title 12, chapter 7, subchapter 11, ARM River restoration program.

87-1-258. River restoration account.

Compiler's Comments

Effective Date: Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

87-1-259. Funding for river restoration account.

Compiler's Comments

Code Commissioner Instruction: Pursuant to sec. 5, Ch. 263, L. 1995, in (3) substituted "combination sports license" for "sportsman's license". Amendment effective March 1, 1996.

Effective Date: Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

87-1-264. Expenditure of program funds on weed control.

Compiler's Comments

Effective Date: Section 28, Ch. 407, L. 2001, provided that this section is effective July 1, 2001.

Termination: Section 29, Ch. 407, L. 2001, provided that this section terminates March 1, 2006.

87-1-265. Hunter management and hunting access enhancement programs created — private landowner assistance to promote public hunting access — rules.

Compiler's Comments

2001 Amendment: Chapter 216 in (3) in first sentence substituted "this section" for "subsection (1)" and inserted second sentence concerning negotiation of access on cooperative basis with voluntary participation. Amendment effective March 1, 2002, and terminates March 1, 2006.

Preamble: The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Termination: Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

87-1-266. Hunter management program — benefits for providing hunting access — nonresident landowner limitation — restriction on landowner liability.

Compiler's Comments

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

Code Commissioner Instruction: Pursuant to sec. 5, Ch. 263, L. 1995, in (2) substituted "combination sports license" for "sportsman's license". Amendment effective March 1, 1996.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Termination: Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

Collateral References

38 C.J.S. Game §§5, 59.

87-1-267. Hunting access enhancement program — benefits for providing hunting access — cooperative agreement — factors for determining benefits earned — restriction on landowner liability.

Compiler's Comments

2001 Amendment: Chapter 216 in (7) increased amount from $8,000 to $12,000. Amendment effective March 1, 2002, and terminates March 1, 2006.

Preamble: The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Termination: Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

Collateral References

38 C.J.S. Game §§5, 59.

87-1-268. Variable pricing of outfitter-sponsored Class B-10 and B-11 licenses.

Compiler's Comments

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Effective Date: Section 17(1), Ch. 459, L. 1995, provided that this section is effective March 1, 1996.

Termination: Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

87-1-269. Report required — review committee.

Compiler's Comments

2001 Amendment: Chapter 196 in (1) in first sentence after "hunters" inserted "anglers" and after "hunting access enhancement program" inserted "the fishing access enhancement program"; in (2)(a) substituted reference to 58th legislature for reference to 57th legislature; inserted (2)(b) concerning report regarding success of fishing access enhancement program; and in two places in (3) inserted "and the fishing access enhancement program". Amendment effective March 1, 2002, and terminates March 1, 2006.

1999 Amendment: Chapter 544 in first sentence in (1) after "interested" substituted "in issues related to hunters, landowners, and outfitters, including but not limited to the hunting access enhancement program, landowner-hunter relations, outfitting industry issues" for "in the hunter management program, the hunting access enhancement program" and after "wildlife" deleted "to review the success and progress of the hunter management program and the hunting access enhancement program", in second sentence substituted "broad representation" for "equal representation" and after "sportspersons" deleted "and be broadly representative of the various geographical areas of the state", and in third sentence substituted "assist" for "facilitate the efforts of"; in first sentence in (2) after "governor" inserted "and to the 57th legislature", after "success" substituted "of various elements of" for "of the hunter management program and", and after "program" inserted language regarding reporting of annual participation, number of enrolled acres, harvest success, qualified applicants, and accounting for "including a report of annual landowner participation and the number of acres annually enrolled in the programs", in

second sentence after "improvement" inserted "needed to achieve the objectives", and deleted former third sentence that read: "If the review committee determines that expanding funding for programs for hunter management and hunting access enhancement is desirable, consideration must be given to providing the expanded funding through increases in resident hunting license fees"; inserted (3) authorizing director to appoint additional advisory committees; and made minor changes in style. Amendment effective April 29, 1999.

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Effective Date: Section 17(1), Ch. 459, L. 1995, provided that this section is effective March 1, 1996.

Termination: Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

87-1-270. Allocation of license fee to hunting access enhancement program.

Compiler's Comments

2001 Amendment: Chapter 216 inserted (2) concerning use of resident and nonresident hunting access enhancement fee; and made minor changes in style. Amendment effective March 1, 2002, and terminates March 1, 2006.

Preamble: The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

Effective Date: Section 9(2), Ch. 544, L. 1999, provided that this section is effective March 1, 2000.

Termination: Section 8, Ch. 544, L. 1999, provided that this section terminates March 1, 2006.

87-1-272. Future fisheries improvement program — funding priority — reports required.

Compiler's Comments

Extension of Termination Date: Section 6, Ch. 529, L. 1999, amended sec. 5, Ch. 463, L. 1995, by extending the termination date imposed by Ch. 463 to July 1, 2009. Effective July 1, 1999.

1997 Amendment: Chapter 440 in (5)(a) substituted "report on a state electronic access system" for "report on the state electronic bulletin board".

Preamble: The preamble attached to Ch. 463, L. 1995, provided: "WHEREAS, the rivers and streams of Montana hold one of the state's most important and economically valuable resources—wild fish; and

WHEREAS, the loss of historic spawning areas and other crucial habitats of native fish species is one of the greatest threats to the natural reproduction and propagation ofthe fish resource; and

WHEREAS, the state is presently in a position to address the key issue of these aquatic habitats in order to promote the future viability of Montana's wild fisheries before the continued loss of spawning areas and other habitats diminishes or destroys the resource; and

WHEREAS, a wild fisheries enhancement program will immensely benefit landowner-sportsperson relations; and

WHEREAS, a wild fisheries enhancement program will benefit Montana's economy; and

WHEREAS, it is fiscally sound state policy to enhance natural habitats and spawning areas to improve fishing opportunities now and preserve fishing opportunities for future generations; and

WHEREAS, voluntary cooperation between landowners, interested citizens, public and private organizations, and the Department of Fish, Wildlife, and Parks will help accomplish the purposes of the future fisheries improvement program."

Termination: Section 5, Ch. 463, L. 1995, provided: "(1) [Sections 1 and 2] [87-1-272 and 87-1-273] terminate July 1, 2005.

(2) [Section 3] [not codified] terminates July 1, 1997."

Effective Date: Section 6(2), Ch. 463, L. 1995, provided that this section is effective April 14, 1995.

Administrative Rules

Title 12, chapter 7, subchapter 12, ARM Future fisheries program.

Toward More Cooperative Fisheries Management: Updating State and Federal Jurisdictional Issues (The Magnuson Fishery Conservation and Management Act: Retrospect and Prospect), Bittleman, 9 Tulane Envtl. L. J. 349 (1996).

Should the Courts Run the River? (Columbia River)(Colloquium: Who Runs the River?) Wright, 25 Envtl. L 403 (1995).

Law Review Articles

Toward More Cooperative Fisheries Management: Updating State and Federal Jurisdictional Issues (The Magnuson Fishery Conservation and Management Act: Retrospect and Prospect), Bittleman, 9 Tulane Envtl. L.J. 349 (1996).

Should the Courts Run the River? (Columbia River) (Colloquim: Who Runs the River?), Wright, 25 Envtl. L. 403 (1995).

87-1-273. Future fisheries review panel — purpose — appointment and duties.

Compiler's Comments

1999 Amendment: Chapter 529 in (1) in first sentence before "appoint" deleted "by August 1, 1995" and near beginning of second sentence increased members from 10 to 13; in (1)(h) substituted "one member with expertise in silviculture" for "one member who is a representative of the governor's office"; inserted (1)(j) providing for a member with mining reclamation expertise; inserted (1)(k) providing for a member with fisheries expertise; inserted (1)(l) providing for an ex officio member from the department of transportation; and made minor changes in style. Amendment effective July 1, 1999, and terminates July 1, 2009.

Extension of Termination Date: Section 6, Ch. 529, L. 1999, amended sec. 5, Ch. 463, L. 1995, by extending the termination date imposed by Ch. 463 to July 1, 2009. Effective July 1, 1999.

Preamble: The preamble attached to Ch. 463, L. 1995, provided: "WHEREAS, the rivers and streams of Montana hold one of the state's most important and economically valuable resources—wild fish; and

WHEREAS, the loss of historic spawning areas and other crucial habitats of native fish species is one of the greatest threats to the natural reproduction and propagation ofthe fish resource; and

WHEREAS, the state is presently in a position to address the key issue of these aquatic habitats in order to promote the future viability of Montana's wild fisheries before the continued loss of spawning areas and other habitats diminishes or destroys the resource; and

WHEREAS, a wild fisheries enhancement program will immensely benefit landowner-sportsperson relations; and

WHEREAS, a wild fisheries enhancement program will benefit Montana's economy; and

WHEREAS, it is fiscally sound state policy to enhance natural habitats and spawning areas to improve fishing opportunities now and preserve fishing opportunities for future generations; and

WHEREAS, voluntary cooperation between landowners, interested citizens, public and private organizations, and the Department of Fish, Wildlife, and Parks will help accomplish the purposes of the future fisheries improvement program."

Termination: Section 5, Ch. 463, L. 1995, provided: "(1) [Sections 1 and 2] [87-1-272 and 87-1-273] terminate July 1, 2005.

(2) [Section 3] [not codified] terminates July 1, 1997."

Effective Date: Section 6(2), Ch. 463, L. 1995, provided that this section is effective April 14, 1995.

Administrative Rules

ARM 12.7.1203 Project Ranking and Approval.

87-1-276. Purpose.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 53, L. 2001, repealed sec. 9, Ch. 475, L. 1999, which terminated this section July 1, 2004. Effective July 1, 2001.

Severability: Section 6, Ch. 475, L. 1999, was a severability clause.

Effective Date: Section 8, Ch. 475, L. 1999, provided: "[This act] is effective July 1, 1999."

Termination: Section 9, Ch. 475, L. 1999, provided: "[This act] terminates July 1, 2004."

87-1-277. Shooting range development grants.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 53, L. 2001, repealed sec. 9, Ch. 475, L. 1999, which terminated this section July 1, 2004. Effective July 1, 2001.

Severability: Section 6, Ch. 475, L. 1999, was a severability clause.

Effective Date: Section 8, Ch. 475, L. 1999, provided: "[This act] is effective July 1, 1999."

Termination: Section 9, Ch. 475, L. 1999, provided: "[This act] terminates July 1, 2004."

87-1-278. Grant criteria.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 53, L. 2001, repealed sec. 9, Ch. 475, L. 1999, which terminated this section July 1, 2004. Effective July 1, 2001.

Severability: Section 6, Ch. 475, L. 1999, was a severability clause.

Effective Date: Section 8, Ch. 475, L. 1999, provided: "[This act] is effective July 1, 1999."

Termination: Section 9, Ch. 475, L. 1999, provided: "[This act] terminates July 1, 2004."

87-1-279. Program rules.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 53, L. 2001, repealed sec. 9, Ch. 475, L. 1999, which terminated this section July 1, 2004. Effective July 1, 2001.

Severability: Section 6, Ch. 475, L. 1999, was a severability clause.

Effective Date: Section 8, Ch. 475, L. 1999, provided: "[This act] is effective July 1, 1999."

Termination: Section 9, Ch. 475, L. 1999, provided: "[This act] terminates July 1, 2004."

87-1-283. Bull trout and cutthroat trout enhancement program.

Compiler's Comments

Preamble: The preamble attached to Ch. 529, L. 1999, provided: "WHEREAS, the bull trout was federally listed as a threatened species under the Endangered Species Act of 1973 in May of 1998; and

WHEREAS, the cutthroat trout is listed as a species of special concern and is a candidate for listing under the Endangered Species Act; and

WHEREAS, the 56th Legislature recognizes the economic and social impacts that may accrue to businesses and individuals in western Montana as federal land-use restrictions to protect and recover the bull trout and cutthroat trout are imposed; and

WHEREAS, significant funding opportunities exist to provide revenue to address land-use impacts to bull trout and cutthroat trout through cooperative efforts with landowners; and

WHEREAS, the 56th Legislature finds the mechanism provided in the future fisheries improvement program to be a highly successful method for on-the-land restoration of river and stream habitat referred to by the United States Secretary of the Interior, Bruce Babbitt, as "a model for other states"."

Effective Date: Section 8(1), Ch. 529, L. 1999, provided that this section is effective July 1, 1999.

Termination: Section 9, Ch. 529, L. 1999, provided that this section terminates July 1, 2009.

87-1-285. Fishing access enhancement program created — private landowner assistance to promote public fishing access — rules.

Compiler's Comments

Effective Date: Section 5, Ch. 196, L. 2001, provided: "[This act] is effective March 1, 2002."

Termination: Section 6, Ch. 196, L. 2001, provided: "[This act] terminates March 1, 2006."

87-1-286. Fishing access enhancement program — benefits for providing fishing access — cooperative agreement — factors for determining benefits earned — restriction on landowner liability.

Compiler's Comments

Effective Date: Section 5, Ch. 196, L. 2001, provided: "[This act] is effective March 1, 2002."

Termination: Section 6, Ch. 196, L. 2001, provided: "[This act] terminates March 1, 2006."

Part 3
Fish, Wildlife, and Parks Commission

87-1-301. Powers of commission.

Compiler's Comments

2001 Amendment: Chapter 575 inserted (6) authorizing commission to adopt rules regarding hunting of mountain lions; and made minor changes in style. Amendment effective May 5, 2001, and terminates April 30, 2004.

Preamble: The preamble attached to Ch. 575, L. 2001, provided: "WHEREAS, the Legislature finds that there are unique and special circumstances associated with lion hunting in Region 1 that have created intense hunting pressure, competition, and biological management problems that are unacceptable to the general public."

Termination Provision Repealed: Section 1, Ch. 21, L. 2001, repealed sec. 6, Ch. 355, L. 1997, which terminated the 1997 amendments to this section October 1, 2001. Effective February 19, 2001.

1999 Amendments — Composite Section: Chapter 373 in (3) at end inserted "and persons with disabilities"; and made minor changes in style. Amendment effective April 20, 1999.

Chapter 533 inserted (5) ((4) in version effective October 1, 2001) concerning rules establishing preference systems for distributing hunting licenses and permits. Amendment effective October 1, 2000.

1997 Amendment: Chapter 355 inserted (4) allowing the Commission to adopt rules regarding separation and sale of deer licenses from nonresident big game combination licenses. Amendment effective April 22, 1997, and terminates October 1, 2001.

1997 Statement of Intent: The statement of intent attached to Ch. 355, L. 1997, provided: "This bill establishes the authority of the fish, wildlife, and parks commission to modify, by rule, the structure of nonresident elk and deer licenses within the general framework established by law as needed for the effective management of big game animals. It is the intent of the legislature that in its initial rulemaking process, the commission utilize an advisory committee, including representatives of hunting and fishing organizations, outfitters, and landowners, to make recommendations regarding the structure of nonresident hunting licenses as authorized by this bill. It is also the intent of the legislature that commission rules not authorize more nonresident elk and deer hunters than are prescribed by current law."

Termination: Section 6, Ch. 355, L. 1997, provided: "[This act] terminates October 1, 2001."

1995 Amendment: Chapter 267 inserted (3) authorizing Commission to adopt rules.

Preamble: The preamble attached to Ch. 267, L. 1995, provided: "WHEREAS, Montana has a long and cherished hunting tradition; and

WHEREAS, as with other traditions Montana's hunting heritage will persevere through its passage from one generation to the next; and

WHEREAS, it is fitting that the Fish, Wildlife, and Parks Commission, as the regulating body for state hunting regulations, be granted the specific authority to encourage this hunting heritage for Montana's youth through the establishment of special youth licenses or permits, seasons, conditions, or programs."

1991 Amendment: Inserted (2) giving Commission authority to adopt rules regarding use of archery equipment for hunting and fishing.

1991 Statement of Intent: The statement of intent attached to Ch. 22, L. 1991, provided: "A statement of intent is required for this bill because 87-1-301(2) grants to the fish and game commission [now fish, wildlife, and parks commission] the authority to adopt rules regarding the use and type of archery equipment that may be employed for hunting and fishing purposes. It is intended that this authority be permissive rather than mandatory in order to allow but not require the commission to address any need for restrictions or limitations on archery equipment, with adequate opportunity for public hearing and comment. The legislature is aware that this rulemaking power is expressed in broad and general language; however, this is necessary because bow hunting technology is an emerging field for which detailed and precise standards have not yet been fully developed. The legislature recognizes that the commission has the power to determine the extent and nature of hunting and fishing privileges and that the commission's expertise makes it the proper forum for addressing the need for archery equipment regulation."

Seasonal Rules Adopted Annually: Section 2-4-102 excludes from the Montana Administrative Procedure Act seasonal rules adopted annually relating to hunting, fishing, and trapping if the rules are published in accordance with statutory requirements. Section 87-1-202 sets out those requirements. Although the rules do not appear in the Administrative Register of Montana, they are published and copies are available in state and regional offices of the Department.

Administrative Rules

Title 12, chapter 2, subchapter 4, ARM Rules implementing the Montana Environmental Policy Act.

ARM 12.3.109 Special licenses and permits — purpose.

ARM 12.3.110 Special licenses and permits — definitions.

ARM 12.3.402 License refunds.

ARM 12.3.404 Animals unfit for human consumption.

Title 12, chapter 4, subchapter 2, ARM Management of block management areas.

Title 12, chapter 5, subchapter 1, ARM Resource statements.

Title 12, chapter 6, subchapter 7, ARM Motorboat and vessel equipment.

Title 12, chapter 7, subchapter 1, ARM Commercial fishing permit.

Title 12, chapter 7, subchapter 2, ARM Commercial minnow seining license.

ARM 12.7.301 Raising fish in public waters.

Title 12, chapter 7, subchapter 6, ARM Fish planting policies.

Title 12, chapter 8, subchapter 6, ARM Parks development.

Title 12, chapter 8, subchapter 7, ARM Primitive fishing access sites.

Title 12, chapter 9, subchapter 1, ARM Wildlife management policies.
Title 12, chapter 9, subchapter 2, ARM Game preserves.
Title 12, chapter 9, subchapter 3, ARM Bird permits.
ARM 12.9.801 Damage hunts.
ARM 12.9.802 Management seasons.
ARM 12.9.805 Supplemental game damage license.
Title 12, chapter 11, subchapter 1, ARM Recreational water use — western fishing district.
ARM 12.11.331 Use of snowmobiles on open, public water.

Case Notes

Summary of Holdings in Litigation Over Hunting and Fishing Rights on Crow Indian Reservation: "The explicit holdings of the Supreme Court in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and of the 9th Circuit Court of Appeals in United States v. State of Montana, 604 F.2d 1162 (9th Cir. 1979), to the extent not reversed by the Supreme Court, are as follows:

1. The Crow Tribe can proscribe all hunting and fishing by non-members on those lands described in 18 U.S.C. §1165. Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254.

2. The Crow Tribe, within 18 U.S.C. §1165 lands, has power to regulate hunting and fishing by non-members of the tribe (whether Indian or non-Indian) subject to the following conditions:

(a) That the Crow Tribe lacks the power to impose criminal sanctions on non-Indians who violate its hunting and fishing regulations,

(b) That the exercise by the Crow Tribe of its power to regulate hunting and fishing by non-Indians must be within the constraints recognized by this court in Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976). Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254; United States v. Montana, 604 F.2d at 1165, 1170.

3. The title to the bed and banks of the Big Horn is in the State of Montana. 450 U.S. at 556-57, 101 S.Ct. at 1253-54.

4. The Crow Tribe has no power to regulate hunting and fishing by non-members on non-member owned fee patent land located within the exterior boundaries of the Crow Reservation. Id. at 557, 101 S.Ct. at 1254.

5. The State of Montana cannot regulate hunting and fishing by members of the Crow Tribe within 18 U.S.C. §1165 lands. 604 F.2d at 1172.

6. The State of Montana has the power to regulate hunting and fishing by non-members of the Crow Tribe within the exterior boundaries of the Crow Reservation subject to the following limitations:

(a) That such regulations of the State of Montana not regulate indirectly the hunting and fishing by members of the Crow Tribe on 18 U.S.C. §1165 lands.

(b) That such regulations of the State of Montana must have as their purpose the conservation and proper management of game and fish and not to discriminate against, nor to impede, authorized regulation by the Crow Tribe. Id. at 1166.

7. Such rights as the State of Montana has to regulate fishing on the Big Horn River by the Crows and all others are not limited by either (a) the treaties of 1851 and 1868 (except to such extent as these treaties might acknowledge pertinent aboriginal title rights of the Crow Tribe not heretofore asserted or recognized in this litigation) or (b) the inherent sovereignty of the Crow Tribe. 604 F.2d at 1170-71." (Quoting from U.S. v. Mont., 686 F2d 766 (9th Cir. 1982), at pp. 768-769.)

Tribal Regulation of Flathead Lake Usage: Confederated Salish and Kootenai Tribes of the Flathead Reservation have authority to regulate federal common-law riparian rights of non-Indians who own reservation land bordering the south half of Flathead Lake. The Circuit Court held that the decision in Mont. v. U.S., 450 US 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981), regarding ownership and control of the Bighorn River, was not controlling. The decision in Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), was given deference under the principle of stare decisis. Rochester held that the United States holds title to the bed and banks of the south half of Flathead Lake in trust for the tribes. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982), followed in In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002).

Law Review Articles

Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit, Isham, 43 Mont. L. Rev. 247 (1982).

Federal Dominance as to Dams and Fisheries: Federal Power Commission v. Oregon, 349 US 435, 99 L Ed 1215, 75 S Ct 832 (1955), evidenced that the federal government can disregard the wishes of a state concerning its fisheries wherever it believes that the interests of the nation are best served by permitting a dam to be built, and this applies even where the waters are nonnavigable, provided only that the powersite is on reserved lands of the United States. Jasperson, 18 Mont. L. Rev. 118 (1956).

Collateral References

Fish *key* 11; Game *key* 6.
36A C.J.S. Fish §37; 38 C.J.S. Game §50.
35 Am. Jur. 2d Fish and Game §§29, 31, 38 through 54.
Power of game or fish commission to open or close season. 34 ALR 832.

87-1-303. Rules for use of lands and waters.

Compiler's Comments

1999 Amendment: Chapter 569 in (2) in second sentence after "public safety" inserted "public welfare", after "property" inserted "and public resources", and after "motor-driven boats" inserted "the operation of personal watercraft, the resolution of conflicts between users of motorized and nonmotorized boats"; and made minor changes in style. Amendment effective June 1, 1999.

Preamble: The preamble attached to Ch. 569, L. 1999, provided: "WHEREAS, Montana waters will experience a great increase in traffic by recreationists celebrating the bicentennial of the Lewis and Clark expedition and retracing the routes of the famous explorers; and

WHEREAS, the increased recreational use of Montana waters by every manner of recreationist, motorized as well as nonmotorized users, has led to a corresponding increase in conflicts between river users; and

WHEREAS, in other states, conflicts between recreational users of waters have escalated to the point of violence and even deaths of recreationists; and

WHEREAS, the use of personal watercraft has grown immensely in Montana, and the irresponsible use of personal watercraft conflicts with the ability of lakeshore cabin owners and homeowners to enjoy their pursuit of happiness through peaceful relaxation; and

WHEREAS, it is in the interests of public health, safety, welfare, and protection of property that measures be taken in Montana to reduce potential conflicts between recreational users of Montana waters before this state experiences similar problems."

1995 Amendments: Chapter 418 near end of (2) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 near end of (2) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Seasonal Rules Adopted Annually: Section 2-4-102 excludes from the Montana Administrative Procedure Act seasonal rules adopted annually relating to hunting, fishing, and trapping if the rules are published in accordance with statutory requirements. Section 87-1-202 sets out those requirements. Although the rules do not appear in the Administrative Register of Montana, they are published and copies are available in state and regional offices of the Department.

Administrative Rules

Title 12, chapter 4, subchapter 2, ARM Management of block management areas.
Title 12, chapter 6, subchapter 1, ARM Ice fishing shelters.
ARM 12.6.601 Snowmobile closures.
Title 12, chapter 6, subchapter 8, ARM Boating regulations.
Title 12, chapter 6, subchapter 9, ARM Water safety regulations.
Title 12, chapter 8, subchapter 2, ARM Public use regulations.
ARM 12.8.301 Montana state golden years pass.
Title 12, chapter 11, subchapter 1, ARM Recreational water use — western fishing district.
Title 12, chapter 11, subchapter 3, ARM Boating regulations.
ARM 12.11.331 Use of snowmobiles on open, public water.

Law Review Articles

Public Use of the Banks and Beds of Montana Streams, Stone, 52 Mont. L. Rev. 107 (1991).

The Background on Recreational Use of Montana Waters, Stone, 32 Mont. L. Rev. 1 (1971).

Stream Access in Montana After *Galt v. State*, Hunter, 8 Pub. Land L. Rev. 177 (1987).

Wildlife Protection on the Public Lands, Brennan & Swanson, 1992 Min. L. Series: Rocky Mtn. Min. L. Found. 7-1 (1992).

Collateral References

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned. 6 ALR 4th 1030.

Validity of prohibition or regulation of bathing, swimming, boating, fishing, or the like, to protect public water supply. 56 ALR 2d 790.

Recreational Use of Montana's Waterways, Report to the 49th Legislature, Joint Interim Subcommittee No. 2, Montana Legislative Council (1984).

Water Resources Oversight Committee, Report to the Legislature, Montana Legislative Council (1983).

Public Access to Public Lands, Interim Study by the Subcommittee on Agricultural Lands, published by the Montana Legislative Council (December 1976).

87-1-304. Fixing of seasons and bag and possession limits.

Compiler's Comments

2001 Amendment: Chapter 3 in (4) at beginning of third sentence substituted "The commission" for "It later"; in (6) in two places increased the age that juveniles may be allowed to fish in certain designated waters from under 13 years to under 15 years; and made minor changes in style. Amendment effective February 7, 2001.

1993 Amendment: Chapter 589 in (1) substituted second sentence concerning restricted areas, species, and types of hunting for former second and third sentences that read: "It may declare areas open to deer or elk or both deer and elk hunting where only bow and arrow or shotguns or both may be used to hunt or kill deer or elk. In areas where deer or elk or both deer and elk hunting is open to the use of shotguns, the commission shall authorize the use of muzzleloaders with restrictions as necessary for safety"; and made minor changes in style. Amendment effective April 29, 1993.

1987 Amendment: At beginning of second sentence of (1), after "deer", substituted "or elk or both deer and elk hunting where only bow and arrow or shotguns or both" for "hunting where shotguns only", at end of sentence, after "deer", inserted "or elk", at beginning of third sentence, after "deer", inserted "or elk or both deer and elk", after "shotguns" deleted "only", after "commission" changed "may" to "shall", and at end of sentence, after "muzzleloaders", substituted "with restrictions as necessary for safety" for "(rifled or smoothbore)".

1985 Amendment: In (1) inserted third sentence concerning muzzleloaders.

1983 Amendment: Inserted (5) relating to the opening or closing of a special season upon 12 hours notice.

Administrative Rules

Title 12, chapter 3, subchapter 1, ARM Special licensing.

ARM 12.3.111 License/permit prerequisites.

ARM 12.3.115 Deer B license/deer permits.

ARM 12.3.116 Moose, sheep, goat licenses.

ARM 12.3.122 Excess licenses/permits.

ARM 12.6.401 Time zones.

Case Notes

Drawing for Licenses: The literal language of section 26-104(15), R.C.M. 1947 (repealed in 1973), did not require that the application process to receive a permit to hunt elk be fulfilled by one personally present at the drawing; rather it merely required that the drawing be held at a particular town. State ex rel. Jones v. District Court, 158 M 67, 488 P2d 1141 (1971).

Seasons on Indian Reservation: Conviction of non-Indian for killing two bull elk on Crow Indian Reservation during season closed by state fish and game laws was not in conflict with act of Congress providing penalty for trespass to possessory rights of reservation Indians or in conflict with The Enabling Act providing that Indian lands shall remain under the absolute jurisdiction and control of Congress of United States. State ex rel. Nepstad v. Danielson, 149 M 438, 427 P2d 689 (1967), followed in U.S. v. Sanford, 547 F2d 1089 (9th Cir. 1976).

Commission Empowered to Lengthen Hunting Season: A temporary order restraining the State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) from putting into effect its order lengthening the hunting season on elk in a certain locality, thus modifying the law on fixing of seasons, was improper since under section 26-104, R.C.M. 1947, declaring prior to amendment that the statutes governing "such subjects" should continue in force and effect except as altered or modified by the rules and regulations of the Commission, the Legislature so empowered the Commission, amounting to modification of existing statutes. State ex rel. Fish & Game Comm'n v. District Court, 107 M 289, 84 P2d 798 (1938).

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Collateral References

35 Am. Jur. 2d Fish and Game §§46, 48.

Applicability to domesticated or captive game, of game laws relating to closed season and the like. 74 ALR 2d 974.

Wildlife Damage to Agriculture, Interim Report, Montana Legislative Council (1986).

87-1-305. Fish and game refuges.

Administrative Rules

Title 12, chapter 9, subchapter 2, ARM Game preserves.

87-1-306. Designation of certain river stretches as no-wake waters — personal watercraft use prohibited.

Compiler's Comments

Preamble: The preamble attached to Ch. 569, L. 1999, provided: "WHEREAS, Montana waters will experience a great increase in traffic by recreationists celebrating the bicentennial of the Lewis and Clark expedition and retracing the routes of the famous explorers; and

WHEREAS, the increased recreational use of Montana waters by every manner of recreationist, motorized as well as nonmotorized users, has led to a corresponding increase in conflicts between river users; and

WHEREAS, in other states, conflicts between recreational users of waters have escalated to the point of violence and even deaths of recreationists; and

WHEREAS, the use of personal watercraft has grown immensely in Montana, and the irresponsible use of personal watercraft conflicts with the ability of lakeshore cabin owners and homeowners to enjoy their pursuit of happiness through peaceful relaxation; and

WHEREAS, it is in the interests of public health, safety, welfare, and protection of property that measures be taken in Montana to reduce potential conflicts between recreational users of Montana waters before this state experiences similar problems."

Effective Date: Section 6, Ch. 569, L. 1999, provided: "[This act] is effective June 1, 1999."

Part 4
Director of Fish, Wildlife, and Parks

87-1-401. Director to carry out policies.

Administrative Rules

Title 12, chapter 2, subchapter 4, ARM Rules implementing the Montana Environmental Policy Act.

87-1-403. Regulation of employees by director.

Case Notes

District Court Bound by Factual Findings of Board of Personnel Appeals — Wrongful Discharge — Reinstatement — No Backpay: An employee of the state was discharged from employment because he used a state-owned vehicle for private purposes. He appealed the decision of the Department of Fish, Wildlife, and Parks, and the Board of Personnel Appeals ruled that though his discharge was properly justified, the Department had never adopted a policy regarding such use of vehicles and had not punished similar usage; thus, the discharge was wrongful and he was entitled to reinstatement. He was offered a substantially equivalent position but appealed the

Board's denial of backpay and benefits and, upon losing the District Court appeal, pursued the issues before the Supreme Court. The court upheld the District Court on all issues, observing that both courts were bound by factual findings of the Board and stipulations by the parties. The District Court was not obligated to hold a hearing on the facts. Hutchin v. St., 213 M 15, 688 P2d 1257, 41 St. Rep. 1916 (1984).

Removal of Employee:

Under this section's former language, the State Fish and Game Director has the power of summary removal without prior charges, notice, or hearing. However, that power is subject to review and final action by the Fish and Game Commission (now Fish, Wildlife, and Parks Commission) if the employee demanded a hearing. State ex rel. Ford v. St. Fish & Game Comm'n, 148 M 151, 418 P2d 300 (1966), distinguished in Steer v. Missoula, 169 M 389, 547 P2d 843 (1976).

Under former language, this section did not require that the Director hold a hearing before discharging an employee for cause but merely required that the employee have an opportunity for hearing before the Commission. State ex rel. Hollibaugh v. St. Fish & Game Comm'n, 139 M 384, 365 P2d 942 (1961).

Collateral References

Sheriffs and Constables *key* 78.

80 C.J.S. Sheriffs and Constables §35, et seq.

87-1-405. Publication of laws.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Part 5
Fish and Game Wardens

87-1-501. Selection and oath of wardens.

Case Notes

Authority of Game Warden to Approach Boat to Promote Safety — Particularized Suspicion Unnecessary: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden looked into the live well of Boyer's boat and in the process found unlawfully killed game fish. Boyer contended that the warden had initiated an investigatory stop without the requisite particularized suspicion of wrongdoing, as required in 46-5-401, and that the evidence was therefore unlawfully seized. The Supreme Court disagreed. The warden was acting within his express authority to enforce outdoor recreation laws, including the safety of persons and property connected with the use of watercraft, and thus the warden's approach of Boyer's boat was lawful. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

87-1-502. Qualifications, powers, and duties.

Compiler's Comments

1991 Amendments: Chapter 609 in (3), near middle after "fish", inserted "and that those persons who make recreational use of state lands, as defined in 77-1-101, for hunting and fishing"; and made minor change in style. Amendment effective March 1, 1992.

Chapter 662 inserted (7) providing that Department is a criminal justice agency and its authorized officers are peace officers with enumerated powers; and made minor changes in style. Amendment effective April 26, 1991.

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

Redundant Language Not Codified: The following language from section 26-107, R.C.M. 1947, was not codified in the MCA because it is redundant with 87-1-502: "State fish and game wardens employed and appointed by virtue of this act shall be persons who have an interest in protection, conservation and propagation of wildlife, game and fur-bearing animals, fish and game birds; they shall devote all of their time to their official duties." This language is still valid law. Citation may be made to sec. 1, Ch. 78, L. 1955, as amended by sec. 1, Ch. 77, L. 1957. See 1-2-208.

Case Notes

Game Warden May Reasonably Request Production of Hunting or Fishing License — Particularized Suspicion of Criminal Activity Inapplicable: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden was assured of Boyer's safety, but when Boyer told the warden that he had been fishing, the warden asked to see Boyer's fishing license. Boyer contended that the warden needed a particularized suspicion of wrongdoing to effectuate detention and the request for the license. However, under 87-2-109, it is unlawful to refuse to show one's fishing license upon demand, and the warden had authority under this section to request production of the license. In light of these provisions, the Supreme Court declined to imply a particularized suspicion into the statutes, holding that a game warden may request production of a hunting or fishing license when circumstances reasonably indicate that an individual has been engaged in those activities. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

Particularized Suspicion of Wrongdoing Not Required for Game Warden to Step on Boat Transom in Effort to Inspect Angler's Catch When Reasonable Suspicion Exists for Investigatory Stop: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden discovered that Boyer was fishing and asked to see Boyer's license and catch. Boyer produced several fish, and the warden requested to see what else was in Boyer's live well. Boyer suggested that the warden could look later when Boyer came to shore, but the warden declined, and after tethering the boats together, the warden stepped onto the transom of Boyer's boat to look into the open live well, and found several unlawfully killed game fish. Boyer suggested that the warden's act of stepping onto the boat transom constituted an illegal search in violation of Boyer's reasonable expectation of privacy. The Supreme Court disagreed. Boyer had no legitimate expectation of privacy in the rear platform of his boat, and the act of stepping on the transom—an exterior platform readily accessible to the public—did not constitute a search. The nature of the intrusion was so minimal as not to violate any privacy expectation that Boyer might have had. Whether or not probable cause existed at that point was irrelevant, because Boyer's behavior gave the warden a reasonable suspicion that an offense had occurred, and it is the presence of reasonable suspicion that allowed the warden to proceed with the investigative stop. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000).

Consent to Improper Tagging: Any consent given by Game Warden to illegal tagging of killed elk would be outside scope of authority and would have no effect whatever in law. State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

Unlawful Possession — Search and Seizure: When plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass, the deer was not unlawfully possessed and the Game Warden was without authority to seize and confiscate the carcass when he arrested plaintiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P2d 300 (1957).

Law Review Articles

Fishing for Evidence: The Expansive Warrantless Search Powers of Fish and Game Wardens, O'Connor, 13 Hastings Const. L.Q. 119 (1985).

Job Stress in Game Conservation Officers, Walsh & Donovan, 12 J. Police Sci. & Ad. 333 (1984).

Collateral References

38 C.J.S. Game §50.

Validity, construction, and application of state wildlife possession laws. 50 ALR 5th 703.

Application of "plain-feel" exception to warrant requirements—state cases. 50 ALR 5th 581.

Validity of roadblocks by state or local officials for purpose of enforcing fish or game laws. 87 ALR 4th 981.

Who is employed in "professional capacity," within exemption, under 29 USCS 213(a)(1), from minimum wage and maximum hours provisions of Fair Labor Standards Act. 77 ALR Fed. 681.

87-1-503. Ex officio wardens.

Compiler's Comments

1995 Amendments: Chapter 328 near beginning inserted "the executive director and investigators of the board of outfitters"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 417 near middle of first sentence inserted "former fish and game wardens". Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1993 Amendment: Chapter 187 near beginning, after "state forest officers", inserted "and, as authorized by cooperative agreement, all" and after "wildlife service" inserted "peace officers of the bureau of land management, national park service, and corps of engineers"; and made minor changes in style.

1991 Amendment: In last sentence inserted "and the laws relating to parks and outdoor recreation contained in chapters 1 and 2 of Title 23, except chapter 2, part 7"; and made minor changes in style. Amendment effective April 26, 1991.

Collateral References

Sheriffs and Constables *key* 78.

80 C.J.S. Sheriffs and Constables §35, et seq.

87-1-504. Protection of private property — duty of wardens.

Compiler's Comments

1993 Amendment: Chapter 10 deleted (2) that read: "(2) As used in this section, "recreational purposes" means recreational purposes as defined in 70-16-301"; and made minor changes in style.

1991 Amendment: In (1), near middle after "75-10-212(2)", inserted "77-1-801, 77-1-806, and rules adopted under 77-1-804", after "private" inserted "and state", and after "purposes" inserted "of hunting and fishing"; and made minor changes in style. Amendment effective March 1, 1992.

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

1985 Amendment: In (1) after "private lands", substituted "being used for recreational purposes" for "where public recreation is permitted"; and inserted (2) defining recreational purposes.

87-1-506. Enforcement powers of wardens.

Compiler's Comments

1997 Amendment: Chapter 523 inserted (2) requiring donation of seized game animals to the food bank network or to public or charitable institutions; and made minor changes in style.

1991 Amendment: Inserted (8) concerning wardens' authority for violations involving outfitters and guides. Amendment effective April 4, 1991.

Preamble: The preamble to Ch. 336, L. 1991, provided: "WHEREAS, under the provisions of section 37-47-306, MCA, fees collected by the Board of Outfitters may be used for investigation of license applicants, administrative costs, and enforcement of statutes and rules related to outfitters and guides; and

WHEREAS, wardens of the Department of Fish, Wildlife, and Parks have authority under section 37-47-345, MCA, to enforce violations of Title 37, chapter 47, MCA, relating to outfitters and guides, and this authority should be clearly provided in Title 87, MCA; and

WHEREAS, the Legislature intends that costs to the Department of Fish, Wildlife, and Parks related to enforcement of Title 37, chapter 47, MCA, by wardens of the Department be funded from the fees that are collected by the Board of Outfitters and transferred to the Department through memorandums of understanding or other agreements."

1983 Amendment: Inserted (7) relating to enforcement of disorderly conduct and public nuisance laws as applied to motorboat use.

Case Notes

No Reasonable Expectation of Privacy in Possession of Game Fish — Probable Cause Not Required for Game Warden's Inspection of Angler's Concealed Catch: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden approached the watercraft. When informed that Boyer had been fishing, the warden asked to see Boyer's license and catch. After Boyer requested a later inspection, he reluctantly exhibited eight fish. At that point, the warden looked into the live well of Boyer's boat, and in the process found unlawfully killed game fish. Boyer contended that the warden needed probable cause to believe that Boyer had committed a violation at the time that the request was made in order to inspect his catch, and that conducting a warrantless search of Boyer's live well was impermissible. The Supreme Court noted that under the Montana Constitution, an impermissible search occurs only when a

reasonable expectation of privacy exists. To determine whether the warden unlawfully intruded into Boyer's privacy, the court considered: (1) whether Boyer had an actual expectation of privacy; (2) whether society was willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion (see St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410 (1999)). The court concluded that Boyer's subjective expectation of privacy in his catch was not one that society would recognize as reasonable. Under Art. IX, sec. 1, Mont. Const., the state must maintain a clean and healthful environment, and the Legislature has provided for game wardens to enforce the environmental laws regarding fish and game by implementing a system that includes the ability of wardens to inspect game in the field, which encompasses proper licensing and game limitation requirements. In this capacity, wardens act as public trustees protecting and conserving Montana wildlife and habitat for all citizens. Fishing is a privilege accorded by the state, not a private right, and anglers must assume the burdens of the sport, as well as its benefits, and acknowledge the prospect of at least some governmental intrusion into their activities, including license checks, inquiries about game taken, and requests to inspect game in the field. Because Boyer had no reasonable expectation of privacy in his catch, the warden's request for and inspection of the catch was not considered a search, so probable cause was not necessary. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

Particularized Suspicion of Wrongdoing Not Required for Game Warden to Step on Boat Transom in Effort to Inspect Angler's Catch When Reasonable Suspicion Exists for Investigatory Stop: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden discovered that Boyer was fishing and asked to see Boyer's license and catch. Boyer produced several fish, and the warden requested to see what else was in Boyer's live well. Boyer suggested that the warden could look later when Boyer came to shore, but the warden declined, and after tethering the boats together, the warden stepped onto the transom of Boyer's boat to look into the open live well, and found several unlawfully killed game fish. Boyer suggested that the warden's act of stepping onto the boat transom constituted an illegal search in violation of Boyer's reasonable expectation of privacy. The Supreme Court disagreed. Boyer had no legitimate expectation of privacy in the rear platform of his boat, and the act of stepping on the transom—an exterior platform readily accessible to the public—did not constitute a search. The nature of the intrusion was so minimal as not to violate any privacy expectation that Boyer might have had. Whether or not probable cause existed at that point was irrelevant, because Boyer's behavior gave the warden a reasonable suspicion that an offense had occurred, and it is the presence of reasonable suspicion that allowed the warden to proceed with the investigative stop. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000).

Forfeiture of Game Properly Applied in Case of Waste of Mountain Goat: Defendant was convicted of wasting game contrary to the provisions of 87-3-102. He contended that it was improper to impose a penalty of forfeiture of the head, cape, and horns of the mountain goat he killed legally. Having failed to comply with the requirement that he not waste the meat, defendant was subject to the game warden's authority under this section to seize any parts of the animal. Imposition of forfeiture was not contrary to law. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

Confiscation of Illegally Killed Game: Illegally killed elk, tagged improperly in that one tag was not punched on month and day of kill and other was not filled in with name and address of hunter and county of kill, were subject to confiscation by State Fish and Game Commission (now Fish, Wildlife, and Parks Commission). State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

Collateral References

38 C.J.S. Game §§61 through 66.

Validity, construction, and application of state wildlife possession laws. 50 ALR 5th 703.

Application of "plain-feel" exception to warrant requirements—state cases. 50 ALR 5th 581.

Sufficiency of description in warrant of person to be searched. 43 ALR 5th 1.

Validity of roadblocks by state or local officials for purpose of enforcing fish or game laws. 87 ALR 4th 981.

87-1-511. Sale of confiscated birds and animals — disposition of seized grizzly bears.

Compiler's Comments

1985 Amendments: Chapter 120 in first sentence of (1) at beginning inserted the exception, and in middle inserted "or otherwise acquired by a department employee in the scope of his employment" and substituted "may be sold" for "shall be sold".

Chapter 540 in (1) near beginning, after "animal", inserted "other than grizzly bear"; and inserted (2) relating to donation or sale of confiscated grizzly bear parts.

Collateral References

Fish *key* 16; Game *key* 10.

36A C.J.S. Fish §42; 38 C.J.S. Game §§61, 63, 64, 67.

Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself. 44 ALR 3d 1008.

87-1-512. Certificate of sale.

Compiler's Comments

1989 Amendment: At end of (1) substituted "reselling the property for human consumption" for "reselling or using the same for any commercial purpose"; at end of first sentence of (2) inserted reference to auction conducted pursuant to 87-1-511; inserted (3) providing that subsection (1) does prohibit resale of heads, hides, pelts, or mounts; and made minor changes in form and phraseology. Amendment effective March 15, 1989.

87-1-513. Disposition of proceeds of sale.

Compiler's Comments

1997 Amendment: Chapter 523 in (1), at end of second sentence, inserted "except as provided in subsection (2)"; and inserted (2) regarding deposit of proceeds from the sale of seized game animal meat.

1993 Amendment: Chapter 170 in first sentence substituted "retained and accounted for by the department when" for "paid over to the court before whom" and in second sentence, after "guilty of", inserted "or forfeits bond"; and made minor changes in style. Amendment effective July 1, 1993.

1985 Amendment: In middle of second-to-last sentence inserted "or where the animals sold were killed pursuant to 87-1-225".

Case Notes

Liability of Game Warden for Seizure of Carcass: This section has reference only to a case wherein the officer has a right to seize the property, and it offered no defense to a Game Warden who confiscated the carcass of a deer that was properly killed in open territory by one with a license. Shipman v. Todd, 131 M 365, 310 P2d 300 (1957).

Collateral References

38 C.J.S. Game §66.

Part 6
Finance

Part Law Review Articles

The Economic Nature of Wildlife Law, Lueck, 18 J. Legal Stud. 291 (1989).

Evaluating Tax Policy Proposals for Funding Nongame Wildlife Programs, Loomis & Mangun, 11 Eval. Rev. 715 (1987).

87-1-601. Use of fish and game money.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 34 at beginning of (5)(a) after "Money" inserted "must be deposited in an account in the permanent fund if it is"; at end of (5)(a)(iii) after "acquisition" deleted "must be deposited in an account within the nonexpendable trust fund of the state treasury"; in (5)(b) near beginning after "derived from the" substituted "account" for "fund"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 257 in (1)(a), (4), and (8) substituted references to department of revenue for references to state treasurer. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1999 Amendment: Chapter 389 in (7) substituted present language requiring fines and forfeited bond money to be deposited in state general fund for former (7)(a) and (7)(b) that read: "(a) 50% in an account for use by the department for the enforcement of 77-1-801, 77-1-806, and rules adopted under 77-1-804; and

(b) 50% in the state lands recreational use account established by 77-1-808 for use by the department of natural resources and conservation in the management of state lands"; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendments: Chapter 417 at beginning of (4), in exception clause, inserted reference to subsection (8); inserted (8) regarding deposit in state general fund; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (7)(b) substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendments: Chapter 41 inserted (1)(c) regarding disposition of interest earned on certain accounts; and made minor changes in style. Amendment effective January 1, 1992.

Chapter 339 inserted (6) excepting money received from license drawing applications from requirements of 17-6-105; and made minor changes in style. Amendment effective April 4, 1991.

Chapter 609 at beginning of (1) and (4) inserted exception clause; in (4), near end of first sentence after "department", deleted "of fish, wildlife, and parks"; and inserted (7) regarding allocation of fines or forfeited bonds collected for violations of 77-1-801, 77-1-806, or rules adopted under 77-1-804. Amendment effective March 1, 1992.

Preamble: The preamble to Ch. 41, L. 1991, provided: "WHEREAS, the federal government has imposed a requirement on the Department of Fish, Wildlife, and Parks that all interest received from cash balances resulting from license sales must be used for department programs; and

WHEREAS, under present law interest earnings from money received are not credited to department programs; and

WHEREAS, unless present law is amended to conform to federal requirements, the department is in danger of losing over $7 million in federal funds; and

WHEREAS, the Legislature finds that it is in the best interests of the state to designate that interest earned on money received by the Department from license sales be credited to the Department's special revenue account so that the interest is available for expenditure by the Department."

Applicability: Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

1987 Amendment: Near beginning of (4), after "bonds", inserted "except money collected or received by a justice's court".

1983 Amendment: In (1), (3), and (4) substituted "state special revenue fund" for "earmarked revenue fund"; in (1) and (3), substituted "federal special revenue fund" for "federal and private revenue fund"; and in first sentence of (5), substituted "nonexpendable trust fund" for "trust and legacy fund".

1981 Amendment: Added (5) establishing a special account for funding the operation, development, and maintenance of real property of the Department of Fish, Wildlife, and Parks.

Attorney General's Opinions

Fines by District Court in Game Violation Case: A court imposing a fine in a fish and game violation case must pay the money collected to the Fish and Game Commission (now Fish, Wildlife, and Parks Commission). 36 A.G. Op. 39 (1975).

Collateral References

States *key* 127.

81A C.J.S. States §228.

87-1-602. Payment of salaries, per diem, and expenses.

Compiler's Comments

1983 Amendment: Substituted "federal special revenue fund" for "federal and private revenue fund"; and substituted "state special revenue fund" for "earmarked revenue fund".

Case Notes

Damages for Torts Not Payable as Expenses: Under former law, the State Fish and Game Fund was property of the state and could not lawfully be used to pay for torts committed by officers or employees of the State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) for which such officers or employees were personally liable as individual wrongdoers. Heiser v. Severy, 117 M 105, 158 P2d 501, 160 ALR 319 (1945).

87-1-603. Payments to counties for department-owned land — exceptions.

Compiler's Comments

1995 Amendment: Chapter 325 in fifth sentence substituted "department of administration" for "state auditor"; and made minor changes in style. Amendment effective July 1, 1995.

1987 Amendment: Deleted references to "voucher" throughout section; at beginning of first sentence substituted "Before November 30" for "The director shall before October 15" and near middle, before "the drawing", inserted "and request"; at beginning of second sentence deleted "A county treasurer receiving a voucher shall execute it and return it to" and after "approve" inserted "or disapprove the request"; inserted third and fourth sentences concerning disapproval of request; at beginning of fifth sentence inserted "If the director approves a request, he shall"; at end of section substituted "acquired and managed for the purposes of Title 23, chapter 1" for "administered with money from the general fund"; and made minor changes in phraseology.

Applicability: Section 3, Ch. 486, L. 1987, provided: "This act applies retroactively, within the meaning of 1-2-109, to tax liabilities arising after June 30, 1986."

87-1-605. Fees used to purchase recreational facilities.

Compiler's Comments

Extension of Termination Date: Section 1, Ch. 109, L. 1999, amended sec. 4, Ch. 428, L. 1995, by extending the termination date imposed by Ch. 428 to July 1, 2003. Effective March 18, 1999.

1997 Amendment: (Both versions) Chapter 336 near beginning of (1) inserted "10% of the fee for a Class A-8 resident temporary fishing license".

1995 Amendments: Chapter 18 near middle of (1), after "B-4 nonresident", deleted "5-day"; and made minor changes in style.

Chapter 428 in two places in (2), after "operation", deleted "development" and in first sentence, after "maintenance", substituted "must equal at least 50% of the money" for "may not exceed 25% of the moneys" and after "section" inserted "and must be expended as provided in subsection (3)"; inserted (3) requiring operation and maintenance money to be expended for weed management, streambank restoration, and general operation and maintenance; and made minor changes in style. Amendment effective July 1, 1995, and terminates July 1, 1999.

Report to Legislature: Section 2, Ch. 428, L. 1995, provided: "Because [section 1] [87-1-605] terminates July 1, 1999, the department of fish, wildlife, and parks shall report to the 56th legislature by December 1, 1998, regarding the success of the operation and maintenance program required by [section 1] [87-1-605] and on the status of weed management and streambank restoration at fishing access sites and frontages."

Termination: Section 4, Ch. 428, L. 1995, provided: "[This act] terminates July 1, 1999."

1983 Amendment: In (1) after "nonresident" substituted "5-day" for "1-day"; after "5-day fishing license" deleted "$5 of the fee for the Class B-3 nonresident 6-day fishing license".

1981 Amendment: Increased the figure in (2) from 15% to 25%.

87-1-610. Contributions for leasing appropriation rights — general spending authority.

Compiler's Comments

Extension of Termination Date: Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999.

1993 Amendment: Chapter 175 in (2), after "fisheries", inserted "including but not limited to departmental funds in the river restoration special revenue account established under 87-1-258". Amendment effective July 1, 1993.

Effective Date: Section 10, Ch. 658, L. 1989, provided that this section is effective May 11, 1989.

Part 7
State-Federal Relationships

Part Collateral References
Indian Jurisdiction, State Bar of Montana (May 1983).

87-1-701. Assent to Dingell-Johnson bill.

Compiler's Comments
Citation of Federal Act: The act of Congress approved August 9, 1950, referred to in this section, is compiled in 16 U.S.C. §§777 through 777k.

87-1-702. Powers of department relating to fish restoration and management.

Law Review Articles
Federal Dominance as to Fisheries and Dams: Federal Power Commission v. Oregon, 349 US 435, 99 L Ed 1215, 75 S Ct 832 (1955), evidenced that the federal government can disregard the wishes of a state concerning its fisheries wherever it believes that the interests of the nation are best served by permitting a dam to be built, and this applies even where the waters are nonnavigable, provided only that the powersite is on reserved lands of the United States. Jasperson, 18 Mont. L. Rev. 118 (1956).

87-1-703. Cooperative agreements on federally owned land.

Compiler's Comments
Citation of Federal Act: The Dingell-Johnson bill, referred to in this section, is compiled in 16 U.S.C. §§777 through 777k.

87-1-704. Federal fish-hatching operations.

Law Review Articles
The One That Got Away: An Analysis of Federal Regulation of the Release of Genetically Engineered Fish, Gorski, 3 U. Balt. J. Envtl. L. 1 (1993).
Preserving the Genetic Diversity of Salmonid Stocks: A Call for Federal Regulation of Hatchery Programs, Goodman, 20 Envtl. L. 111 (1989).

Collateral References
Fish *key* 12.
36A C.J.S. Fish §28.

87-1-705. Acquisition of land by United States for migratory bird reservation.

Compiler's Comments
Citation of Federal Act: The act of Congress approved February 18, 1929, referred to in this section, is compiled in 16 U.S.C. §§715 through 715d, 715e, 715f through 715k, 715l through 715r.

87-1-706. Regulation of bird reserve in Flathead County.

Administrative Rules
ARM 12.9.209 Stillwater game preserve.

Law Review Articles
Migratory Species in International Law, De Klemm, 29 Nat. Resources J. 935 (1989).

87-1-707. Water supply for the Benton Lake wildlife refuge.

Compiler's Comments
Citation of Federal Act: The act of Congress approved February 18, 1929, referred to in this section, is compiled in 16 U.S.C. §§715 through 715d, 715e, 715f through 715k, 715l through 715r.

Law Review Articles
Winters Doctrine Rights — Keystone of National Programs for Western Land and Water Conservation and Utilization: The "Winters doctrine" applies to wildlife refuges. Veeder, 26 Mont. L. Rev. 152 (1965).

87-1-708. Assent to Pittman-Robertson Act — authority of department.

Compiler's Comments
Citation of Federal Act: The act of Congress approved September 2, 1937, referred to in this section, is compiled in 16 U.S.C. §§669 through 669b, 669c through 669i.

Case Notes

Enforcement of Pittman-Robertson Act — No Private Right of Action: No private right of action exists to enforce the Pittman-Robertson Wildlife Restoration Act. Ill. St. Rifle Ass'n v. Ill., 717 F. Supp. 634 (N.D. Ill. 1989).

87-1-709. Cooperation with United States for wildlife restoration.

Compiler's Comments

Citation of Federal Act: The Pittman-Robertson Act, referred to in this section, is compiled in 16 U.S.C. §669, et seq.

Law Review Articles

Wildlife Protection on the Public Lands, Brennan & Swanson, 1992 Min. L. Series: Rocky Mtn. Min. L. Found. 7-1 (1992).

Timber Dependency and Wilderness Selection: The U.S. Forest Service, Congress, and the RARE II Decisions, Booth, 31 Nat. Resources J. 715 (1991).

Part 8
Interstate Wildlife Violator Compact

Part Compiler's Comments

Authorization to Participate in Compact: Chapter 122, L. 1995, authorized Montana's participation in the Interstate Wildlife Violator Compact with neighboring states to deal with resident and nonresident violators of fish and wildlife statutes and regulations. Other signatory states include Colorado, Oregon, Arizona, Nevada, Idaho, Utah, and Washington.

87-1-803. Reciprocal recognition of license suspensions — suspension of privileges for conviction in participating state.

Compiler's Comments

1999 Amendment: Chapter 502 at end of (4) substituted "87-1-102(4)" for "87-1-102(3)". Amendment effective October 1, 1999.

87-1-804. Suspension of privileges for failure to comply with citation issued in participating state.

Compiler's Comments

1999 Amendment: Chapter 502 at end of (3) substituted "87-1-102(4)" for "87-1-102(3)". Amendment effective October 1, 1999.

CHAPTER 2
FISHING, HUNTING, AND TRAPPING LICENSES

Chapter Case Notes

Constitutionality: The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

Tagging Game Killed by Another: Tagging of game animal that someone else has killed or so far brought under control that one can walk up to it and cut its throat is not method of acquiring ownership contemplated by statute authorizing licensed hunter to pursue, hunt, shoot, and kill game animal and then to possess carcass with result that person tagging illegally killed elk is not entitled to possession. State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

Chapter Law Review Articles

DNR Regulation: A Bear of an Issue, Trost, 76 Mich. B.J. 436 (1997).

Reserving Wildlife for Resident Consumption: Is the Dormant Commerce Clause the Outfitters' White Knight?, Nicolaysen, 32 Land & Water L. Rev. 125 (1997).

Does the Federal Crime Bill's Hunter Harrassment Provision Violate the First Amendment or if an Animal Rights Protestor Falls Down in the Woods and a Hunter Hears, Is It a Federal Crime?, Sherr, 11 J. Nat. Resources & Envtl. L. 119 (1996).

Harrassing Hunters With the First Amendment, Schuster, 32 Idaho L. Rev. 469 (1996).

The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?, Cottriel, 27 Pac. L.J. 1235 (1996).

Part 1
General Provisions

87-2-101. Definitions.

Compiler's Comments

1995 Amendment: Chapter 417 in introductory clause inserted "and 87-1-102"; substituted definition of angling for former definition that read: ""Angling" or "fishing" means the taking of or attempting to take fish by hook and single line or single rod, in hand or within immediate control"; inserted definitions of bait, hunt, and trap; adjusted internal references; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

1985 Amendment: In (5) at end, after "bear", inserted "and wild buffalo".

1983 Amendment: In (7), inserted last clause relating to mourning doves and open season on mourning doves.

Administrative Action Required: Section 2, Ch. 46, L. 1979, provided: "It is the intent of this legislature that the department of fish and game take the necessary administrative action to remove lynx, northern swift fox, and wolverine from the listing of nongame species in need of management."

Severability: Section 19, Ch. 478, L. 1979, was a severability clause.

Composite Section: This section was amended by Ch. 44, Ch. 46, and Ch. 478, L. 1979, and a composite was prepared by the Code Commissioner, 1979. Chapter 478 added "Canada lynx" to the definition of "fur-bearing animals" in subsection (4), and Ch. 46 added "lynx" to that definition. The Ch. 46 language was chosen because it is more general and incorporates the additions intended by both Ch. 478 and Ch. 46.

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Collateral References

Fish *key* 2; Game *key* 2.

36A C.J.S. Fish §1; 38 C.J.S. Game §2.

87-2-102. Resident defined.

Compiler's Comments

2001 Amendment: Chapter 60 inserted (1)(b) pertaining to residency status of a Montana resident with respect to a hunting, fishing, or trapping license if the resident is a member of the armed forces and obtains a resident hunting, fishing, or trapping license in another state; in (2) before "hunting" inserted "resident"; in (2)(d) at beginning inserted exception clause; and made minor changes in style. Amendment effective March 16, 2001.

1999 Amendment: Chapter 499 in (1)(b) substituted "proof of completion of a hunter safety course approved by the department" for "proof of competency". Amendment effective July 1, 1999.

Saving Clause: Section 10, Ch. 499, L. 1999, was a saving clause.

1997 Amendment: Chapter 187 in (1)(b), near middle of first sentence before "of competency", substituted "proof" for "a certificate"; and made minor changes in style. Amendment effective March 1, 1998.

1995 Amendment: Chapter 417 in (1)(b), near beginning after "currently", inserted "stationed in and", inserted third sentence concerning reassignment, and inserted fourth sentence concerning designation in armed forces record; deleted former (2) that read: "(2) A person who

has been a resident of the state of Montana for a period of 6 months immediately prior to making application for a license is eligible to receive a resident hunting, fishing, or trapping license. A person is considered a resident if the person meets the following criteria"; inserted (2) concerning primary home or abode for 180 consecutive days; inserted (3) requiring continuing residence for 120 days a year; inserted (4) concerning additional criteria; substituted (4)(a) concerning primary home for former text that read: "the person lives in Montana or has a fixed intent to return to this state when the person leaves it"; in (4)(d), near beginning, substituted "possess or apply for" for "use", after "trapping" inserted "licenses from another state or country or exercise resident hunting, fishing, or trapping", and at end deleted "during the time the resident Montana license is valid"; inserted (5) concerning students; inserted (9) concerning disqualifying factors for residency; inserted (10) providing that license agent is not a representative of state; adjusted internal references; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1993 Amendments: Chapter 219 in (1)(b), at end of first sentence, inserted reference to certificate of competency or other certificate. Amendment effective March 1, 1994.

Chapter 589 substituted (1) concerning determination of residency for member of armed forces or a dependent for former text that read: "Members of the regular armed forces of the United States or members of the armed forces of foreign governments attached to the armed forces of the United States who are assigned to active duty in Montana and their dependents, as defined in 15-30-113, who reside in their Montana household with them, after a period of 30 days within Montana, upon presenting assignment orders emanating from the proper unit commander, are considered residents for the purpose of this chapter. The 30-day residence requirement is waived in time of war"; substituted (5) concerning residency of an unmarried minor for former text that read: "An unmarried minor whose parents, legal guardian, or custodial parent is a resident for purposes of this section is also considered a resident for purposes of this section"; and made minor changes in style. Amendment effective April 29, 1993.

1991 Amendment: In (1), near beginning of first sentence before "armed forces", inserted "regular", near middle, before "duty", inserted "active", and after "dependents" inserted reference to 15-30-113; in (2), near beginning of first sentence after "Montana", deleted "as defined in 1-1-215" and inserted (2)(a) through (2)(e) establishing criteria for determining residency; in (4), near beginning after "person", substituted "who does not reside in Montana but who meets" for "meeting"; inserted (5) regarding residency of unmarried minors; and made minor changes in style. Amendment effective July 1, 1991.

1985 Amendment: Inserted (4) regarding criteria by which a nonresident may be considered a resident for hunting and fishing licensing purposes.

1983 Amendment: In middle of (1), substituted "their dependents who reside in their Montana household with them" for "members of their immediate families".

Case Notes

Residency Requirements for Obtaining Hunting or Fishing License Not Unconstitutionally Vague: Britton was charged in Justice's Court with various hunting license-related crimes, but moved for dismissal on grounds that Montana's residency laws are so vague as to violate due process. The motion was denied. Following conviction, Britton asserted in District Court that this section, defining residency for hunting and fishing license purposes, is vague because other statutes define residency differently for purposes such as voting, dissolution of marriage, college attendance, and taxation. The District Court held that fish and game residency requirements are neither vague nor ambiguous and affirmed the Justice's Court conviction. On appeal, Britton asserted that the various statutory definitions of residency might confuse a person of ordinary intelligence and operate as a trap for the innocent. However, the Supreme Court affirmed, noting that the other statutory residency provisions to which Britton referred clearly provide that those provisions are for specific acts or purposes other than obtaining a hunting license and that it strained credulity to suggest that a person of ordinary intelligence would be confused into thinking that any of those statutes define residency for the purpose of obtaining a hunting license. Britton failed to establish that the residency requirements for obtaining a hunting or fishing license are facially unconstitutional on vagueness grounds. St. v. Britton, 2001 MT 141, 306 M 24, 30 P3d 337 (2001).

False Affirmation of Six-Month Residency Requirement Distinct From Constitutionality of Residency Requirement: Still falsely affirmed on his applications for hunting licenses that he had been a resident of the state for 6 months. The Supreme Court declined to address the constitutionality of the residency requirement imposed by this section because Still violated 87-2-106, a separate statute. The Supreme Court held that if Still wanted to challenge the

constitutionality of the residency requirement, he should have filled out the application truthfully and then challenged the subsequent denial of the license. St. v. Still, 273 M 261, 902 P2d 546, 52 St. Rep. 965 (1995).

"Resident" Requirement for Hunting, Fishing, or Trapping License Not Unconstitutionally Vague: After the state filed charges against appellants for making false statements concerning residency in order to obtain hunting licenses, appellants filed an action, claiming that the residency statute is unconstitutionally vague. Upholding the statute, the Supreme Court ruled that the fact that the statute may be difficult to apply does not render it unconstitutionally vague. Monroe v. St., 265 M 1, 873 P2d 230, 51 St. Rep. 327 (1994), followed, as to difficulty in the application insufficient to render the statute unconstitutional, in St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Attorney General's Opinions

Out-of-State Employment as Affecting Eligibility for Resident License: A Montana resident who has resided in state 6 months or more but who is absent from the state by reason of employment prior to application for a resident fish and game license does not lose his residence by being employed out of state and need not reside 6 continuous months after his return to be eligible for a resident license. 27 A.G. Op. 27 (1957). (Annotator's note: See 1995 amendment, which attempted to clarify criteria for residency by a person who has established residency but who may not physically reside in the state more than 120 days a year.)

Law Review Articles

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

Collateral References

35 Am. Jur. 2d Fish and Game §§34, 35.

87-2-103. License required.

Compiler's Comments

1995 Amendment: Chapter 417 at beginning of (1)(a), (1)(b), and (1)(c) substituted "hunt or trap or attempt to hunt or trap" for "pursue, hunt, trap, take, shoot, or kill or attempt to trap, take, shoot, or kill" and near middle of each subsection, after "fur-bearing animal", deleted "take, kill, trap"; in (1)(c), after "state or", deleted "have, keep"; in (1)(d), in two places after "trap", deleted "snare"; in (2), after "order to" and after "attempt to", deleted "pursue, hunt, take, shoot, or"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1993 Amendment: Chapter 49 at beginning of (1) inserted exception clause; inserted (2) regarding nonlicensure of companion of disabled hunter who assists in taking a wounded game animal; and made minor changes in style. Amendment effective February 18, 1993.

Case Notes

Taking Elk Without Valid License — Consent Defense Invalid: Undercover government agents did not consent to defendant's shooting of elk without a valid Montana hunting license when they provided defendant with a false hunting license. Defendant did not know that the persons who provided him the license were government agents but did know that he was shooting elk without a valid license. Defendant's proposed consent instruction improperly propounded a theory akin to entrapment without stating the proper elements of entrapment and was correctly disallowed. U.S. v. Heuer, 916 F2d 1557 (9th Cir. 1990).

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Law Review Articles

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

The Right to Kill Wild Animals in Defense of Person or Property, Bender, 31 Mont. L. Rev. 235 (1970).

Collateral References

Fish *key* 10(1); Game *key* 5.

36A C.J.S. Fish §36; 38 C.J.S. Game §§52, 53.

35 Am. Jur. 2d Fish and Game §45.

Applicability of state fishing license laws or other public regulations to fishing in private lake or pond. 15 ALR 2d 754.

87-2-104. Number of licenses allowed — fees.

Compiler's Comments

1989 Amendment: In (1) substituted language prohibiting a person from applying for, obtaining, or possessing more than one license of a class unless authorized by the Fish and Game Commission (now Fish, Wildlife, and Parks Commission) for "Except as authorized by the commission and except for class B-4 licenses, only one license of any one class shall be issued to any one person"; in (2), after "replacement license", deleted "of the same class" and at end substituted "a fee not to exceed $5" for "the original price of the lost, stolen, or destroyed license, not to exceed $5"; and in (4) substituted reference to subsection (3) for reference to subsection (2) and at end inserted "or species". Amendment effective April 4, 1989.

1987 Amendment: Inserted (2) relating to additional game management licenses; and substituted (3) relating to fees for former (2) and (3) that read: "(2) Except for Class A-4 licenses, the fee for additional licenses of any class issued as authorized by the commission is one-half the regular fee provided by law.

(3) The fee for additional Class A-4 licenses issued as authorized by the commission is the regular fee provided by law."

1983 Amendment: In (1), substituted "Except as authorized by the commission and except for Class B-4 licenses" for "except Class B-3 and B-4 licenses"; inserted (2) relating to fees for additional licenses; and inserted (3) relating to setting of fees annually.

1981 Amendment: At end of (1), changed "payment of the sum of $3 or the cost of the original license, whichever is the smaller amount" to "payment of the original price of the lost, stolen, or destroyed license, not to exceed $5".

Administrative Rules

ARM 12.3.403 Issuance of duplicate licenses — fee.

87-2-105. Safety instruction required.

Compiler's Comments

1999 Amendment: Chapter 499 in (1) substituted "a certificate of completion from the Montana youth hunter safety and education course established in subsection (5)" for "proof of competency as provided by this section"; in (2) substituted "a certificate of completion from the Montana youth hunter safety and education course established in subsection (5)" for "proof of competency, as provided in this section" and substituted "a hunter safety course" for "a course in the safe handling of firearms"; in (3) substituted "proof of completion of a hunter safety course approved by the department" for "proof of competency, as provided in this section"; in (5) in first sentence before "course" inserted "youth hunter safety and education" and at end substituted "promotion of hunter safety and education" for "promotion of safety in the handling of firearms", in second sentence substituted "instructions to youth in hunter safety and education, including the handling of firearms" for "instructions in the handling of firearms", and in third sentence substituted "certificate of completion from Montana's youth hunter safety and education course" for "certificate of competency in the safe handling of firearms"; inserted (7) authorizing development of adult hunter education course; at end of (8) substituted "proof of completion or achievement" for "proof of competency"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 10, Ch. 499, L. 1999, was a saving clause.

1997 Amendment: Chapter 187 in (1), after "unless the", deleted "resident presents to the" and after "the license" substituted "receives proof" for "a certificate"; in (2), after "unless the", deleted "nonresident presents to the" and after "the license" substituted "receives proof" for "a certificate"; in (3), near middle after "unless the", deleted "member or dependent presents to the" and after "the license" substituted "receives proof" for "a certificate"; in (4), in first sentence after "unless the", deleted "resident or nonresident presents to the", after "the license" inserted "receives", and after "season or" substituted "receives proof of completion of a bowhunter education course" for "a certificate of completion" and deleted fourth sentence that read: "As part of those public information efforts, the department shall notify by mail all individuals who purchased a Class A-2 special bow and arrow license during the 1990-91 hunting season"; inserted (7) regarding adoption of rules concerning proof of competency; and made minor changes in style. Amendment effective March 1, 1998.

1997 Statement of Intent: The statement of intent attached to Ch. 187, L. 1997, provided: "A statement of intent is required for this bill because 87-2-105(7) and 87-2-903(8) grant rulemaking authority to the department of fish, wildlife, and parks regarding standards applicable to license agents.

It is intended that the rules adopted pursuant to 87-2-105(7) address the methods by which a license agent determines proof of competency in hunter safety, particularly the competency of nonresidents who apply for a Montana hunting license. It is intended that the rules recognize that a person who takes a hunter safety course from a department-authorized instructor will be considered competent for licensing purposes.

It is intended that rules adopted pursuant to 87-2-903(8) address compensation, system installation fees, and duties of license agents."

1993 Amendment: Chapter 219 inserted (3) prohibiting issuance of license without certificate of competency; and made minor changes in style. Amendment effective March 1, 1994.

1991 Amendment: In (3), near beginning of first sentence after "nonresident", deleted "person under the age of 18 years", near middle, after "the license", inserted "an archery license issued for a prior hunting season or", at end substituted "certificate of completion from the national bowhunter education foundation" for "certificate of competency in the safe handling of bow hunting tackle, in addition to the certificate of competency in the safe handling of firearms", and inserted second, third, and fourth sentences regarding provision of records of past archery license purchases and notification procedures; in (5), in first sentence after "instruction", substituted "from the national bowhunter education foundation" for "in the safe handling of bow hunting tackle", at end of second sentence substituted "the national bowhunter education foundation instruction" for "instructions in the handling of bow hunting tackle", and in third sentence substituted "completion from the national bowhunter education foundation" for "competency in the safe handling of bow hunting tackle"; and made minor changes in style. Amendment effective March 1, 1992.

1987 Amendment: Near beginning of (1) and (2) substituted "may" for "shall"; redesignated former (2) as (4) and made minor changes in phraseology; inserted (3) relating to nonresident minors; and inserted (5) relating to bowhunting safety instruction. Amendment effective March 1, 1988.

Administrative Rules

ARM 12.3.120 Hunter safety requirements.

Title 12, chapter 10, subchapter 1, ARM Shooting range development grants.

Collateral References

Hunter's civil liability for unintentionally shooting another person. 26 ALR 3d 561.

Criminal responsibility for injury or death resulting from hunting accident. 23 ALR 2d 1401.

87-2-106. Application for license — penalties for violation — forfeiture of privileges.

Compiler's Comments

2001 Amendment: Chapter 321 in (1) in second sentence inserted brackets around "social security number"; in (9) inserted brackets; and in (10) inserted brackets. Amendment effective April 21, 2001.

1999 Amendment: Chapter 29 in (1) in second sentence near beginning inserted "social security number"; inserted (9) requiring applicant's social security number to be kept confidential; and inserted (10) requiring deletion of applicant's social security number after 5 years. Amendment effective July 1, 1999.

Applicability: Section 7, Ch. 29, L. 1999, provided: "(1) [Sections 2 and 3] [61-5-107 and 61-5-111] apply to driver's licenses issued on or after October 1, 2000.

(2) [Sections 4 and 5] [87-2-106 and 87-2-202] apply to license years beginning on or after March 1, 2000."

1997 Amendment: Chapter 187 in (1), in second sentence before "address", inserted "street", after "residence" substituted "mailing" for "and post-office", and after "Montana" substituted "and status as" for "whether"; and made minor changes in style. Amendment effective March 1, 1998.

1995 Amendment: Chapter 417 in (1), in second sentence, substituted "address of permanent residence" for "place of residence"; in (3), in two places, substituted "87-2-102(7)" for "87-2-102(4)"; in (6), near end, substituted "subsection" for "statute"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1991 Amendments: Chapter 277 deleted former (7) that read: "(7) The department may bring an action to prosecute a violation of this section within 3 years of the date of application for licensure". Amendment effective July 1, 1991.

Chapter 321 in (1), near middle of second sentence before "length", inserted "qualifying", after "time" inserted "as a resident", and inserted third through fifth sentences regarding documentation required for license application and providing penalty for sale of a license to an applicant who fails to produce required identification; inserted (7) establishing penalty for affirming to a false statement; inserted (8) establishing penalty for assisting an unqualified applicant in obtaining a resident license; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendments: Chapter 83 in (4), after "hunting license", substituted "or fishing license" for "and fishing license" and at end changed "licenses" to "license".

Chapter 416 inserted (7) relating to prosecution of license application violation within 3 years. Amendment effective April 3, 1989.

1987 Amendment: In (1), in exception clause of last sentence, substituted "subsections (2) through (4)" for "subsections (2) and (3)"; and inserted (4) allowing purchase of license by spouse or sibling.

1985 Amendment: In (1) in third sentence, changed "subsection (2)" to "subsections (2) and (3)"; at beginning of (2), inserted exception clause; and inserted (3) relating to application for a license under 87-2-102(4).

1983 Amendment: In (1), inserted exception clause at beginning of last sentence; inserted (2) providing for issuance of licenses by mail; inserted (3) requiring license to be subscribed to by the licensee and the licensing authority; and in (4), in first sentence after "subscribe to" substituted "any statement, on any application or license, that is materially false" for "any application containing a material false statement", and in second sentence before "license" substituted "the" for "if and any".

Administrative Rules

ARM 12.3.209 Regulations for issuance of fish and game licenses.

Case Notes

Residency Requirements for Obtaining Hunting or Fishing License Not Unconstitutionally Vague: Britton was charged in Justice's Court with various hunting license-related crimes, but moved for dismissal on grounds that Montana's residency laws are so vague as to violate due process. The motion was denied. Following conviction, Britton asserted in District Court that 87-2-102, defining residency for hunting and fishing license purposes, is vague because other statutes define residency differently for purposes such as voting, dissolution of marriage, college attendance, and taxation. The District Court held that fish and game residency requirements are neither vague nor ambiguous and affirmed the Justice's Court conviction. On appeal, Britton asserted that the various statutory definitions of residency might confuse a person of ordinary intelligence and operate as a trap for the innocent. However, the Supreme Court affirmed, noting that the other statutory residency provisions to which Britton referred clearly provide that those provisions are for specific acts or purposes other than obtaining a hunting license and that it strained credulity to suggest that a person of ordinary intelligence would be confused into thinking that any of those statutes define residency for the purpose of obtaining a hunting license. Britton failed to establish that the residency requirements for obtaining a hunting or fishing license are facially unconstitutional on vagueness grounds. St. v. Britton, 2001 MT 141, 306 M 24, 30 P3d 337 (2001).

False Affirmation of Six-Month Residency Requirement Distinct From Constitutionality of Residency Requirement: Still falsely affirmed on his applications for hunting licenses that he had been a resident of the state for 6 months. The Supreme Court declined to address the constitutionality of the residency requirement imposed by 87-2-102 because Still violated this section, a separate statute. The Supreme Court held that if Still wanted to challenge the constitutionality of the residency requirement, he should have filled out the application truthfully and then challenged the subsequent denial of the license. St. v. Still, 273 M 261, 902 P2d 546, 52 St. Rep. 965 (1995).

Bear Killed Unlawfully — State Prosecution Barred: Defendant was charged in state District Court for subscribing to a materially false statement on an application for a grizzly bear trophy license and was charged and convicted in federal District Court for violating the Endangered Species Act for taking the same trophy. The federal court and the state court have concurrent jurisdiction, and the state prosecution is barred as it is based on an offense arising out of the same

transaction as the federal charge. St. v. Sword, 229 M 370, 747 P2d 206, 44 St. Rep. 2053 (1987), distinguishing St. v. Pierce, 199 M 57, 647 P2d 847 (1982), and Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932).

Refusal to Sell License — Liability: The Director (the Fish and Game Warden under former law) is not liable in damages for failure to sell fishing licenses to a particular person. Meinecke v. McFarland, 122 M 515, 206 P2d 1012 (1949).

87-2-109. Carrying and exhibiting license and identification.

Compiler's Comments

1995 Amendment: Chapter 417 in (1), at beginning, inserted exception clause, after "fish" deleted "for or take any fish or pursue", after "hunt" deleted "shoot, kill, or take", after "attempt to" substituted "hunt for" for "trap, trap, or take", and near end substituted "is carrying the required license, licenses, or permit" for "has the license, licenses, or permit in the person's possession"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1991 Amendment: Near middle of (2), after "permit", inserted "and the identification used in purchasing a license or permit"; and made minor changes in style. Amendment effective July 1, 1991.

Case Notes

Game Warden May Reasonably Request Production of Hunting or Fishing License — Particularized Suspicion of Criminal Activity Inapplicable: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden was assured of Boyer's safety, but when Boyer told the warden that he had been fishing, the warden asked to see Boyer's fishing license. Boyer contended that the warden needed a particularized suspicion of wrongdoing to effectuate detention and the request for the license. However, under this section, it is unlawful to refuse to show one's fishing license upon demand, and the warden had authority under 87-1-502 to request production of the license. In light of these provisions, the Supreme Court declined to imply a particularized suspicion into the statutes, holding that a game warden may request production of a hunting or fishing license when circumstances reasonably indicate that an individual has been engaged in those activities. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

Collateral References

Fish *key* 10(1); Game *key* 5.

36A C.J.S. Fish §36; 38 C.J.S. Game §§52, 53.

35 Am. Jur. 2d Fish and Game §45.

87-2-110. Alteration, attachment, or transfer of license.

Compiler's Comments

1995 Amendment: Chapter 417 inserted third sentence prohibiting attaching license to animal killed by another; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Case Notes

Application of Federal Lacey Act to Outfitting and Guiding — Statute of Limitations on Charges of Conspiracy: While a prosecution under the federal Lacey Act, 16 U.S.C. 3371, et seq., which prohibits transportation or acquisition in interstate commerce of wildlife in violation of state laws, may not properly be had for the substantive acts of selling guiding services and hunting permits, a prosecution can be maintained for conspiracies to violate the Act while providing outfitting and guiding services, such as arranging for out-of-state hunters to use elk licenses and permits belonging to other hunters, knowing that any elk taken would be transported out of state. The Act applied when evidence was sufficient to establish the involvement of defendant, a hunting guide and outfitter, in a conspiracy to transport elk in interstate commerce in violation of Montana law. Further, the 5-year "catchall" statute of limitations set out in 18 U.S.C. 3282 applied to charges of conspiring to violate the Act. U.S. v. Thomas, 887 F2d 1341 (9th Cir. 1989), distinguishing U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

Illegal Sale of Special Season Elk Tag Not an Offer to Sell Wildlife Prohibited by Federal Law: The alleged sale of a special season elk tag in violation of this section did not constitute an illegal sale or offer to sell wildlife under the federal Lacey Act (16 U.S.C. 3372, 3373). U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

87-2-111. Termination of license.

Compiler's Comments

1985 Amendment: Inserted exception clause at end of section.

1983 Amendment: Substituted "the last day of February" for "April 30".

87-2-112. Forfeiture of license or permit for littering.

Collateral References

35 Am. Jur. 2d Fish and Game §54.

87-2-113. Drawing and application fees.

Compiler's Comments

1999 Amendment: Chapter 533 inserted (2) concerning participation in preference system; at beginning of (3) substituted "Drawing fees collected pursuant to this section" for "This fee"; and made minor changes in style. Amendment effective October 1, 2000.

1991 Amendment: In (1) increased species drawing fee from $2 to $3. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Administrative Rules

ARM 12.3.121 Drawing fee.

87-2-114. Unlawful possession of hunting license or permit of another — penalties.

Compiler's Comments

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Effective Date: Section 39, Ch. 417, L. 1995, provided that this section is effective July 1, 1995.

87-2-120. Lawful means of angling or fishing.

Compiler's Comments

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Effective Date: Section 39, Ch. 417, L. 1995, provided that this section is effective July 1, 1995.

Part 2
Wildlife Conservation License

87-2-201. Wildlife conservation license prerequisite for other licenses.

Compiler's Comments

1989 Amendment: At beginning inserted exception clause; and made minor change in style. Amendment effective February 24, 1989.

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Collateral References

35 Am. Jur. 2d Fish and Game §45.

87-2-202. Application — fee — expiration.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 216 inserted (3)(c) concerning additional $2 resident hunting access enhancement fee; and inserted (3)(d) concerning additional $10 nonresident hunting access enhancement fee. Amendment effective March 1, 2002, and terminates March 1, 2006.

Chapter 321 in (1) in second sentence inserted brackets around "social security number"; in (5) inserted brackets; and in (6) inserted brackets. Amendment effective April 21, 2001.

Chapter 528 in (3)(b) increased nonresident wildlife conservation license fee from $5 to $7. Amendment effective March 1, 2002.

Preamble: The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

1999 Amendment: Chapter 29 in (1) in second sentence near beginning inserted "social security number"; inserted (5) requiring applicant's social security number to be kept confidential; and inserted (6) requiring deletion of applicant's social security number after 5 years. Amendment effective July 1, 1999.

Applicability: Section 7, Ch. 29, L. 1999, provided: "(1) [Sections 2 and 3] [61-5-107 and 61-5-111] apply to driver's licenses issued on or after October 1, 2000.

(2) [Sections 4 and 5] [87-2-106 and 87-2-202] apply to license years beginning on or after March 1, 2000."

1997 Amendment: Chapter 187 in (1), in first sentence after "occupation," substituted "street address of permanent residence, mailing address" for "place of residence, post-office address", after "Montana" substituted "and status as" for "state whether the applicant is", and near end substituted "signed" for "subscribed"; in (2), after "licenses", substituted "issued in a form determined by the department" for "in the form of tags or stamps issued to a holder of a wildlife conservation license", after "must be" deleted "affixed to or", and after "recorded" deleted "on the wildlife conservation license"; and made minor changes in style. Amendment effective March 1, 1998.

1991 Amendments: Chapter 321 in (1), near middle of second sentence before "length", inserted "the qualifying" and after "time" inserted "as a resident", in third sentence, before "driver's license", inserted "valid Montana", inserted reference to driver's examiner's identification card, and inserted language regarding required information specified by Department, and inserted fourth and fifth sentences regarding documentation required for license application and making it unlawful for an agent to sell a conservation license without adequate documentation; and made minor changes in style. Amendment effective July 1, 1991.

Chapter 592 in (3)(a), after "Resident", deleted "and nonresident" and increased wildlife conservation license fee from $2 to $4; and inserted (3)(b) establishing $5 nonresident wildlife conservation license fee. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1983 Amendment: In (4), substituted "the last day of February" for "April 30".

1981 Amendment: Changed fee in (3) from "$1" to "$2".

87-2-204. Disposition of wildlife conservation license fees.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Part 3
Fishing Licenses

Part Case Notes

Constitutionality: The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters

Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish and Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

Part Law Review Articles

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

Part Collateral References

35 Am. Jur. 2d Fish and Game §§34, 35, 45.

87-2-301. Class A—resident fishing license.

Compiler's Comments

1991 Amendment: Increased resident fishing license fee from $9.50 to $11 beginning March 1, 1992, and to $13 beginning March 1, 1994. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1989 Amendment: Changed "$9" to "$9.50". Amendment effective July 1, 1989.

Applicability: Section 11, Ch. 601, L. 1989, provided that this section applies to licenses for fishing seasons that begin on or after March 1, 1990.

1985 Amendment: Increased license fee from $8 to $9 effective March 1, 1986.

1983 Amendment: Increased license fee from $7 to $8 effective March 1, 1984.

1981 Amendment: Changed fee from "$5" to "$7".

87-2-302. Class B—nonresident fishing license.

Compiler's Comments

2001 Amendment: Chapter 528 after "sum of" substituted "$60" for "$40 beginning March 1, 1992, and $45 beginning March 1, 1994"; and made minor changes in style. Amendment effective March 1, 2002.

1991 Amendment: Increased nonresident fishing license fee from $36 to $40 beginning March 1, 1992, and to $45 beginning March 1, 1994. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1989 Amendment: Changed "$35" to "$36". Amendment effective July 1, 1989.

Applicability: Section 11, Ch. 601, L. 1989, provided that this section applies to licenses for fishing seasons that begin on or after March 1, 1990.

1985 Amendment: Increased license fee from $30 to $35 effective March 1, 1986.

1981 Amendment: Changed fee from "$20" to "$30".

87-2-304. Class B-4—two-day nonresident fishing license.

Compiler's Comments

2001 Amendment: Chapter 528 after "sum of" increased fee amount from $10 to $15; and made minor changes in style. Amendment effective March 1, 2002.

1991 Amendment: Increased 2-day nonresident fishing license fee from $8 to $10. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1985 Amendment: Increased license fee from $6 to $8 effective March 1, 1986.

1983 Amendment: Increased license fee from $4 to $6 effective March 1, 1984.

1981 Amendment: Changed fee from "$2" to "$4"; and changed language from 1 day to 2 days throughout.

87-2-305. Navigable waters subject to fishing rights.

Case Notes

Public Recreational Use Rights Statute — Constitutionality: Following Curran and Hildreth decisions (see below), which held that the public trust doctrine provides the public with a constitutional right to use the bed and banks of navigable streams up to the high-water mark despite a landowner's fee title, the Legislature enacted 23-2-302 providing public recreational use of streams. Plaintiff filed suit requesting the court to declare the recreational use statute an

unconstitutional taking or private property without just compensation. Plaintiff then appealed after the trial court upheld the statute's constitutionality and awarded the state summary judgment. The Supreme Court ruled unconstitutional 23-2-302(2)(d), (2)(e), and (2)(f), which provided the public a right to hunt big game, build duck blinds and boat moorages, and camp overnight so long as not within sight of an occupied dwelling or within 500 yard of an occupied dwelling, whichever is less. The court further held as unconstitutional 23-2-311(3)(e), which required a landowner to pay costs of constructing a portage route around artificial barriers. The public has a right of use of the bed and banks up to the high-water mark but only such use as is necessary to utilization of the water itself. Any use of the bed and banks must be of minimal impact. Galt v. St., 225 M 142, 731 P2d 912, 44 St. Rep. 103 (1987).

Public Right to Use Beaverhead River for Recreational Purposes: Following the decision in Mont. Coalition for Stream Access v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984), the Supreme Court held that: (1) the Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water; (2) determination of navigability for title is not necessary; (3) the public does not have the right to trespass over private property in order to reach the state-owned waters; and (4) plaintiff's action did not constitute inverse condemnation because public use of waters, rather than title, was determined. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984).

Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens: In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (now Department of Natural Resources and Conservation) and the Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Determining Public's Right to Use Dearborn River — Indispensable Parties: Stream access coalition, the Department of State Lands (now Department of Natural Resources and Conservation), and the Department of Fish, Wildlife, and Parks sued landowner along the Dearborn River, seeking a determination of the public's right to use the river. The District Court did not err for failure to dismiss the plaintiffs' claims for failure to join indispensable parties. When litigation seeks vindication of a public right, those who may be adversely affected by a decision do not thereby become indispensable parties. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Navigability for Title Purposes — Federal Test — Dearborn River Navigable: Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Navigability for Title Purposes — Summary Judgment — Dearborn River: The District Court properly granted the coalition for stream access and two state departments summary judgment on the issue of navigability of the Dearborn River in 1889 for title purposes. The affidavits and depositions of plaintiffs' two competent historians were admissible because the historians were qualified experts who provided evidence of the history of the river, their affidavits and depositions disclosed circumstantial guarantees of trustworthiness, and the facts and data they relied on were of a type reasonably relied on by experts in their field; the facts and data did not themselves have to be admissible. The affidavits of defendant landowner's witnesses were worthless, were not admissible, and did not create any genuine issue of material fact concerning the navigability of the river at the time Montana became a state in 1889. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Public Recreational Use Rights on Dearborn River — Limits: Navigability for public use is governed by state law and is separate from the question of navigability under federal law for title purposes. The question is whether waters owned by the State under Art. IX, sec. 3(3), Mont. Const., are susceptible to recreational use by the public. The capability of use of the waters for

recreational purposes determines the availability of the waters for recreational use by the public. Whether or not a private party owns the bed beneath the waters is irrelevant. The constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State, and any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Recreation on Dearborn River — Ex Post Facto, Contract Clause, and Irrevocable Privileged Considerations: The Supreme Court held that the State, not the landowner along the Dearborn River, held title to the bed of the river under the federal test of navigability (at the time Montana became a state) for purposes of determining title to the riverbed. The court also held that landowner had no right to exclude the public from recreational use of the waters of the Dearborn. Because of these holdings, landowner's questions relating to ex post facto laws, violation of the contract clause of the constitution, and irrevocable rights and privileges were not germane to the case. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Use of Dearborn River — Federal Commerce Clause Navigability Immaterial: In action for determination of the public's right to use the Dearborn River, whether Montana has adopted the log-floating test of commercial navigability and whether the Dearborn is navigable under the federal commercial use test were immaterial because the question was one of recreational use or navigability, not commercial navigability. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found: Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Summary of Holdings in Litigation Over Hunting and Fishing Rights on Crow Indian Reservation: "The explicit holdings of the Supreme Court in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and of the 9th Circuit Court of Appeals in United States v. State of Montana, 604 F.2d 1162 (9th Cir. 1979), to the extent not reversed by the Supreme Court, are as follows:

1. The Crow Tribe can proscribe all hunting and fishing by non-members on those lands described in 18 U.S.C. §1165. Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254.

2. The Crow Tribe, within 18 U.S.C. §1165 lands, has power to regulate hunting and fishing by non-members of the tribe (whether Indian or non-Indian) subject to the following conditions:

(a) That the Crow Tribe lacks the power to impose criminal sanctions on non-Indians who violate its hunting and fishing regulations,

(b) That the exercise by the Crow Tribe of its power to regulate hunting and fishing by non-Indians must be within the constraints recognized by this court in Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976). Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254; United States v. Montana, 604 F.2d at 1165, 1170.

3. The title to the bed and banks of the Big Horn is in the State of Montana. 450 U.S. at 556-57, 101 S.Ct. at 1253-54.

4. The Crow Tribe has no power to regulate hunting and fishing by non-members on non-member owned fee patent land located within the exterior boundaries of the Crow Reservation. Id. at 557, 101 S.Ct. at 1254.

5. The State of Montana cannot regulate hunting and fishing by members of the Crow Tribe within 18 U.S.C. §1165 lands. 604 F.2d at 1172.

6. The State of Montana has the power to regulate hunting and fishing by non-members of the Crow Tribe within the exterior boundaries of the Crow Reservation subject to the following limitations:

(a) That such regulations of the State of Montana not regulate indirectly the hunting and fishing by members of the Crow Tribe on 18 U.S.C. §1165 lands.

(b) That such regulations of the State of Montana must have as their purpose the conservation and proper management of game and fish and not to discriminate against, nor to impede, authorized regulation by the Crow Tribe. Id. at 1166.

7. Such rights as the State of Montana has to regulate fishing on the Big Horn River by the Crows and all others are not limited by either (a) the treaties of 1851 and 1868 (except to such extent as these treaties might acknowledge pertinent aboriginal title rights of the Crow Tribe not heretofore asserted or recognized in this litigation) or (b) the inherent sovereignty of the Crow Tribe. 604 F.2d at 1170-71." (Quoting from U.S. v. Mont., 686 F2d 766 (9th Cir. 1982), at pp. 768-769.)

Tribal Regulation of Flathead Lake Usage: Confederated Salish and Kootenai Tribes of the Flathead Reservation have authority to regulate federal common-law riparian rights of non-Indians who own reservation land bordering the south half of Flathead Lake. The Circuit Court held that the decision in Mont. v. U.S., 450 US 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981), regarding ownership and control of the Bighorn River, was not controlling. The decision in Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), was given deference under the principle of stare decisis. Rochester held that the United States holds title to the bed and banks of the south half of Flathead Lake in trust for the tribes. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982), followed in In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002).

Law Review Articles

Public Use of the Banks and Beds of Montana Streams, Stone, 52 Mont. L. Rev. 107 (1991).

Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit, Isham, 43 Mont. L. Rev. 247 (1982).

The Legal Background on Recreational Use of Montana Water, Stone, 32 Mont. L. Rev. 1 (1971).

Stream Access in Montana After *Galt v. State*, Hunter, 8 Pub. Land L. Rev. 177 (1987).

Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination, Allen, 16 B.C. Envtl. Aff. L. Rev. 857 (1989).

Indian Allotment Water Rights, Collins, 20 Land & Water L. Rev. 421 (1985).

Indian Water Law: The Continuing Jurisdictional Nightmare, Lightstone, 25 Nat. Res. J. 841 (1985).

Resolving Indian Reserved Water Rights in the Wake of San Carlos Apache Tribe, Upite, 15 Envtl. L. 181 (1984).

Collateral References

Fish *key* 3.

36A C.J.S. Fish §§6 through 8.

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned. 6 ALR 4th 1030.

Right created by private grant or reservation to hunt or fish on another's land. 49 ALR 2d 1395.

Right of public to fish in stream notwithstanding objection by riparian owner. 47 ALR 2d 381.

What are "navigable waters" subject to the provisions of the Federal Water Pollution Control Act, as amended (33 U.S.C.S. §1251, et seq.). 52 ALR Fed. 788.

Recreational Use of Montana's Waterways, Report to the 49th Legislature, Joint Interim Subcommittee No. 2, Montana Legislative Council (1984).

Select Committee on Indian Affairs: 1983-84 Activities, Report to the 49th Legislature, Montana Legislative Council (1984).

Water Resources Oversight Committee, Report to the Legislature, Montana Legislative Council (1983).

Report and Recommendations of the Select Committee on Indian Affairs, Montana Legislative Council (November 1980).

Committee on Indian Legal Jurisdiction, published by Montana Legislative Council (January 1979).

87-2-306. Paddlefish tags.

Compiler's Comments

2001 Amendment: Chapter 3 in (1) near beginning of first sentence after "tags to" substituted "persons listed in subsection (2)" for "holders of valid Class A, Class B, and Class B-4 fishing licenses"; inserted (2) listing persons eligible to obtain paddlefish tags; and made minor changes in style. Amendment effective February 7, 2001.

1991 Amendment: Increased resident paddlefish tag fee from $3 to $4 beginning March 1, 1992, and to $5 beginning March 1, 1994, and increased nonresident fee from $10 to $15. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1985 Amendment: At end of first sentence, after "$3", inserted "for residents and $10 for nonresidents", effective March 1, 1986.

Part 4
Game Bird Licenses

Part Case Notes

Constitutionality: The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

Part Law Review Articles

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

Part Collateral References

35 Am. Jur. 2d Fish and Game §§34, 35, 45.

87-2-401. Class A-1—resident upland game bird license.

Compiler's Comments

1999 Amendment: Chapter 533 after first "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

1995 Amendments: Chapter 32 in two places, after "game birds", deleted "cranes, rails, snipes, and mourning doves"; and made minor changes in style. Amendment effective March 1, 1996.

Chapter 417 near middle, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1987 Amendments: Chapter 105 throughout section inserted "upland" before "game" and after "birds" inserted "cranes, rails, snipes, and mourning doves".

Chapter 636 increased fee from $4 to $6.

87-2-402. Class B-1—nonresident upland game bird license — authority to limit licenses.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 525 in (1) increased fee from $55 to $110; inserted (2) pertaining to the issuance of nonresident upland game bird licenses; inserted (3) requiring a report to the legislature on upland game bird populations if nonresident license limits are adopted; inserted (4) authorizing rule adoption for group applicant participation in drawing system; and made minor changes in style. Amendment effective March 1, 2000, and terminates January 1, 2003; however, the amendment in (1) was made permanent by Ch. 544.

Chapter 533 after first "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

Chapter 544 increased fee from $55 to $110. Amendment effective March 1, 2000.

1995 Amendments: Chapter 32 in two places, after "game birds", deleted "cranes, rails, snipes, and mourning doves"; and made minor changes in style. Amendment effective March 1, 1996.

Chapter 417 near middle, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1991 Amendment: Increased upland game bird license fee from $53 to $55. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1987 Amendments: Chapter 105 throughout section inserted "upland" before "game" and after "birds" inserted "cranes, rails, snipes, and mourning doves".

Chapter 636 increased fee from $30 to $53.

Administrative Rules

ARM 12.9.305 Sale of nonresident upland game bird licenses.

87-2-403. Wild turkey tags and fee.

Compiler's Comments

2001 Amendment: (Version effective March 1, 2002) Chapter 528 in (1) substituted "nonresident wildlife conservation license" for "Class B-1 license"; and in (2) in first sentence substituted "$5 for a resident and $115 for a nonresident" for "$4 beginning March 1, 1992, and $5 beginning March 1, 1994, for residents and $13 for nonresidents".

(Version effective March 1, 2006) In (1) substituted "nonresident wildlife conservation license" for "Class B-1 license"; and in (2) in first sentence after "$5" inserted "for a resident and $105 for a nonresident".

1995 Amendment: Chapter 417 in (1), after "holder to", deleted "pursue", after "hunt" deleted "shoot, and kill", and near end substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Extension of Termination Date: Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

1991 Amendment: (Version effective March 1, 1992) In (2) increased resident turkey tag fee from $3 to $4 beginning March 1, 1992, and to $5 beginning March 1, 1994.

(Version effective March 1, 1996) In (2) increased turkey tag fee from $3 to $5. Amendments effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

Extension of Termination Date: Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

1987 Amendment: In (2) inserted nonresident fee and made minor change in phraseology.

1985 Amendment: In (1) inserted "or as set out in subsection (3)"; and inserted (3) removing turkey tag fee for certain applicants.

1981 Amendment: Changed fee in (2) from "$2" to "$3".

87-2-404. Three-day nonresident captive-reared bird hunting stamp.

Compiler's Comments

1999 Amendment: Chapter 533 after first "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

1995 Amendment: Chapter 417 near end, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

87-2-411. License required to hunt migratory game birds.

Compiler's Comments

2001 Amendment: Chapter 129 in second sentence inserted "a resident to purchase" and inserted third sentence establishing $50 license fee for nonresident. Amendment effective March 1, 2002.

Termination Provision Repealed: Section 2, Ch. 49, L. 2001, repealed sec. 4, Ch. 568, L. 1999, which terminated the amendments to this section February 28, 2002. Effective March 16, 2001.

1999 Amendment: Chapter 568 near beginning of first sentence after "person" substituted "16" for "15". Amendment effective March 1, 2000, and terminates February 28, 2002.

Preamble: The preamble attached to Ch. 568, L. 1999, provided: "WHEREAS, Montana's youth should be encouraged to take advantage of Montana's abundant outdoor recreational opportunities; and

WHEREAS, a person who learns early in life to fish and hunt responsibly and ethically is likely to continue that behavior throughout the person's life; and

WHEREAS, Montana's fishing and hunting heritage will be preserved for future generations as more youth are introduced to those sports; and

WHEREAS, providing an affordable combination license that allows a young person to fish and hunt upland game birds, deer, and elk will be an effective way to cultivate an appreciation for the state's wildlife resources among Montana's youth."

1997 Amendment: Chapter 187 in two places substituted "license" for "stamp". Amendment effective March 1, 1998.

1995 Amendments: Chapter 32 in two places substituted reference to migratory game birds for reference to waterfowl; deleted (2) that read: "(2) For the purpose of this section, the term "waterfowl" means wild ducks, wild geese, brant, and swans"; and made minor changes in style. Amendment effective March 1, 1996.

Chapter 417 after "older to" deleted "pursue" and after "hunt" deleted "shoot, or kill"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1989 Amendment: In (1) reduced age limit of persons who must obtain a waterfowl stamp to hunt waterfowl from 16 years to 15 years. Amendment effective April 4, 1989.

87-2-412. Procurement and sale of artwork for migratory bird stamp — disposition of proceeds.

Compiler's Comments

1997 Amendment: Chapter 187 in (1), near middle of first sentence after "bird stamp", deleted "required by 87-2-411". Amendment effective March 1, 1998.

1995 Amendment: Chapter 32 near beginning of (1) substituted reference to migratory game bird for reference to waterfowl; and made minor changes in style. Amendment effective March 1, 1996.

Part 5
Game Animal Licenses

Part Case Notes

Constitutionality: The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

Tagging Game Killed by Another: Tagging of game animal that someone else has killed or so far brought under control that one can walk up to it and cut its throat is not a method of acquiring ownership contemplated by the statute authorizing a licensed hunter to pursue, hunt, shoot, and kill game animals and then to possess the carcass, with the result that the person tagging illegally killed elk is not entitled to possession. State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

Part Law Review Articles

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

Part Collateral References

35 Am. Jur. 2d Fish and Game §§34, 35, 45.

87-2-501. Class A-3, A-4, A-5, A-6, A-7—resident deer, elk, and bear licenses — special Class A-7 resident and nonresident license requirements and preference.

Compiler's Comments

1999 Amendment: Chapter 533 in (1) after "who" substituted "is" for "will be", after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of", and after "holder" inserted "who is 12 years of age or older"; in (2)(a) after "license" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

1995 Amendments: Chapter 263 in (1)(a) through (1)(e) deleted former license fees and dates upon which fees became effective (see 1995 Session Law for text); in (1)(d), after "black", deleted "or brown"; and made minor changes in style. Amendment effective March 1, 1996.

Chapter 417 in (1), after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; in (1)(a), after "tag", deleted "$11 beginning March 1, 1992, and" and after "$13" deleted "beginning March 1, 1994"; in (1)(b), after "tag", deleted "$7 beginning March 1, 1992, and" and after "$8" deleted "beginning March 1, 1994"; in (1)(c), after "tag", deleted "$13 beginning March 1, 1992, and" and after "$16" deleted "beginning March 1, 1994"; in (1)(d), after "tag", deleted "$11 beginning March 1, 1992, and" and after "$15" deleted "beginning March 1, 1994"; in (1)(e), after "tag", deleted "$13 beginning March 1, 1992, and" and after "$16" deleted "beginning March 1, 1994"; in (2)(a), after "entitled to", substituted "hunt" for "take"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1991 Amendments: Chapter 418 in (3), near beginning after "who", substituted "owns or is contracting to purchase" for "holds fee title to".

Chapter 592 in (1)(a) increased deer A tag fee from $9 to $11 beginning March 1, 1992, and to $13 beginning March 1, 1994; in (1)(b) increased deer B tag fee from $6 to $7 beginning March 1, 1992, and to $8 beginning March 1, 1994; in (1)(c) increased elk tag fee from $10 to $13 beginning March 1, 1992, and to $16 beginning March 1, 1994; in (1)(d) increased bear tag fee from $8 to $11 beginning March 1, 1992, and to $15 beginning March 1, 1994; and in (1)(e) increased antlerless elk tag fee from $10 to $13 beginning March 1, 1992, and to $16 beginning March 1, 1994. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1989 Amendment: Near beginning of (1), after "87-2-102", inserted "or a nonresident who wishes to purchase a Class A-7 elk license only"; near beginning of (2)(a), after "to take", deleted "surplus" and at end, after "commission", deleted "but may not simultaneously possess a Class A-5 and a Class A-7 license in the same year. The commission shall include in the terms of issuance of the Class A-7 license a requirement for surrender of a current Class A-5 license if held by a person at the time he purchases a Class A-7 license. If a current Class A-5 license is surrendered, as required by this section, the Class A-7 license must be issued without cost to the holder"; near end of first sentence of (2)(b), after "Class A-5", inserted "license or nonresident" and inserted second sentence relating to Department's use of special elk permits; and inserted (2)(c) that read: "(c) A nonresident shall hold a nonresident Class B-10 license as a prerequisite to application for a Class A-7 license." Amendment effective March 1, 1990.

Delayed Effective Date: Section 3, Ch. 296, L. 1989, provided: "[This act] is effective March 1, 1990."

1987 Amendment: Inserted (3) through (5) relating to the landowner set-aside of Class A-7 licenses.

1985 Amendment: Effective March 1, 1986, near middle of (1), after "licenses", inserted "at the prescribed cost"; in (1)(e) increased fee from $8 to $10; and in (2) near end of first sentence, substituted "and upon such terms as set forth by the commission but may not simultaneously possess a Class A-5 and a Class A-7 license in the same year" for "during the regular big game season as set forth by the commission", inserted second and third sentences requiring surrender of current Class A-5 license and issuance of Class A-7 license without cost if Class A-5 license is surrendered, at beginning of fourth sentence deleted "However", and in middle of fourth sentence, after "person", substituted "holding a Class A-7 antlerless elk tag may not take an elk" for "taking an antlerless elk as provided in this subsection may not take another elk".

1983 Amendment: Increased license fees as follows: Class A-3, deer A tag from $8 to $9; Class A-4, deer B tag from $5 to $6; Class A-5, elk tag from $9 to $10; and inserted (1)(e) and (2), creating Class A-7, antlerless elk tag.

Statement of Intent: The statement of intent attached to HB 335 (Ch. 680, L. 1983) provided: "A statement of intent is required for House Bill 335 because section 3 [87-2-501] provides that the Fish and Game Commission [now Fish, Wildlife, and Parks Commission] will designate the areas in which surplus antlerless elk may be taken with a Class A-7 antlerless elk license. In addition, the Commission may set times during the regular big game season for the taking of surplus antlerless elk in designated areas.

The intent of the Class A-7 antlerless elk license is to provide the Commission with the option to issue antlerless elk licenses. The Commission would, with appropriate public comment, authorize antlerless elk licenses to be used in problem areas where additional antlerless elk need to be harvested. Class A-7 antlerless elk license holders would not be allowed to harvest a bull elk in the designated areas for the time period authorized by the Commission for the antlerless elk license.

The Class A-7 antlerless elk license would not replace the need for or use of the antlerless or either sex elk permits now in place. The Class A-7 antlerless elk license would provide additional flexibility for the Commission to deal with problems of surplus antlerless elk, particularly on private land."

1981 Amendment: Increased license fees as follows: Class A-3, deer A tag from "$7" to "$8"; Class A-5, elk tag from "$8" to "$9"; and Class A-6, bear tag from "$6" to "$8".

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

87-2-504. Class B-7 and B-8—nonresident deer licenses.

Compiler's Comments

2001 Amendment: Chapter 528 in (1)(a) near end substituted "fish, wildlife, and parks" for "fish and game"; in (1)(a)(i) increased license fee to $250; and made minor changes in style. Amendment effective March 1, 2002.

Termination Provision Repealed: Section 1, Ch. 21, L. 2001, repealed sec. 6, Ch. 355, L. 1997, which terminated the 1997 amendments to this section October 1, 2001. Effective February 19, 2001.

1999 Amendment: (Version effective October 1, 2000) Chapter 533 in (1)(a) after second "who" substituted "is" for "will be" and after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of"; in (1)(b) after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. (Corresponding changes were made in later versions.) Amendment effective October 1, 2000.

1997 Amendment: (Temporary version) Chapter 355 in (1)(a)(i) increased cost of Class B-7 deer tag from $150 to $175; in (1)(a)(ii) increased cost of Class B-8 deer tag from $50 to $75; in (1)(b), at end before "rules", substituted "commission" for "department"; in (2), in first sentence after "license", substituted "may" for "must", after "region or" inserted "regions or a", and after "administrative region" inserted "or regions or in a specific hunting district or districts or a portion of a specific hunting district or districts", in second sentence, after "state", inserted "except as provided in 87-2-512(1)(d)", and deleted third sentence that read: "Money received from the sale of Class B-7 licenses in excess of 1,700 must be used as provided in 87-1-242(1)"; inserted (3) allowing the Commission to set certain conditions on Class B-8 licenses; and made minor changes in style. Amendment effective April 22, 1997, and terminates October 1, 2001.

1997 Statement of Intent: The statement of intent attached to Ch. 355, L. 1997, provided: "This bill establishes the authority of the fish, wildlife, and parks commission to modify, by rule, the structure of nonresident elk and deer licenses within the general framework established by law as needed for the effective management of big game animals. It is the intent of the legislature that in its initial rulemaking process, the commission utilize an advisory committee, including representatives of hunting and fishing organizations, outfitters, and landowners, to make recommendations regarding the structure of nonresident hunting licenses as authorized by this bill. It is also the intent of the legislature that commission rules not authorize more nonresident elk and deer hunters than are prescribed by current law."

Termination: Section 6, Ch. 355, L. 1997, provided: "[This act] terminates October 1, 2001."

1995 Amendment: Chapter 417 near end of first sentence, in clause following first list of licenses after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Extension of Termination Date: Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

Extension of Termination Date: Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

1987 Amendments: Chapter 458 near beginning of second sentence inserted "or B-11" and inserted sentence allowing B-7 license purchased as part of B-11 license to be used statewide. Amendment effective March 1, 1988.

Chapter 598 increased B-7 tag from $100 to $150 and inserted last two sentences limiting number of licenses sold and providing for use of money from sale. (Chapter 598 amendments terminate March 1, 1994.)

87-2-505. Class B-10—nonresident big game combination license.

Compiler's Comments

2001 Amendments — Composite Section: (Version effective March 1, 2002) Chapter 216 in (1) near middle of first sentence after "$475" inserted "plus the nonresident hunting access enhancement fee in 87-2-202(3)(d)". Amendment effective March 1, 2002, and terminates March 1, 2006.

(Version effective March 1, 2002) Chapter 528 in (1) in first sentence increased fee from $475 to $625.

(Version effective March 1, 2006) In (1) substituted "fee of $550" for "fee of $398 or upon payment of the fee of $408 if the license is one of the 5,600 licenses reserved pursuant to 87-2-511 for applicants indicating their intent to use the services of a licensed outfitter"; and made minor changes in style.

(Versions effective March 1, 2002, and March 1, 2006) In (1) in first sentence substituted "fish, wildlife, and parks office" for "fish and game office".

Preamble: The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

1999 Amendment: Chapter 533 in (1) after second "who" substituted "is" for "will be", after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of", and after "holder" inserted "who is 12 years of age or older"; inserted (2) concerning unsuccessful nonresident in B-10 drawing; and made minor changes in style. Amendment effective October 1, 2000.

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

1995 Amendment: Chapter 459 in version effective March 1, 1996, in first sentence, after "payment of the fee of", deleted "$462 beginning March 1, 1992, and", after "$475" deleted "beginning March 1, 1994", substituted "established as provided in 87-1-268" for "of $472 beginning March 1, 1992, and $485 beginning March 1, 1994", and before "licenses" deleted "5,600" and in second sentence substituted "11,500 unreserved" for "17,000"; and made minor changes in style. Amendment effective March 1, 1996, and terminates October 1, 2001.

Amendment Not Codified: The Code Commissioner has not codified the amendments to the version effective March 1, 2006. Section 18(1), Ch. 459, L. 1995, terminated the amendments on October 1, 2001, before the section became effective on March 1, 2006.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Extension of Termination Date: Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

1991 Amendment: (Version effective March 1, 1992) In first sentence increased nonresident big game combination license fee from $450 to $462 beginning March 1, 1992, and to $475 beginning March 1, 1994, or to $472 beginning March 1, 1992, and to $485 beginning March 1, 1994, for applicants indicating intent to use services of licensed outfitter and near end, after "Class B-7", deleted "and black bear"; and made minor change in style.

(Version effective March 1, 1996) In first sentence increased nonresident big game combination license fee from $373 to $398 or to $408 for applicants indicating intent to use services of licensed outfitter and near end, after "Class B-7", deleted "and black bear"; and made minor change in style. Amendments effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

Extension of Termination Date: Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

1987 Amendments: Chapter 598 increased fee from $350 to $450 from March 1, 1988, to March 1, 1994.

Chapter 636 increased fee from $350 to $373.

1985 Amendment: Increased license fee from $300 to $350 effective March 1, 1986.

1983 Amendment: Increased license fee from $275 to $300 effective March 1, 1984.

1981 Amendment: Changed the fee from "$225" to "$275".

Administrative Rules

ARM 12.3.124 Combination license preference system.

Case Notes

Constitutionality: The disparity in the treatment of residents and nonresidents under this section is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. (See 1999 amendment.) Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

87-2-506. Restrictions on hunting licenses.

Compiler's Comments

1985 Amendment: In two places in (2) inserted "big game" before "licenses".

Administrative Rules

ARM 12.3.116 Moose, sheep, and goat licenses.

87-2-507. Class D-1—nonresident mountain lion license.

Compiler's Comments

1999 Amendment: Chapter 533 in first sentence after "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

1995 Amendment: Chapter 417 near middle of first sentence, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Extension of Termination Date: Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

Extension of Termination Date: Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

1987 Amendment: Increased fee from $300 to $320.

1983 Amendment: Increased license fee from $100 to $300 and inserted last two sentences relating to trophy license requirements for mountain lion — effective March 1, 1984.

87-2-508. Class D-2—resident mountain lion license.

Compiler's Comments

1999 Amendment: Chapter 533 in first sentence after "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

1995 Amendment: Chapter 417 in first sentence, after "fee of", deleted "$13 beginning March 1, 1992, and", after "$15" deleted "beginning March 1, 1994", after "holder to" deleted "pursue", and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1991 Amendment: In first sentence increased mountain lion license fee from $10 to $13 beginning March 1, 1992, and to $15 beginning March 1, 1994. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1983 Amendment: Increased license fee from $5 to $10 and inserted last two sentences relating to trophy license requirements for mountain lion — effective March 1, 1984.

87-2-509. Tagging of carcasses of game animals.

Compiler's Comments

1995 Amendment: Chapter 417 in (1), in first sentence after "license to", substituted "hunt" for "pursue, shoot, kill, capture, take, or possess", in second sentence, near beginning after "person", deleted "takes or" and near middle, after "killed", deleted "or taken", and at beginning of fourth sentence inserted "When a game animal has been lawfully killed and" and near end substituted "lawfully killed" for "tagged"; at end of (2) inserted sentence concerning tagging animal with restricted tag; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1993 Amendment: Chapter 589 in last sentence of (1), before "may be possessed", inserted "becomes the property of the person who tagged the animal and", after "stored" inserted "donated to another or to a charity", and before "transported" substituted "or" for "and"; and made minor changes in style. Amendment effective April 29, 1993.

Administrative Rules

ARM 12.6.301 Tagging of carcasses of game animals.

Case Notes

Failure to Keep Tag Attached to Animal Hide — Continuous Offense: Defendant argued that the statute of limitations on the misdemeanor offense of failing to keep a tag attached to a hide is 1 year under 45-1-205. However, the language of this section indicates that the offense continues as long as any considerable portion of the hide remains unconsumed, which in this case was interpreted to mean as long as the bear hide remained in preparation for taxidermy. St. v. Earl, 242 M 279, 790 P2d 464, 47 St. Rep. 691 (1990).

Sufficient Evidence of Failure to Keep Tag on Bear Hide: In the freezer of a taxidermy shop, fish and game inspectors found a frozen bear hide without a tag attached. Defendant was cited for failure to keep a tag attached to the hide but argued that the state failed to prove she was in possession of the hide at any time when it was not tagged. However, a rational jury could have found possession beyond a reasonable doubt, based on defendant's testimony that she knew where the hide was at all times and had not given it away or abandoned control over it. St. v. Earl, 242 M 279, 790 P2d 464, 47 St. Rep. 691 (1990).

Tagging Game Killed by Another: Under statute requiring tagging, the word "take" does not mean that one can tag animal someone else has killed, so if one person illegally killed elk, another person cannot gain ownership by tagging it and ownership of elk remains in state. State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

Seizure and Confiscation of Untagged Carcass: In a case which arose while section 26-205, R.C.M. 1947 (subsequently repealed), was in effect, it was held that when plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass, the deer was not unlawfully possessed and the Game Warden was without authority to seize and confiscate the carcass when he arrested plaintiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P2d 300 (1957).

87-2-510. Class B-11—nonresident deer combination license.

Compiler's Comments

2001 Amendments — Composite Section: (Version effective March 1, 2002) Chapter 216 in first sentence in (1) after "$245" and after "$250" inserted "plus the nonresident hunting access enhancement fee in 87-2-202(3)(d)". Amendment effective March 1, 2002, and terminates March 1, 2006.

(Version effective March 1, 2002) Chapter 528 in (1) increased fee for nonresident 12 years of age or older from $245 to $325, increased fee for nonresident using outfitter from $250 to $325, and substituted "fish, wildlife, and parks office" for "fish and game office".

(Version effective March 1, 2006) In (1) at end of first sentence substituted "$300, purchase a Class B-11 nonresident deer combination license that entitles a holder who is 12 years of age or older to all the privileges of the Class B, Class B-1, and Class B-7 licenses" for "$220 or upon payment of the fee of $225", at beginning of second sentence inserted "The fee for a Class B-11

license is $300", and in fourth sentence substituted "fish, wildlife, and parks office" for "fish and game office" and after "Montana" deleted "to purchase a Class B-11 nonresident deer combination license that entitles a holder who is 12 years of age or older to all the privileges of the Class B, Class B-1, and Class B-7 licenses"; and made minor changes in style.

Preamble: The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

1999 Amendment: Chapter 533 in (1) after second "who" substituted "is" for "will be", after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of", and after "holder" inserted "who is 12 years of age or older"; inserted (3) concerning unsuccessful nonresident in B-11 drawing; and made minor changes in style. Amendment effective October 1, 2000.

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

1995 Amendment: Chapter 459 in version effective March 1, 1996, in (1), in first sentence, substituted "established as provided in 87-1-268" for "of $225", after "license is one of" substituted "those" for "the 4,000", and inserted requirement for payment of $225 fee for license reserved under 87-2-511; in (2) substituted "Not more than 2,300 unreserved" for "Six thousand"; and made minor changes in style. Amendment effective March 1, 1996, and terminates October 1, 2001.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory

guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Code Commissioner Correction: This section was amended in 1991 by Ch. 592, L. 1991, to increase the cost of a general Class B-11 license to $245 and the cost of a resident-sponsored and outfitter-sponsored license to $250, effective March 1, 1994. The 1995 Legislature amended this section to reflect pricing of the outfitter-sponsored license according to the variable pricing format of Ch. 459, L. 1995, without changing the price of the general or resident-sponsored license, but amended an earlier version of this section. The prices of the general license and the resident-sponsored license have been corrected by the Code Commissioner to reflect the actual license prices set by Ch. 592, L. 1991.

1991 Amendment: (Version effective March 1, 1992) In (1) increased nonresident combination deer license fee from $200 to $238 beginning March 1, 1992, and to $245 beginning March 1, 1994, or to $248 beginning March 1, 1992, and to $250 beginning March 1, 1994, for applicants indicating intent to use services of licensed outfitter or to hunt with resident sponsor on sponsor's land.

(Version effective March 1, 1994) In (1) increased nonresident deer combination license fee from $175 to $220 or to $225 for applicants indicating intent to use services of licensed outfitter or to hunt with resident sponsor on sponsor's land. Amendments effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

Coordination Instruction: Section 11, Ch. 598, L. 1987, a coordination instruction, increased fee in (1) of temporary version from $175 to $200.

87-2-511. Sale and use of Class B-10 and Class B-11 licenses.

Compiler's Comments

1999 Amendment: (Temporary version) Chapter 544 in (3) inserted second, third, fourth, and fifth sentences requiring department to issue licenses to applicant sponsored by resident owner of 640 or more acres if licenses sufficient, requiring issuance of licenses to second applicant for sponsor, requiring drawing for remaining resident-sponsored licenses, and requiring drawing when number of licenses insufficient and in sixth sentence decreased number of sponsorship certificates from 20 to 15 and after "year" deleted "prior to expiration of the moratorium established in 37-47-315, after which no more than 10 certificates of sponsorship may be submitted in any license year"; and made minor changes in style. Amendment effective April 29, 1999.

Extension of Termination Date: Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

1995 Amendments: Chapter 328 in (1), after "applicants", substituted "using" for "indicating their intent to use"; in (2), near beginning, substituted "resident-sponsored license" for "reserved license", after "affirmation" inserted "by the applicant", after "hunt with" deleted "a licensed outfitter or", after "name of the" deleted "licensed outfitter or", after "signed by a" deleted "licensed outfitter or", and at end substituted "the resident sponsor will" for "the outfitter or resident will"; in (2)(b) inserted reference to resident sponsor; in (2)(c), at end, inserted reference to Title 37, chapter 47; inserted (4) relating to outfitter-sponsored license; inserted (5) relating to substitute outfitter; adjusted subsection references; and made minor changes in style.

Chapter 459 in temporary version in (1) substituted "a number" for "5,600", after "Class B-10" inserted "and Class B-11", and substituted "as determined under 87-1-268" for "and 2,000 Class B-11 licenses"; in (2)(b), pursuant to sec. 15(2), Ch. 459, L. 1995, a coordination section, substituted "the resident sponsor" for "the outfitter or resident"; in (3) inserted second sentence regarding limitation of submission of certificates of sponsorship; inserted (6) regarding limitation on deer hunting; inserted (7) regarding validity of permits or tags; in (8) inserted "outfitter-sponsored", after "remain unsold" deleted "on April 15", and substituted reference to

87-1-268 for "to nonresident applicants without restriction as to hunting with a licensed outfitter or resident sponsor"; in (9), after "subsection (1)", deleted "and all unsold reserved licenses available under subsection (4)"; and made minor changes in style. Amendment terminates October 1, 2001.

Preamble: The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

1995 Statement of Intent: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

Severability: Section 13, Ch. 459, L. 1995, was a severability clause.

Saving Clause: Section 14, Ch. 459, L. 1995, was a saving clause.

Administrative Rules

ARM 12.3.123 Combination license alternate list.

87-2-512. Separation of Class B-7 license from Class B-10 license for deer management purposes — disposition of license revenue.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 21, L. 2001, repealed sec. 6, Ch. 355, L. 1997, which terminated the 1997 amendments to this section October 1, 2001. Effective February 19, 2001.

1997 Statement of Intent: The statement of intent attached to Ch. 355, L. 1997, provided: "This bill establishes the authority of the fish, wildlife, and parks commission to modify, by rule, the structure of nonresident elk and deer licenses within the general framework established by law as needed for the effective management of big game animals. It is the intent of the legislature that in its initial rulemaking process, the commission utilize an advisory committee, including

representatives of hunting and fishing organizations, outfitters, and landowners, to make recommendations regarding the structure of nonresident hunting licenses as authorized by this bill. It is also the intent of the legislature that commission rules not authorize more nonresident elk and deer hunters than are prescribed by current law."

Effective Date: Section 5, Ch. 355, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 22, 1997.

Termination: Section 6, Ch. 355, L. 1997, provided: "[This act] terminates October 1, 2001."

87-2-513. Either-sex or antlerless elk permit for landowner who offers free public elk hunting — terms, conditions, and issuance of permit.

Compiler's Comments

Preamble: The preamble attached to Ch. 519, L. 2001, provided:

"WHEREAS, landowner stewards provide important habitat that beneficially contributes to elk herd numbers and health; and

WHEREAS, certain landowners close their land to public hunting, preventing any harvest of big game, while other landowners allow limited hunting access and harvest, creating a problem of uneven distribution of big game; and

WHEREAS, restricted access to private property for public hunting prevents the department from managing big game population numbers and distribution."

Effective Date: Section 3, Ch. 519, L. 2001, provided: "[This act] is effective on passage and approval." Approved May 1, 2001.

Termination: Section 4, Ch. 519, L. 2001, provided: "[This act] terminates March 1, 2006."

87-2-520. Supplemental game damage license — terms and conditions.

Compiler's Comments

Effective Date: Section 3, Ch. 590, L. 2001, provided that this section is effective on passage and approval. Approved May 5, 2001.

Termination: Section 4, Ch. 590, L. 2001, provided that this section terminates March 1, 2006.

Administrative Rules

ARM 12.9.805 Supplemental game damage licenses.

Part 6
Trapping Licenses

Part Administrative Rules

Title 12, chapter 6, subchapter 10, ARM Trapping.

Part Case Notes

Constitutionality: The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

Part Attorney General's Opinions

Right to Trap on Streams Not Governed by Stream Access Law: The right to trap fur-bearing animals between the ordinary high-water marks of a stream is not governed by Title 23, ch. 2, part 3, but rather is dependent upon whether the trapper has license, invitation, or privilege to enter or remain upon land and whether the trapper has secured a license to trap. 41 A.G. Op. 36 (1985).

Part Law Review Articles

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

The Missing Lynx: Trapping, Logging and Compensation, Van Drimmelen, 25 U. Brit. Colum. L. Rev. 335 (1991).

Part Collateral References

35 Am. Jur. 2d Fish and Game §§34, 35, 45.

87-2-601. Class C—trapper's license.

Compiler's Comments

1985 Amendment: Near beginning, after "87-2-102", inserted "who is 13 years of age or older".

1983 Amendment: Increased license fee from $10 to $20.

87-2-602. Class C-1—landowner's trapping license.

Collateral References

35 Am. Jur. 2d Fish and Game §16.

87-2-603. Class C-2—nonresident trapper's license.

Compiler's Comments

1985 Amendment: Near beginning of (1) after "87-2-102", inserted "who is 13 years of age or older".

Part 7
Special and Combination Licenses and Nongame Certificate

Part Case Notes

Constitutionality: The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

Part Law Review Articles

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

Part Collateral References

35 Am. Jur. 2d Fish and Game §45.

87-2-701. Special licenses.

Compiler's Comments

2001 Amendment: (Version effective March 1, 2002) Chapter 528 in (1)(a), (1)(b), and (1)(c) increased nonresident fees for moose, mountain goat, and mountain sheep licenses from $475 to $750; in (1)(d) increased antelope nonresident fee from $150 to $200; in (1)(f) increased nonresident black bear fee from $120 to $350; and made minor changes in style.

(Version effective March 1, 2006) In (1)(a), (1)(b), and (1)(c) increased nonresident fees for moose, mountain goat, and mountain sheep licenses from $455 to $980; in (1)(d) increased antelope nonresident fee from $130 to $180; in (1)(f) increased nonresident black bear fee from $100 to $330; and made minor changes in style.

1999 Amendment: Chapter 533 in (1) after "who" substituted "is" for "will be" and after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of"; and in (2) after "license" inserted "who is 12 years of age or older". Amendment effective October 1, 2000.

1995 Amendment: Chapter 263 in (1)(a) through (1)(d) of March 1, 1996, version deleted former license fees and dates upon which fees became effective (see 1995 Session Law for text); in versions effective March 1, 1996, and March 1, 2006, in (1)(f), after "black", deleted "or brown"; and made minor changes in style. Amendment effective March 1, 1996.

Extension of Termination Date: Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

1991 Amendments: Chapter 401 deleted (1)(g) establishing wild buffalo license with resident fee of $200 and nonresidential fee of $1,000; and made minor changes in style. Amendment effective April 9, 1991.

(Version effective March 1, 1992) Chapter 592 in (1)(a) increased resident moose license fee from $50 to $60 beginning March 1, 1992, and to $75 beginning March 1, 1994, and nonresident fee from $320 to $450 beginning March 1, 1992, and to $475 beginning March 1, 1994; in (1)(b) increased resident mountain goat license fee from $50 to $60 beginning March 1, 1992, and to $75

beginning March 1, 1994, and nonresident fee from $320 to $450 beginning March 1, 1992, and to $475 beginning March 1, 1994; in (1)(c) increased resident mountain sheep license fee from $50 to $60 beginning March 1, 1992, and to $75 beginning March 1, 1994, and nonresident fee from $320 to $450 beginning March 1, 1992, and to $475 beginning March 1, 1994; and in (1)(d) increased resident antelope license fee from $6 to $9 beginning March 1, 1992, and to $11 beginning March 1, 1994, and nonresident fee from $120 to $145 beginning March 1, 1992, and to $150 beginning March 1, 1994.

(Version effective March 1, 1996) Chapter 592 in (1)(a) increased resident moose license fee from $50 to $75 and nonresident fee from $300 to $455; in (1)(b) increased resident mountain goat license fee from $50 to $75 and nonresident fee from $300 to $455; in (1)(c) increased resident mountain sheep license fee from $50 to $75 and nonresident fee from $300 to $455; and in (1)(d) increased resident antelope license fee from $6 to $11 and nonresident fee from $100 to $130. Amendments effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

Extension of Termination Date: Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

1987 Amendment: Increased all nonresident fees except on grizzly bear and wild buffalo by $20.

1985 Amendment: Inserted (1)(g) establishing license fee for wild buffalo.

1983 Amendment: Effective March 1, 1984, increased license fees for residents and nonresidents respectively as follows: in (1)(a) for moose from $25 to $50 and from $175 to $300; in (1)(b) for mountain goat from $15 to $50 and from $175 to $300; in (1)(c) for mountain sheep from $25 to $50 and from $175 to $300; in (1)(e) for grizzly bear from $25 to $50 and $175 to $300; and in (1)(d) increased the resident fee for antelope from $5 to $6.

1981 Amendment: Changed the nonresident fee in (1)(a), (b), (c), and (e) from "$150" to "$175".

Composite Section: This section was amended by Ch. 100 and Ch. 478, L. 1979, and a composite section was prepared by the Code Commissioner, 1979. Although Ch. 100 and Ch. 478 differ in language usage, they do not conflict conceptually. Changes were made to incorporate the concepts of both chapters.

Administrative Rules

ARM 12.3.105 Limitation on number of hunting licenses.

ARM 12.3.116 Moose, sheep, and goat licenses.

ARM 12.3.118 Application for drawings.

Case Notes

Bear Killed Unlawfully — State Prosecution Barred: Defendant was charged in state District Court for subscribing to a materially false statement on an application for a grizzly bear trophy license and was charged and convicted in federal District Court for violating the Endangered Species Act for taking the same trophy. The federal court and the state court have concurrent jurisdiction, and the state prosecution is barred as it is based on an offense arising out of the same transaction as the federal charge. St. v. Sword, 229 M 370, 747 P2d 206, 44 St. Rep. 2053 (1987), distinguishing St. v. Pierce, 199 M 57, 647 P2d 847 (1982), and Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932).

87-2-702. Restrictions on special licenses.

Compiler's Comments

1995 Amendment: Chapter 115 in (3), after "may", deleted "during his lifetime"; in (4)(a) inserted definition of limited mountain sheep license; inserted (4)(b) relating to unlimited mountain sheep license; and made minor changes in style.

1991 Amendment: Inserted (4) prohibiting a person who receives a certain special license from eligibility for receiving another license for that species for 7 years. Amendment effective February 27, 1991.

1989 Amendment: Deleted former (1) that read: "(1) A person who has received a special permit for elk is not eligible to receive a second special permit for elk during any license year. However, in the event the number of applications received is not equal to the number of elk desired to be killed by the department, reapplication may be made by those valid license holders of the current year who may fall within these limitations." Amendment effective April 4, 1989.

1987 Amendment: In (1) substituted "elk" for "this species of game animal" and for "game animals"; inserted (3) requiring applicants for a special license to first hold a current license for that species; and inserted (4) restricting to one the number of grizzly bears any person may take in his lifetime.

1981 Amendment: Deleted former subsection (1) dealing with restrictions on eligibility to apply for another special license for the next succeeding 7 years if special game for which license was issued was killed.

87-2-704. Regulation of special elk permits.

Compiler's Comments

1991 Amendments: Chapter 358 inserted (2) limiting hunting by special elk permit to taking of only antlerless elk in the district where the permit is valid, while allowing general elk hunting privileges in other districts; and made minor change in style. Amendment effective April 6, 1991.

Chapter 592 inserted (3) concerning fees for special elk permit. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1991 Statement of Intent: The statement of intent attached to Ch. 358, L. 1991, provided: "A statement of intent is provided for this bill because the legislature is aware that increasing elk populations are of concern to private landowners who are impacted by increased numbers of elk on their property. This legislation is not intended to replace the Class A-7 antlerless elk license but is intended to provide flexibility to solve problems that might arise for both landowners and sportsmen regarding surplus antlerless elk. The legislature encourages the fish and game commission [now fish, wildlife, and parks commission] and the department of fish, wildlife, and parks to utilize the Class A-7 antlerless elk license whenever practical."

87-2-705. Drawing for special elk permits.

Compiler's Comments

1991 Amendment: In (2), near beginning after "who", substituted "owns or is contracting to purchase" for "holds fee title to".

1989 Amendment: In (2), at end, substituted "in the hunting district under the terms and conditions of the permit" for "on land owned by him". Amendment effective March 24, 1989.

1987 Amendment: Inserted (2) through (4) relating to the landowner set-aside of special elk permits.

1981 Amendment: Deleted preference granted persons who applied but did not receive a special elk permit during the season immediately preceding; and inserted second sentence relating to choice of hunting districts.

Administrative Rules

ARM 12.3.113 Elk permits.

87-2-706. Drawing for special antelope licenses.

Compiler's Comments

1997 Amendment: Chapter 472 in (2), in first sentence, substituted "nonambulatory and have a permanent physical disability" for "permanently physically handicapped and nonambulatory"; and made minor changes in style.

1987 Amendment: Inserted (2) relating to handicapped preference for special antelope licenses; and in (3), after "department", substituted "may" for "shall have the authority to". Amendment effective March 1, 1988.

1981 Amendment: Deleted preference granted persons who applied but did not receive a special antelope license during the season immediately preceding; and inserted second sentence relating to choice of hunting districts.

Administrative Rules

ARM 12.3.112 Antelope licenses.

87-2-708. Class A-2—special bow and arrow license.

Compiler's Comments

1995 Amendment: Chapter 417 near middle, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1991 Amendment: Increased Class A-2 license fee from $7 to $8. Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1987 Amendment: Near middle of section increased fee from $6 to $7. Amendment effective March 1, 1988.

Composite Unnecessary: This section was amended by Ch. 220 and Ch. 478, L. 1979, but the Code Commissioner chose the language of Ch. 478 over that of Ch. 220 because the language "or any special license" added to the specific listing of licenses by Ch. 220 was obviated by the deletion of references to specific licenses in favor of a general, all-inclusive reference to "a valid hunting license for which a special archery season is set by the department" by Ch. 478.

87-2-711. Class AAA—combination sports license.

Compiler's Comments

2001 Amendment: Chapter 216 in (1)(a) after "$54" and in (1)(b) after "$64" inserted "plus the resident hunting access enhancement fee in 87-2-202(3)(c)". Amendment effective March 1, 2002, and terminates March 1, 2006.

Preamble: The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

1999 Amendment: Chapter 533 in (1) after "who" substituted "is" for "will be" and after "older" substituted "or who will turn 12 years old before or during" for "before September 15 of"; in (1)(a) and (1)(b) after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

1997 Amendment: Chapter 187 in (2), after "department", substituted "may" for "shall"; and made minor changes in style. Amendment effective March 1, 1998.

1995 Amendment: Chapter 263 in (1)(a) of March 1, 1996, version, after "$54", deleted "beginning March 1, 1992, and $64 beginning March 1, 1994, shall be entitled to"; in version effective March 1, 2006, substituted "$54" for "$64"; in both versions: in (1)(a) and (2) substituted "combination sports license" for "sportsman's license"; in (1)(a), after "A-5", deleted "A-6"; inserted (1)(b) regarding combination sports license; and made minor changes in style. Amendment effective March 1, 1996.

The effect of the amendment was to render the March 1, 1996, version and the March 1, 2006, version identical. Accordingly, the Code Commissioner has not separately published the version effective March 1, 2006.

Extension of Termination Date: Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006. The extension of the termination date made by Ch. 241, L. 1993, was rendered meaningless by the amendments made by Ch. 263, L. 1995.

1991 Amendment: (Version effective March 1, 1992) Increased sportsman's license fee from $45.50 to $54 beginning March 1, 1992, and to $64 beginning March 1, 1994.

(Version effective March 1, 1996) Increased sportsman's license fee from $38.50 to $64. Amendments effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

Extension of Termination Date: Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

1989 Amendment: Changed "$45" to "$45.50". Amendment effective July 1, 1989. Section 9, Ch. 601, L. 1989, amended sec. 8, Ch. 636, L. 1987, to increase the fee from "$38" to "$38.50" after March 1, 1994.

Applicability: Section 11, Ch. 601, L. 1989, provided that this section applies to licenses for fishing seasons that begin on or after March 1, 1990.

1987 Amendments: Chapter 598 increased fee from $36 to $45 from March 1, 1988, to March 1, 1994.

Chapter 636 increased fee from $36 to $38.

1985 Amendment: Increased license fee from $35 to $36 effective March 1, 1986.

87-2-722. Auction of mountain sheep license.

Compiler's Comments

1993 Amendment: Chapter 349 in last sentence of (2), after "report", deleted "to each legislature concerning" and after "proceeds" inserted "to the office of budget and program planning as a part of the information required by 17-7-111".

Statement of Intent: The statement of intent attached to HB 282 (Ch. 414, L. 1985) provided: "House Bill No. 282 requires a statement of intent because section 1 [87-2-722] authorizes the fish and game commission [now fish, wildlife, and parks commission] to establish rules for the use of the license to be auctioned and for the conduct of the auction.

It is the intent of the legislature that the commission, in drafting rules, shall consult with other states such as Wyoming, Utah, and Nevada which have similar legislation. The commission shall strive to maximize the revenue generated by the auction, and to that end shall select the method of auction which it perceives will best attain that objective.

Because revenue from the auction of the license is not predictable, it is the intent of the legislature that the department shall use such money only for special projects related to mountain sheep research, management, and habitat improvement, and such funds may not be budgeted or used in place of funds regularly appropriated by the legislature for mountain sheep related purposes."

87-2-724. Auction of Shiras moose license.

Compiler's Comments

1993 Amendment: Chapter 349 deleted third sentence of (2) that read: "The department shall, as provided in 5-11-210, report to each legislature concerning the use or investment of auction proceeds."

1991 Amendment: In last sentence inserted reference to 5-11-210. Amendment effective March 20, 1991.

1987 Statement of Intent: The statement of intent attached to Ch. 174, L. 1987, provided: "This bill requires a statement of intent because section 1 [87-2-724] authorizes the fish and game commission [now fish, wildlife, and parks commission] to establish rules for the use of the license to be auctioned and for the conduct of the auction.

It is the intent of the legislature that the commission, in drafting rules, shall consult with any other states which have similar legislation. The commission shall strive to maximize revenue generated by the auction and for that purpose shall select the method of auction which it determines will best attain that objective.

Because revenue from the auction of the license is not predictable, it is the intent of the legislature that the department shall use such money only for special projects related to moose research, management, and habitat improvement, and such funds may not be budgeted or used in place of funds regularly appropriated by the legislature for moose-related purposes."

Part 8
Exceptions to License Requirements

Part Case Notes

Constitutionality: The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

Part Law Review Articles

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

The Right to Kill Wild Animals in Defense of Person or Property, Bender, 31 Mont. L. Rev. 235 (1970).

87-2-801. Residents over sixty-two years of age — resident or nonresident legion of valor members.

Compiler's Comments

1999 Amendment: Chapter 35 inserted (3) allowing a legion of valor member to fish with a conservation license; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 35, L. 1999, provided: "WHEREAS, the Legion of Valor is composed of recipients of the Congressional Medal of Honor, the Army Distinguished Service Cross, the Navy Cross, and the Air Force Cross; and

WHEREAS, members of the Legion of Valor have bravely served their country above and beyond the call of duty; and

WHEREAS, there are approximately 800 members of the Legion of Valor, 5 of whom reside in Montana; and

WHEREAS, pursuant to Article II, section 35, of the Montana Constitution, special considerations that the Legislature may give the five Montana Legion of Valor members should be extended to their distinguished out-of-state colleagues; and

WHEREAS, the people of Montana can show their appreciation to these medal recipients by allowing resident and nonresident Legion of Valor members to fish with a conservation license issued by the Department of Fish, Wildlife, and Parks."

1983 Amendment: In (2), changed "65" to "62" in two places and before "one-half" deleted "no more than".

1981 Amendment: Deleted "for a fee of $1" after "by the department" at the end of the first sentence of (1); added (2) providing discounted fee for persons over 65.

87-2-802. Veterans in VA hospitals and residents of state institutions and long-term care facilities, nursing care facilities, personal care facilities, and community homes for persons with disabilities.

Compiler's Comments

1999 Amendment: Chapter 491 in (1) in first sentence near middle after "residents of all" deleted "correctional facilities and", after "under the jurisdiction of" deleted "the department of corrections and", and after "health and human services" deleted "except the Montana state prison at Deer Lodge or the Montana women's prison". Amendment effective April 27, 1999.

Saving Clause: Section 24, Ch. 491, L. 1999, was a saving clause.

1997 Amendments — Composite Section: Chapter 77 inserted (2) requiring the Department to allow supervised residents of licensed long-term care facilities, nursing care facilities, personal care facilities, and community homes for persons with disabilities to fish without a license upon annual application by facility managers or directors; and made minor changes in style.

Chapter 189 near middle of first sentence of (1), after "all", inserted "correctional facilities and" and near end substituted "Montana women's prison, may" for "women's correctional system, will be entitled to".

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Applicability: Section 2, Ch. 77, L. 1997, provided: "[Section 1] [87-2-802] applies to license years beginning March 1, 1998."

1995 Amendment: Chapter 546 near middle of first sentence substituted "department of corrections and the department of public health and human services" for "department of corrections and human services" and after "Deer Lodge" inserted "or the women's correctional system"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

87-2-803. Persons with disabilities — definitions.

Compiler's Comments

2001 Amendment: Chapter 248 throughout section substituted "permitholder" for "person with a disability"; in (1) in first sentence after "game birds" inserted "not including turkeys" and inserted third sentence concerning certified disabled hunter hunting from vehicle in subsequent years; in (3) substituted first sentence concerning hunter being certified as disabled for "A resident or nonresident person with a disability who is certified as disabled by the department and who is not residing in an institution may carry a permit on a form prescribed by the department. A person with a disability who is issued a permit under this subsection is entitled to have the department stamp the permit with "Permission to Hunt From a Vehicle" if the person establishes to the satisfaction of the department that the person has substantially impaired mobility" and at end of second sentence substituted "subsection (8)" for "this subsection"; in (4) in first sentence after "permit" substituted "to hunt from a vehicle, referred to in this subsection as a permitholder" for "as required in subsection (3), upon which is stamped "Permission to Hunt From a Vehicle"", at beginning of third sentence substituted "permitholder" for "person with a disability who hunts as authorized in this subsection", and at end of last sentence inserted "or as prescribed by the department"; in (7) deleted definitions of permanently physically handicapped person and substantially impaired mobility that read: "(b) "permanently physically handicapped person" means a disabled person as defined in subsection (7)(a) except for a person with a disability that is due to mental retardation or mental illness;

(c) "substantially impaired mobility" means, with respect to a disabled person, that the person is nonambulatory or virtually unable to move on foot. The board or boards of review established pursuant to subsection (3) shall resolve any disputes regarding whether a person meets the criteria for having substantially impaired mobility"; inserted (8) establishing conditions for receiving a permit to hunt from a vehicle; inserted (9) concerning certification by physician; inserted (10) concerning review of eligibility by voluntary board; and made minor changes in style. Amendment effective April 16, 2001.

1999 Amendment: Chapter 382 in (1) inserted last sentence allowing refund for fishing license or game bird license for person disabled during license year; in (2) inserted last sentence allowing refund for deer license or elk license for person disabled during license year; in (3) at end of second sentence substituted "that the person has substantially impaired mobility" for "that the person is nonambulatory and has a permanent physical disability or that the person's mobility is substantially impaired" and inserted last two sentences granting rulemaking authority for establishment of review boards to resolve disputes; in (4) in three places substituted "person with a disability" for "hunter with a disability"; in (5)(a) substituted "experiencing blindness" for "suffering from blindness"; inserted (5)(b) allowing issuance of deer and elk licenses to persons experiencing blindness and requiring blind hunter to be accompanied by companion; inserted (6) requiring adoption of rules regarding companions and companions as designated shooters; in (7) inserted (a) defining disabled person or person with disability, inserted (b) defining permanently physically handicapped person, and inserted (c) defining substantially impaired mobility; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments: Chapter 42 in (5) substituted "certified by the department as suffering from blindness, as defined in 53-7-301" for "certified by the department as a blind individual, as defined in 53-7-301"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 472 throughout section substituted references to persons with disabilities for references to disabled persons; near end of (3) substituted "nonambulatory and has a permanent physical disability" for "permanently physically handicapped and nonambulatory"; in (4), in last sentence, substituted "persons with disabilities" for "the handicapped"; and made minor changes in style.

1995 Amendment: Chapter 417 in (4), near end of first sentence after "motorists or", deleted "may hunt by shooting a firearm from within a self-propelled or drawn vehicle" and in fourth sentence, after "hunter by", deleted "pursuing" and after "hunting" deleted "taking, shooting, or killing"; in (5), in second sentence after "fish", deleted "with hook and line or rod"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1993 Amendment: Chapter 49 at beginning of (3) substituted "A resident or nonresident disabled person who is certified as disabled by the department and who is not residing in an institution may" for "Such disabled persons shall"; in (4) inserted fourth sentence allowing assistance in taking a game animal by a hunting companion of disabled hunter; and made minor changes in style. Amendment effective February 18, 1993.

1989 Amendment: Inserted (5) providing for a lifetime fishing license for the blind. Amendment effective February 24, 1989.

1985 Amendment: In (3) inserted second sentence allowing nonambulatory persons to hunt from a vehicle; and inserted (4) relating to hunting by nonambulatory persons from a vehicle.

1983 Amendment: In (1), after "entitled to" substituted "fish and to hunt game birds with only a conservation license" for "fish without a license" and after "certified as disabled", substituted "as prescribed by departmental rule" for "by a medical doctor licensed to practice medicine in Montana"; substituted (2) (see 1983 Session Law) for former (2), which read: "Disability is defined as a physical or mental condition that prevents a person from doing any substantial gainful work that is expected to last for the rest of his life."

Statement of Intent: The statement of intent attached to HB 402 (Ch. 169, L. 1983), first adopted by the House Fish and Game Committee, read: "A statement of intent is required for this bill because it delegates rulemaking authority to the Department of Fish, Wildlife, and Parks. Section 2 of the bill [amending 87-2-803] authorizes the department to make rules concerning disabled persons and exemptions to fishing and game bird license requirements.

The legislature contemplates that the rules should address the following subjects as well as others:

(1) A definition of "disabled" as it applies to persons meeting license requirements for fishing and hunting game birds and qualifying for the one-half fee deer and elk licenses;

(2) Documents that would, of themselves, be adequate certification of disability."

Administrative Rules

ARM 12.3.106 Disabled persons.

87-2-805. Persons under eighteen years of age — youth combination sports license.

Compiler's Comments

2001 Amendment: Chapter 49 in (3)(e) inserted first sentence authorizing certain youth to use youth combination sports license and near beginning of second sentence after "A person who" deleted "is 18 years of age or older who" and after "combination sports license" inserted "purchased after the person reaches 18 years of age"; and made minor changes in style. Amendment effective March 16, 2001.

Termination Provision Repealed: Section 2, Ch. 49, L. 2001, repealed sec. 4, Ch. 568, L. 1999, which terminated the amendments to this section February 28, 2002. Effective March 16, 2001.

1999 Amendment: Chapter 568 in (1) inserted second sentence allowing resident minors 15 years of age to hunt migratory game birds with only a conservation license; inserted (3) establishing provisions of the youth combination sports license; and made minor changes in style. Amendment effective March 1, 2000, and terminates February 28, 2002.

Preamble: The preamble attached to Ch. 568, L. 1999, provided: "WHEREAS, Montana's youth should be encouraged to take advantage of Montana's abundant outdoor recreational opportunities; and

WHEREAS, a person who learns early in life to fish and hunt responsibly and ethically is likely to continue that behavior throughout the person's life; and

WHEREAS, Montana's fishing and hunting heritage will be preserved for future generations as more youth are introduced to those sports; and

WHEREAS, providing an affordable combination license that allows a young person to fish and hunt upland game birds, deer, and elk will be an effective way to cultivate an appreciation for the state's wildlife resources among Montana's youth."

1985 Amendment: At beginning of (1) inserted "Resident"; and in (2) after "Class", deleted "A-1".

1983 Amendments: Chapter 169, in first sentence, substituted present language allowing minors 12 through 14 years old to fish and hunt birds with a conservation license for "Minors under 15 years of age may fish for and take fish during the open season without a license."; inserted second sentence of (1) allowing residents under 12 years of age to fish without a license; and in (2), substituted final clause after "A-5 licenses at" for "$2 per license".

Chapter 239, in (1), deleted "B-3" after "Class B".

87-2-806. Taking fish or game for scientific purposes.

Compiler's Comments

1995 Amendment: Chapter 154 in (1), in first sentence after "agency", inserted "or for an individual" and at end inserted "provided that a permit to collect is authorized by the department", at beginning of second sentence inserted "Under the provisions of this section" and

near middle, after "way", inserted "that is approved by the department", at beginning of third sentence inserted "A permittee may not take, kill, or capture", and inserted last sentence concerning when permits may not be issued; in (2), in three places, substituted "department" for "director" and inserted second sentence concerning plan of operations; inserted (3) concerning grounds for denying a permit; inserted (4) concerning annual report; in (5) increased fee from $5 to $50 and inserted exception clause concerning educational institutions and governmental agencies; in (6), near end, substituted "allowed" for "mentioned"; in (7), throughout subsection, inserted references to students, in first sentence, after "learning", inserted "or an individual permittee", inserted second sentence concerning qualifications and supervision, in third and fourth sentences substituted "primary" for "original", at end of fourth sentence substituted "conducts a collection under the permit" for "is issued a copy", and at end of last sentence deleted "including their reports of species and numbers of animals collected"; and made minor changes in style. Amendment effective March 16, 1995.

Administrative Rules

ARM 12.7.1301 Application process and criteria for a scientific collectors permit.

Collateral References

Fish *key* 10(1); Game *key* 5.

36A C.J.S. Fish §36; 38 C.J.S. Game §§52, 53.

87-2-807. Taking migratory game birds for propagation — avicultural permit.

Compiler's Comments

1995 Amendment: Chapter 417 in (1) substituted "87-2-101(9)" for "87-2-101(7)"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Sunset Repealed: Section 1, Ch. 227, L. 1989, repealed sec. 4, Ch. 262, L. 1985, which provided that this section was to terminate September 30, 1989. Repealed effective March 22, 1989.

Statement of Intent: The statement of intent attached to HB 581 (Ch. 262, L. 1985) provided: "A statement of intent is necessary for this bill because section 1 [87-2-807] grants rulemaking authority to the department of fish, wildlife, and parks. It is the intent of the legislature that the department adopt rules providing for coordination with federal agencies in the issuance of avicultural permits and enforcement of conditions and restrictions imposed by the federal migratory game bird regulations.

The legislature intends that the department adopt rules addressing disposition of migratory game birds that remain the property of the state under the provisions of this bill. It is the further intent of the legislature that the department provide necessary guidelines for the issuance and exercise of avicultural permits not stated in the bill."

Administrative Rules

Title 12, chapter 6, subchapter 18, ARM Migratory game bird avicultural permits.

87-2-808. Fishing license exception for angler educational events and activities.

Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 452, L. 1997, provided: "A statement of intent is required for this bill because it grants rulemaking powers to the department of fish, wildlife, and parks to implement fishing license exceptions for approved angler educational events and activities. In approving angler educational events, the department shall give consideration to activities that promote family togetherness. The legislature intends that the rules adopted by the department include:

(1) procedural requirements for applications;

(2) criteria for qualification of the instructors;

(3) a procedure for training volunteers from the private sector to conduct the angler educational events and activities; and

(4) any other procedures and criteria reasonably necessary or desirable to administratively review and approve angler educational events and activities."

Effective Date: Section 3, Ch. 275, L. 1997, provided that this section was effective on passage and approval. Approved April 16, 1997.

Administrative Rules

ARM 12.3.126 Criteria and procedure for approval of angler education events and activities.

ARM 12.3.127 Procedure for angler applications and events.

ARM 12.3.128 Training and certification of volunteers.

Part 9
License Agents

87-2-901. Appointment of license agents.

Administrative Rules

Title 12, chapter 3, subchapter 2, ARM License agents.

ARM 12.3.210 Discount sale of hunting and fishing licenses prohibited.

87-2-902. Bond or security of agent and preferred claim of state for license money.

Compiler's Comments

1997 Amendment: Chapter 187 in (1), in third sentence, substituted reference to March 1 for reference to April 1; and made minor changes in style. Amendment effective March 1, 1998.

1983 Amendment: In (1), at end of first sentence substituted "or other security as required by department rule" for "of $1,000 or in an amount equal to the value of the licenses, permits, and certificates received for distribution, the amount to be fixed at the discretion of the director".

Statement of Intent: The statement of intent attached to HB 434 (Ch. 534, L. 1983), which amended this section, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the Department of Fish, Wildlife, and Parks to adopt rules to set deadlines for license receipts according to different classes of license agents and setting guidelines for allowing alternative forms of security for small volume license agents.

Section 2 of this bill [amending 87-2-903] proposes to allow the director of the Department of Fish, Wildlife, and Parks to set deadlines for the license receipts according to different classes of license agents. The intent of this bill is to allow the director the flexibility to recognize that there are widely disparate kinds of license agents. In some sparsely populated areas, the license receipts for a given year are so few that the current monthly accounting requirement may be unrealistic. On the other hand, in heavily populated areas some license agents have extremely high monthly receipts, necessitating that the money be transferred promptly, on a monthly basis, to the Department. The Department contemplates rules that would have deadlines grounded in population base and historical demand in an area.

Section 1 of this bill [amending 87-2-902] proposes to change the security requirements for license agents. Currently, the law requires a minimum bond of $1,000. In reality, no bonding company gives a bond for only $1,000. The current industry standard is a minimum of $5,000. Many of the small license agents may carry a total inventory of licenses far below $5,000. In those instances, where the license agent does not stand to make a great deal of money on the license agency, the $5,000 bonding requirement may be unduly burdensome. The proposed amendment would allow the director to adjust the bonding requirement to the particular circumstance of a given license agent. For instance, a license agent with a large inventory would be obliged to provide a bond. A license agent with an inventory of less than $1,000 may be obliged to provide some other kind of security to ensure performance under the law. The Department anticipates promulgating rules that would allow alternative forms of security other than a bond for the small volume license agent."

Administrative Rules

ARM 12.3.208 Acceptable license agent security.

87-2-903. Compensation, fees, and duties of agents — penalty for late submission of license money.

Compiler's Comments

1999 Amendment: Chapter 427 in (7) substituted "charged under 15-1-216" for "charged on late corporation license tax payments under 15-31-510". Amendment effective January 1, 2000.

Applicability: Section 57, Ch. 427, L. 1999, provided that this section applies to all tax periods beginning after December 31, 1999.

1997 Amendment: Chapter 187 in (1), after "services rendered", substituted "a commission of 50 cents for each transaction" for "the sum of 50 cents for each license, permit, or certificate issued" and deleted second sentence that read: "Each license agent shall submit to the department all duplicates of each class of licenses sold and shall accompany the duplicate licenses with all money received for the sale of the licenses, less the appropriate fee"; inserted (2) through (4) setting out additional conditions applicable to license agents; in (6), after "term", substituted "transaction" for "license", after "includes" inserted "the sale of", and before "certificate" substituted "or" for "and"; in (7), after "15-31-510", deleted "(2)"; and inserted (8) allowing the adoption of rules. Amendment effective March 1, 1998.

1997 Statement of Intent: The statement of intent attached to Ch. 187, L. 1997, provided: "A statement of intent is required for this bill because 87-2-105(7) and 87-2-903(8) grant rulemaking authority to the department of fish, wildlife, and parks regarding standards applicable to license agents.

It is intended that the rules adopted pursuant to 87-2-105(7) address the methods by which a license agent determines proof of competency in hunter safety, particularly the competency of nonresidents who apply for a Montana hunting license. It is intended that the rules recognize that a person who takes a hunter safety course from a department-authorized instructor will be considered competent for licensing purposes.

It is intended that rules adopted pursuant to 87-2-903(8) address compensation, system installation fees, and duties of license agents."

1993 Amendment: Chapter 92 in (1), in first sentence after "sum of", deleted "40 cents for the 1992 license year"; in (3), near end of first sentence, substituted "15-31-510(2)" for "15-31-502"; and made minor changes in style.

Applicability: Section 4(1), Ch. 92, L. 1993, provided: "[This act] applies to tax years beginning after December 31, 1993."

Rulemaking Authority: Section 4(2), Ch. 92, L. 1993, provided: "The department of revenue may institute rulemaking under Title 2, chapter 4, to implement [this act] prior to October 1, 1993, but the rules may not be effective prior to October 1, 1993."

1991 Amendment: In first sentence of (1) increased sum for services from 30 cents to 40 cents for 1992 license year and to 50 cents thereafter and at end of second sentence, after "licenses less", substituted "the appropriate fee" for "a fee of 30 cents for each license sold". Amendment effective March 1, 1992.

Preamble: The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

1983 Amendment: In (1), in second sentence deleted "On or before the 10th day of each month" at the beginning and "during the preceding month" following "licenses sold", and inserted third sentence relating to classification of license agents and submission of license money; and inserted (3) relating to late submission of license money.

1983 Statement of Intent: See statement of intent attached to HB 434 (Ch. 534, L. 1983), set out in compiler's comments under 87-2-902.

1981 Amendment: Changed sum and fee in (1) from "15 cents" to "30 cents".

87-2-904. Nontransferability of appointments — revocation and oaths.

Administrative Rules

ARM 12.3.206 Other criteria for appointment of agents.

ARM 12.3.210 Discount sale of hunting and fishing licenses prohibited.

Part 10
Interstate Fishing Privileges

Part Collateral References

35 Am. Jur. 2d Fish and Game §33.

87-2-1001. Reciprocal fishing privileges of licensees of bordering states.

Compiler's Comments

1997 Amendment: Chapter 187 in (2), in second sentence after "only when", substituted "a valid reciprocal license is" for "there is affixed to such license a stamp" and near end substituted "the reciprocal license" for "such stamp"; and made minor changes in style. Amendment effective March 1, 1998.

CHAPTER 3
RESTRICTIONS AND REGULATIONS

Chapter Case Notes

Media Coverage of Search Involving Alleged Wildlife Violation Outside Scope of Warrant — Open Fields Doctrine and Invited Informer Doctrine Inapplicable: Federal agents who suspected a

wildlife violation searched the Bergers' ranch pursuant to a search warrant and to a written contract with two national broadcasting networks authorizing the filming and recording of the search for broadcast on environmental television shows. After Berger was convicted of one misdemeanor count of improper use of a pesticide, he sued both the networks and the federal agents for violations of constitutional rights. On appeal, the Ninth Circuit Court held that activities conducted pursuant to the search were not authorized by the open fields doctrine, which allows law enforcement officers to obtain evidence while on privately owned open fields, because Berger had a reasonable expectation of privacy with regard to outbuildings that were photographed and because that doctrine does not authorize trespass by third parties. Further, the invited informer doctrine, which allows the use of informers with recording devices to obtain information as part of a good faith government investigation, did not apply in this instance because the recording of Berger's conversations was used to assist commercial television, not to further law enforcement objectives. Pursuant to the joint action test, the networks were considered to be acting under color of law and, as such, were liable for damages as government actors for contractually engaging in a search enterprise that only the government could lawfully institute for the mutual benefit of both private and governmental interests in publicity. The case was reversed for further consideration of Berger's state claims of trespass and intentional infliction of emotional distress. Berger v. Hanlon, 129 F3d 505 (9th Cir. 1997).

Chapter Law Review Articles

The Right to Kill Wild Animals in Defense of Person or Property, Bender, 31 Mont. L. Rev. 235 (1970).

Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination, Allen, 16 B.C. Envtl. Aff. L. Rev. 857 (1989).

Can Indians Hunt in National Parks? Determinable Indian Treaty Rights and United States v. Hicks, Holt, 16 Env. L. 207 (1986).

On-Reservation Treaty Hunting Rights: Abrogation v. Regulation by Federal Conservation Statutes—What Standard?, Walker, 26 Nat. Res. J. 187 (1986).

Part 1
General Provisions

Part Compiler's Comments

Preamble: The preamble attached to Ch. 272, L. 1999, provided: "WHEREAS, Montana's rivers are drawing people to the state to fish, float, and camp at an accelerating rate; and

WHEREAS, although the increasing popularity of Montana is beneficial to the state's economy, steps must be taken to ensure that escalating recreational use of natural resources does not degrade the resource, taint the experience, or threaten private property rights; and

WHEREAS, with the unparalleled scenery and the abundance of fish, osprey, bald eagles, deer, and other wildlife sustained by its waters, the Blackfoot River in western Montana offers recreationists a unique, pristine outdoor experience; and

WHEREAS, the same attributes that bring floaters, campers, and anglers to the banks of the Blackfoot River to visit have attracted Montana families to live, work, and recreate for over a hundred years; and

WHEREAS, increased use of the river has led to an increase in the frequency and intensity of conflicts among the landowner, the commercial outfitter, and the private recreationist, each of whom has a legitimate and legal interest in the Blackfoot River; and

WHEREAS, cooperation between private property owners and recreationists to resolve conflict along the Blackfoot River is not unprecedented; and

WHEREAS, the Legislature finds it appropriate and timely to direct the Department of Fish, Wildlife, and Parks to lead a comprehensive study of the Blackfoot River and its capacity to sustain recreational use, while ensuring that private property and water rights are retained with minimal conflict."

Blackfoot River Study: Section 1, Ch. 272, L. 1999, provided: **"Blackfoot River study.** (1) The department of fish, wildlife, and parks shall undertake a comprehensive study of the Blackfoot River, which may include ongoing department studies as well as findings derived from the draft Blackfoot River Recreation Management Direction of 1999.

(2) The study must address:

(a) the growing popularity of the Blackfoot River and ways to mitigate conflict among landowners, outfitters, and private recreationists;

(b) ways to protect the integrity of the river's resources, while continuing to accommodate recreational use;

(c) the amount and scope of use by recreationists that the river is capable of sustaining;

(d) easement, right-of-way, access, and trespass concerns between private landowners and public users of the river;

(e) the impact that heavy recreational use has on the river's fish, wildlife, streambanks, and water quality; and

(f) any other issue that the department determines needs to be examined in order to complete the study.

(3) During the course of the study, the department may enlist the assistance of the governor's consensus council, created pursuant to executive order, to organize discussions among all interested parties.

(4) The department shall report its findings and conclusions to the 57th legislature. The report must include but is not limited to:

(a) a suggested appropriate role for the department and the fish, wildlife, and parks commission in mitigating and mediating conflicts between recreationists and private landowners;

(b) the amount and type of use that is taking place on the river and how that use is changing from the historical recreational use of the river;

(c) the amount of use that the river is capable of sustaining before significant resource degradation occurs;

(d) a description of the amount, nature, and location of conflicts occurring on the river that have warranted intervention;

(e) the steps taken to ensure that landowners, outfitters, and members of the public were afforded the opportunity to comment and participate in the study; and

(f) suggested legislation or department rules, if either are warranted, to alleviate conflict, preserve the integrity of the resource, protect private property rights, and ensure continued high-quality fishing, camping, and floating for commercial and private recreational users."

87-3-101. General restrictions.

Compiler's Comments

1995 Amendment: Chapter 417 in introductory clause substituted "hunt or attempt to hunt" for "take, capture, shoot, kill, or attempt to take, capture, shoot, or kill"; and in (3), after "jacklight", inserted "spotlight", after "snare" inserted exception parenthetical, after "lick" inserted "or bait", and deleted "nor may any such set gun, jacklight or other artificial light, trap, snare, salt lick, or other device to entrap or entice game animals or game birds be used, made, or set". Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1987 Amendment: Near end of (2) changed "61-1-201" to "61-1-202".

1985 Amendments: Chapter 214 in (2) after "from", inserted "or across" and after "highway" inserted "or the shoulder, berm, or borrow-pit right-of-way of any public highway, as defined in 61-1-201".

Chapter 416 at beginning of section inserted exception clause.

Case Notes

Road Hunter Pleading Ignorance: The defendant argued that the state did not prove that he knew road hunting was illegal or that he knew it was not hunting season. The Supreme Court ruled that ignorance of the law is no excuse. St. v. Lynn, 243 M 430, 795 P2d 429, 47 St. Rep. 1288 (1990).

Shooting From Public Highway or Its Shoulder: The defendant argued that the state had not proved that he had fired at game from a public highway. The Supreme Court stated that the elements of an offense can be proved by circumstantial evidence, including in the case before it the fact that casings of the same brand as those used by the defendant were found beside the road. St. v. Lynn, 243 M 430, 795 P2d 429, 47 St. Rep. 1288 (1990).

Court Not to Imply Mental State Requirement: The Supreme Court will not imply a mental state in a statute prohibiting spotlighting while hunting when that statute (87-3-122, now repealed) does not include a mental state. To do so would arbitrarily make some persons guilty of an offense, while excepting others committing the offense. St. v. Austin, 217 M 265, 704 P2d 55, 42 St. Rep. 1186 (1985).

Invalid Classification: The classification created by 87-3-122's (now repealed) exemption from its coverage of landowners, lessees, or their agents is not rationally related to the state interest involved, that is, protection of its wildlife. Section 87-3-122 (now repealed) allowed exceptions that

would permit arbitrary and irrational enforcement by law enforcement officers and was a nullity. It was inadequate to serve the legislative purpose of prohibiting the use of artificial light with the intent to hunt for animals. St. v. Austin, 217 M 265, 704 P2d 55, 42 St. Rep. 1186 (1985).

Validity of Statute Under Which Defendant Not Charged: In ruling 87-3-122 (repealed, 1991) inadequate to serve its legislative purpose and a violation of equal protection, the Supreme Court stated that 87-3-101 correctly prohibits spotlighting in connection with hunting. St. v. Austin, 217 M 265, 704 P2d 55, 42 St. Rep. 1186 (1985).

Collateral References

Fish *key* 13(1), (2); Game *key* 7.

36A C.J.S. Fish §§28 through 30; 38 C.J.S. Game §§8, 22 through 28, 30, 51, 55 through 57, 76.

35 Am. Jur. 2d Fish and Game §§31, 46, 47.

Entry on private lands in pursuit of wounded game as criminal trespass. 41 ALR 4th 805.

Use of set gun, trap, or similar device on defendant's own property. 47 ALR 3d 646.

Validity, construction, and effect of statutes or regulations making possession of fish or game, or of specified hunting or fishing equipment, prima facie evidence of violation. 81 ALR 2d 1093.

Entrapment with respect to violation of game laws. 75 ALR 2d 709.

Validity of prohibition or regulation of fishing, to protect public water supply. 56 ALR 2d 790.

Right created by private grant or reservation to fish on another's land. 49 ALR 2d 1395.

Right of public to fish in stream notwithstanding objection by riparian owner. 47 ALR 2d 381.

87-3-102. Waste of fish or game.

Compiler's Comments

2001 Amendment: Chapter 275 in (3) and (4) in introductory clause at end inserted "purposely or knowingly"; in (6) inserted second, third, and fourth sentences regarding forfeiture of licenses and privileges and surrender of licenses; and made minor changes in style. Amendment effective April 20, 2001.

1995 Amendment: Chapter 263 in (1), after "death of", deleted "a black or brown bear or"; in (3), after "except", deleted "grizzly, black, and brown bear and"; inserted (5) regarding bear meat; in (6) substituted "may" for "shall"; and made minor changes in style. Amendment effective March 1, 1996.

1991 Amendment: Inserted (1) and (2) regarding waste of bear or mountain lion; substituted (3) regarding waste of animals other than bear or mountain lion for former language (see 1989 MCA for text); inserted (4) regarding waste of animal suitable for food; inserted (5) providing a penalty for waste of game; and made minor changes in style. Amendment effective July 1, 1991.

Case Notes

Crime of Waste of Game as Absolute Liability Offense: Defendant contended that because the offense of wasting game meat is punishable by a fine in excess of $500, the offense may not be classed as an absolute liability offense. However, the second element of 45-2-104, wherein a clear legislative purpose validates the imposition of absolute liability, was indicated by the obvious statutory intent to preserve game resources for the benefit of the public and by the recognition of the state's duty to protect public wildlife resources. The trial court did not err in failing to instruct the jury on criminal intent. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

Forfeiture of Game Properly Applied in Case of Waste of Mountain Goat: Defendant was convicted of wasting game contrary to the provisions of this section. He contended that it was improper to impose a penalty of forfeiture of the head, cape, and horns of the mountain goat he killed legally. Having failed to comply with the requirement that he not waste the meat, defendant was subject to the game warden's authority under 87-1-506 to seize any parts of the animal. Imposition of forfeiture was not contrary to law. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

No Arbitrary Exceptions in Game Waste Statute: Unlike the spotlighting statute considered in St. v. Austin, 217 M 265, 704 P2d 55 (1985), this section does not contain exceptions that would permit arbitrary and irrational enforcement sufficient to render the statute unconstitutional. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

Statute Not Vague or Overbroad: Defendant contended that this section was unconstitutionally vague because it did not clearly set forth the prohibited conduct. The Supreme Court disagreed, holding that the statute did not fail to give a person of ordinary intelligence a reasonable opportunity to know what was prohibited so that person could act accordingly. Defendant's contention that this section was overbroad, in that it could be construed to prohibit otherwise legal activities of a hunter or taxidermist who removed the head, horns, and cape at any

time, was also disaffirmed. The court noted that it is not the removal of the specified body parts that is illegal, but rather the removal of only those parts without using the remainder of the animal. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Collateral References

Game *key* 3 ½.

38 C.J.S. Game §§45, 46.

35 Am. Jur. 2d Fish and Game §51.

Applicability, to domesticated or captive game, of game laws relating to closed season and the like. 74 ALR 2d 974.

Rights of fishing in inland lakes. 57 ALR 2d 569.

Power of game or fish commission to open or close season. 59 ALR 294; 47 ALR 258; 34 ALR 823.

87-3-103. Limit on number of game animals hunted or killed.

Compiler's Comments

1991 Amendment: Near beginning inserted phrase regarding attempt and after "kill" inserted "take, hunt, shoot, or capture". Amendment effective July 1, 1991.

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Collateral References

35 Am. Jur. 2d Fish and Game §§31, 46 through 48.

87-3-104. Unlawful to hunt or fish during closed season.

Compiler's Comments

1995 Amendment: Chapter 417 substituted "attempt to hunt or to hunt" for "attempt to take, shoot, kill, or capture or to take, hunt, shoot, kill, or capture"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1991 Amendment: Near middle, after "fish", inserted "to attempt to take, shoot, kill, or capture or"; and made minor changes in style. Amendment effective July 1, 1991.

Case Notes

Road Hunter Pleading Ignorance: The defendant argued that the state did not prove that he knew road hunting was illegal or that he knew it was not hunting season. The Supreme Court ruled that ignorance of the law is no excuse. St. v. Lynn, 243 M 430, 795 P2d 429, 47 St. Rep. 1288 (1990).

Indians Hunting on Open and Unclaimed Land: Members of the Confederated Salish and Kootenai Tribes have a right to hunt free from the regulation of Montana game laws on "open and unclaimed lands" by virtue of Article II of the Treaty of Hell Gate and this includes National Forest Service land. St. v. Stasso, 172 M 242, 563 P2d 562 (1977).

Regulation Subject to Constitutional Guaranties: On appeal from a conviction of killing an elk out of season, defendant's defense was predicated upon the constitutional guaranties under sec. 3, 13, and 29, Art. III, 1889 Mont. Const. (now sec. 3 and 12, 1972 Mont. Const.), of the right to enjoy and defend one's property; held, under the facts presented, that legal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law, and that the general law on the right to use force, 49-1-103, must be construed in pari materia with this section when found inoperative, otherwise this section would be unconstitutional as denying an inalienable right. Reversed and remanded for a new trial. St. v. Rathbone, 110 M 225, 100 P2d 86 (1940).

Commission Empowered to Lengthen Hunting Season: A temporary order restraining the State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) from putting into effect its order lengthening the hunting season on elk in a certain locality, thus modifying the law on fixing of seasons, was improper since under section 26-104, R.C.M. 1947, declaring prior to amendment that the statutes governing "such subjects" should continue in force and effect except as altered or modified by the rules and regulations of the Commission, the Legislature so empowered the Commission, amounting to modification of existing statutes. State ex rel. Fish & Game Comm'n v. District Court, 107 M 289, 84 P2d 798 (1938).

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Collateral References

35 Am. Jur. 2d Fish and Game §§31, 46.

Applicability to domesticated or captive game, of game laws relating to closed season and the like. 74 ALR 2d 974.

87-3-105. Unlawful to import for introduction or to introduce or transplant wildlife.

Compiler's Comments

1985 Amendment: Substituted present language (see 1985 Session Law) for: "It is unlawful for any person to transplant or introduce any fish or fish eggs into any body of water in the state, and it is unlawful for any person to transplant or introduce any species of game birds, game or fur-bearing animals, or nongame wildlife into the state of Montana without first having obtained authorization from the department".

87-3-106. Hunting and fishing prohibited in fire-danger areas.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1981 Amendment: Changed "the department of natural resources and conservation" to "the department of state lands".

Administrative Rules

Title 36, chapter 10, subchapter 2, ARM Closure of areas because of fire danger.

87-3-107. Use of snare lawful under certain conditions.

Compiler's Comments

1995 Amendment: Chapter 417 at end of (1) substituted "a fur-bearing animal, a predatory animal, or a nongame species" for "any animal or bird"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Administrative Rules

ARM 12.6.1001 Snare traps.

Collateral References

35 Am. Jur. 2d Fish and Game §47.

87-3-108. Restrictions on use of reproduced sounds.

Collateral References

35 Am. Jur. 2d Fish and Game §47.

87-3-109. Attempting to take simulated wildlife decoy — penalty.

Compiler's Comments

1995 Amendment: Chapter 417 near end of (1), after "hunting", deleted "or taking"; in (2), after "attempting to", substituted "hunt" for "take" and after "prescribed for" substituted "the state statute or commission rule violated during the attempted hunting" for "unlawful taking"; and inserted (3) concerning restitution. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Effective Date: Section 3, Ch. 309, L. 1991, provided: "[This act] is effective July 1, 1991."

87-3-111. Unlawful to buy, sell, possess, or transport fish or game — exceptions — penalties.

Compiler's Comments

1995 Amendments: Chapter 116 inserted (2)(d) allowing possession, transportation, sale, or purchase of bones of certain game animals; and made minor changes in style.

Chapter 262 inserted (3) making it unlawful, with exceptions, to possess or transport live fish; and made minor changes in style. Amendment effective March 28, 1995.

1993 Amendment: Chapter 153 in (2)(c), after "naturally shed antlers", inserted "or the antlers with a skull or portion of a skull attached from a game animal that has died from natural causes and that has not been unlawfully or accidentally killed"; and made minor changes in style.

Extension of Termination Date: Section 2, Ch. 196, L. 1993, amended sec. 5, Ch. 409, L. 1989, by extending the termination date imposed by that chapter. Amendment effective March 25, 1993.

1991 Amendments: Chapter 277 inserted (2)(c) regarding naturally shed antlers; and made minor change in style. Amendment effective July 1, 1991.

Chapter 329 in (3), at beginning, deleted exception clause and at end substituted "in 87-1-102" for "by law"; deleted (4) establishing a penalty for trafficking in body parts of unlawfully taken species; and made minor change in style. Amendment effective July 1, 1991.

1989 Amendment: Inserted (2)(c) providing that section does not apply to donation and sale of paddlefish roe as caviar under 87-4-601. Amendment effective July 1, 1989, and terminates June 30, 1993.

1985 Amendment: In (2)(b) at end added exception clause relating to grizzly bears and made minor changes in phraseology.

1981 Amendment: Divided section into three subsections; added (4) providing a felony penalty; and made minor changes in phraseology.

Case Notes

Sale of Eagle Parts — Federal Violation Notwithstanding Claims of Religious Use: Frank and William Hugs admitted active involvement in purchasing and selling eagles and eagle parts but claimed that they did so for religious purposes. Following an undercover investigation, they were convicted of a violation of the federal Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. 668(a), which prohibits the taking of eagle parts for religious purposes unless the person has obtained the proper federal permit. The Hugses claimed that the BGEPA infringed on their constitutional guarantee of free exercise of religion and that actions of the undercover agent were so outrageous as to warrant dismissal of the prosecution. The Hugses could challenge only the facial validity of the BGEPA, not the operation of the underlying administrative scheme, because they did not possess a permit and never applied for one. On appeal, it was held that the statute and permit system, while imposing a substantial burden on the practice of religion by restricting the ability of adherents to obtain and possess eagles and eagle parts, nevertheless provided the least restrictive means of conserving eagles while permitting access to eagles and eagle parts for religious purposes. Further, the undercover agent's conduct fell short of the level of outrageousness required to invalidate a prosecution under the due process clause. Judgment was affirmed. U.S. v. Hugs, 109 F3d 1375 (9th Cir. 1997).

Authority of Tribal Warden to Detain and Turn Nontribal Member Over to State Game Warden: Horseman was detained by a tribal warden and turned over to a state game warden, who had requested that Horseman be detained for possessing an illegally killed game animal. Horseman argued that he had been unlawfully extradited. The Supreme Court held that Horseman, although Indian, was not a member of the tribe on whose reservation he had been detained and that under Duro v. Reina, 495 US 676 (1990), the tribal game warden had the authority to detain a nontribal member and turn the person over to state authorities. St. v. Horseman, 263 M 87, 866 P2d 1110, 50 St. Rep. 1720 (1993).

No Treaty Hunting Rights Off Reservation: Horseman was charged with possessing unlawfully killed game. He argued that an 1855 treaty gave him the right to hunt on traditional tribal hunting grounds located outside the reservation. The Supreme Court held that the treaty Horseman based his argument on had only been for 99 years and had expired in 1954. St. v. Horseman, 263 M 87, 866 P2d 1110, 50 St. Rep. 1720 (1993).

Tribal Members Subject to State Hunting Laws Off Reservation: Horseman argued that he could not be charged with possession of unlawfully killed game because, as a tribal member, he was not subject to state game laws. The Supreme Court held that the game had been killed off the reservation and that the state may assume jurisdiction in disputes concerning Indians that arise outside the reservation. St. v. Horseman, 263 M 87, 866 P2d 1110, 50 St. Rep. 1720 (1993).

Market Value of Deer Taken in Violation of Lacey Act: The prohibition in the Lacey Act against offering guide services for the illegal taking of wildlife does not involve the "sale" of game in the traditional sense. Rather, the commodity being sold is the opportunity to illegally hunt game with the assistance of a guide. In determining the market value of illegally taken deer, the fine imposed under Montana law for illegal taking did not establish market value, nor was that value established by the value of the deer if sold in open market. Rather, the market value is the amount that hunters were willing to pay for the guide's services. U.S. v. Atkinson, 966 F2d 1270 (9th Cir. 1992).

Trafficking as Misdemeanor by Classification: Regardless of the statement in this section, prior to 1991 amendment, that trafficking in game animals is a felony, because the jail sentence for a trafficking violation does not exceed 1 year, under classification rules provided by the Legislature prior to 1991, trafficking may not be considered a felony. St. v. Gibbs, 244 M 251, 797 P2d 928, 47 St. Rep. 1584 (1990).

Application of Federal Lacey Act to Outfitting and Guiding — Statute of Limitations on Charges of Conspiracy: While a prosecution under the federal Lacey Act, 16 U.S.C. 3371, et seq., which prohibits transportation or acquisition in interstate commerce of wildlife in violation of state laws, may not properly be had for the substantive acts of selling guiding services and hunting permits, a prosecution can be maintained for conspiracies to violate the Act while providing outfitting and guiding services, such as arranging for out-of-state hunters to use elk licenses and permits belonging to other hunters, knowing that any elk taken would be transported out of state. The Act applied when evidence was sufficient to establish the involvement of defendant, a hunting guide and outfitter, in a conspiracy to transport elk in interstate commerce in violation of Montana law. Further, the 5-year "catchall" statute of limitations set out in 18 U.S.C. 3282 applied to charges of conspiring to violate the Act. U.S. v. Thomas, 887 F2d 1341 (9th Cir. 1989), distinguishing U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

Provision of Guiding Service Not an Offer to Sell Wildlife Prohibited by Federal Law: The alleged provision of guiding services to an unlicensed hunter does not constitute an illegal sale or offer to sell wildlife under the federal Lacey Act (16 U.S.C. 3372, 3373). U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

Felony Offense Versus Misdemeanor Offense — Jury Instruction: Hankins was convicted of trafficking in the unlawfully obtained body parts of a protected species in violation of this section. On appeal, Hankins argued that the court's jury instructions failed to distinguish between the felony and the misdemeanor offenses under this section. When read together, however, the jury instructions clearly drew a distinction between the felony offense charged and the lesser included misdemeanor offense. St. v. Hankins, 209 M 365, 680 P2d 958, 41 St. Rep. 762 (1984). See also St. v. Gibbs, 244 M 251, 797 P2d 928, 47 St. Rep. 1584 (1990).

Trafficking — Jury Instruction: It is not reversible error to give a jury instruction defining "trafficking" that is taken directly from this section. St. v. Hankins, 209 M 365, 680 P2d 958, 41 St. Rep. 762 (1984).

Collateral References

35 Am. Jur. 2d Fish and Game §§49, 50.

Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself. 44 ALR 3d 1008.

Owner's or keeper's liability for personal injury or death inflicted by wild animal. 21 ALR 3d 603.

87-3-112. Possession of unlawfully killed animals and of unlawful fishing implements.

Case Notes

Authority of Game Warden to Approach Boat to Promote Safety — Particularized Suspicion Unnecessary: Initially concerned for the safety of the occupants of a seemingly unoccupied

watercraft, a game warden looked into the live well of Boyer's boat and in the process found unlawfully killed game fish. Boyer contended that the warden had initiated an investigatory stop without the requisite particularized suspicion of wrongdoing, as required in 46-5-401, and that the evidence was therefore unlawfully seized. The Supreme Court disagreed. The warden was acting within his express authority to enforce outdoor recreation laws, including the safety of persons and property connected with the use of watercraft, and thus the warden's approach of Boyer's boat was lawful. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

Unlawful Possession: Section 87-1-506 has reference only to what the Legislature denounced as unlawful possession under this section and for which the accused could be prosecuted for unlawful possession. Shipman v. Todd, 131 M 365, 310 P2d 300 (1957).

Private Ownership of Wildlife: Under section 26-401, R.C.M. 1947 (now repealed), prohibiting the killing of beaver except as therein provided, and under 87-3-112, making possession of certain wild animals or parts thereof prima facie evidence that the possessor killed the same, private ownership of beaver pelts was not a matter of common right but could be acquired only by compliance with the restrictions, and then such ownership was qualified. Rosenfeld v. Jakways, 67 M 558, 216 P 776 (1923).

Collateral References

Fish *key* 15; Game *key* 7, 9.

36A C.J.S. Fish §43; 38 C.J.S. Game §§8, 22 through 28, 30, 51, 76 through 81.

35 Am. Jur. 2d Fish and Game §50.

Right to kill game in defense of person or property. 93 ALR 2d 1366.

Validity, construction, and effect of statutes or regulations making possession of fish or game, or of specified hunting or fishing equipment, prima facie evidence of violation. 81 ALR 2d 1093.

Constitutionality of statutes making one fact presumptive or prima facie evidence of another. 162 ALR 495; 86 ALR 179; 51 ALR 1139.

Construction and application of statute making possession of carcass of game, fish, or bird or parts thereof, a criminal offense. 125 ALR 1200.

87-3-113. Removal of illegally taken animals or parts of animals from state.

Case Notes

Market Value of Deer Taken in Violation of Lacey Act: The prohibition in the Lacey Act against offering guide services for the illegal taking of wildlife does not involve the "sale" of game in the traditional sense. Rather, the commodity being sold is the opportunity to illegally hunt game with the assistance of a guide. In determining the market value of illegally taken deer, the fine imposed under Montana law for illegal taking did not establish market value, nor was that value established by the value of the deer if sold in open market. Rather, the market value is the amount that hunters were willing to pay for the guide's services. U.S. v. Atkinson, 966 F2d 1270 (9th Cir. 1992).

Application of Federal Lacey Act to Outfitting and Guiding — Statute of Limitations on Charges of Conspiracy: While a prosecution under the federal Lacey Act, 16 U.S.C. 3371, et seq., which prohibits transportation or acquisition in interstate commerce of wildlife in violation of state laws, may not properly be had for the substantive acts of selling guiding services and hunting permits, a prosecution can be maintained for conspiracies to violate the Act while providing outfitting and guiding services, such as arranging for out-of-state hunters to use elk licenses and permits belonging to other hunters, knowing that any elk taken would be transported out of state. The Act applied when evidence was sufficient to establish the involvement of defendant, a hunting guide and outfitter, in a conspiracy to transport elk in interstate commerce in violation of Montana law. Further, the 5-year "catchall" statute of limitations set out in 18 U.S.C. 3282 applied to charges of conspiring to violate the Act. U.S. v. Thomas, 887 F2d 1341 (9th Cir. 1989), distinguishing U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

Collateral References

Fish *key* 5; Game *key* 7.

38 C.J.S. Game §§82 through 85.

35 Am. Jur. 2d Fish and Game §§42, 49, 50.

Validity, construction, and application of statutes and other regulations relating to transportation or disposal of carcasses of dead animals not slaughtered for food. 121 ALR 732.

Statutes or regulations regarding possession, transportation, or sale within state of fish or game taken outside of state as interference with foreign or interstate commerce. 92 ALR 1266.

87-3-114. Labeling of packages.

Collateral References
Fish *key* 13(1); Game *key* 7.
36A C.J.S. Fish §28; 38 C.J.S. Game §§41, 58.

87-3-115. Violation by carriers.

Collateral References
Fish *key* 16; Game *key* 10.
36A C.J.S. Fish §42; 38 C.J.S. Game §§61, 63, 64, 67.
35 Am. Jur. 2d Fish and Game §§42, 49.

87-3-117. Definitions of lawfully taken wildlife and unlawfully taken wildlife.

Compiler's Comments
Effective Date: Section 6, Ch. 329, L. 1991, provided: "[This act] is effective July 1, 1991."

87-3-118. Felony sale or possession of wildlife — penalty.

Compiler's Comments
1999 Amendment: Chapter 502 at end of second sentence in (2) inserted "and 87-1-115". Amendment effective October 1, 1999.
1995 Amendment: Chapter 417 in (1)(a), after "exchanges", inserted "unlawfully taken wildlife"; inserted (3) concerning the offense of unlawful sale or possession of wildlife; inserted (4) concerning calculation of value of wildlife; and made minor changes in style. Amendment effective July 1, 1995.
Severability: Section 37, Ch. 417, L. 1995, was a severability clause.
Effective Date: Section 6, Ch. 329, L. 1991, provided: "[This act] is effective July 1, 1991."

Case Notes
Admission of Evidence of Prior Game Farm (now Alternative Livestock Ranch) Acts Proper: The District Court did not err in admitting evidence of prior game farm (now alternative livestock ranch) acts and in limiting references to those acts and not to any subsequent convictions since the earlier case was still pending on appeal because: (1) the prior acts were sufficiently similar, although not identical, to those for which defendant was presently charged; (2) the acts, although occurring 3 years prior, were not so remote as to be inadmissible because of the similarity of the acts; and (3) the state's purpose in introducing the evidence was to establish absence of mistake or accident regarding defendant's possession of unlawfully taken wildlife. St. v. Brogan, 272 M 156, 900 P2d 284, 52 St. Rep. 636 (1995). See also St. v. Matt, 249 M 136, 814 P2d 52 (1991), and St. v. Romero, 261 M 221, 861 P2d 929 (1993).
Statute Not Unconstitutionally Vague: Brogan challenged the constitutionality of this section as being void for vagueness because it does not sufficiently define "constructive possession" and thus does not give a reasonable person notice of what conduct is proscribed and because no specific intent to possess unlawfully taken wildlife is required. Applying St. v. Crisp, 249 M 199, 814 P2d 981 (1991), the Supreme Court held that by incorporating the intent element of purposely and knowingly, which are statutorily defined terms, into the definition of the offense of possession of unlawfully taken wildlife, the Legislature has given fair warning of the mental state that is an element of the offense. Further, although the term "constructive possession" is not defined by statute, it has been defined in St. v. Meader, 184 M 32, 601 P2d 386 (1979), to mean that the goods are not in actual, physical possession but that the person charged with possession has dominion and control over the goods. Thus, this section is not unconstitutionally vague by virtue of the mental state element of the offense or the absence of a statutory definition of "constructive possession". St. v. Brogan, 272 M 156, 900 P2d 284, 52 St. Rep. 636 (1995). Meader was followed, as to constructive possession of a firearm, in St. v. Caekaert, 1999 MT 147, 295 M 42, 983 P2d 332, 56 St. Rep. 583 (1999).

87-3-121. Conditions for award of prizes.

Compiler's Comments
1987 Amendment: In (1) deleted "fish" in two places from list of protected species; inserted (2) relating to adoption of rules by the Commission; and in (3) deleted "fish" after "game bird".
1987 Statement of Intent: The statement of intent attached to Ch. 346, L. 1987, provided: "A statement of intent is required for this bill because it grants rulemaking duties to the fish and game commission [now fish, wildlife, and parks commission] with regard to the awarding of prizes

for the taking of protected fish in state waters. It is the intent of the legislature that the commission adopt rules that address an approval process for the conditions or operations of fishing tournaments, derbies, or contests in order to protect and preserve the fish resources in the state from potentially harmful practices or results of such events.

It is the intent of the legislature that the commission adopt rules that are designed to prevent adverse impacts on the fish resources. To accomplish the purpose, the commission may adopt rules that include but are not limited to:

(1) the duties of the department of fish, wildlife, and parks to recommend approval or disapproval of a tournament, derby, or contest or its conditions, based on sound wildlife conservation criteria;

(2) reporting requirements for the rules and conditions of a tournament, derby, or contest that awards a prize for the taking of fish;

(3) purse or participation limits for such events;

(4) time limits for reporting such events to obtain commission approval or disapproval; and

(5) details of the approval process, including any appeal process.

Notwithstanding the general rulemaking areas listed, it is the intent of the legislature to permit the commission to adopt rules that allow the commission enough flexibility to consider the merits of each tournament, derby, or contest on a case-by-case basis."

Administrative Rules

Title 12, chapter 7, subchapter 8, ARM Regulation of fishing contests.

87-3-123. Use of silencers or mufflers on firearms forbidden.

Compiler's Comments

Section Not Codified: Section 26-1007, R.C.M. 1947, was not codified in the MCA because it is redundant with 87-3-123. This section has not been repealed and is still valid law. Citation may be made to sec. 80, Ch. 173, L. 1917. See 1-2-208.

Collateral References

Game *key* 7.

38 C.J.S. Game §§8, 22 through 28, 30, 51, 76.

35 Am. Jur. 2d Fish and Game §47.

87-3-124. Dogs — restrictions on hunting — penalty for chasing hooved game animals.

Compiler's Comments

2001 Amendment: Chapter 275 in (1)(a) near beginning after "87-3-127 and" substituted "subsections (2) and (3)" for "subsection (2)"; in (1)(c) at beginning inserted exception clause, near middle after "witnesses a dog" inserted "chasing, stalking, pursuing", and near end after "may destroy that dog" inserted "on public land or on private land at the request of the landowner"; inserted (1)(d) providing for misdemeanor and defense to misdemeanor; inserted (2) allowing use of dogs to chase game or fur-bearing animals; and made minor changes in style. Amendment effective April 20, 2001.

1997 Amendment: Chapter 43 in (1)(a), after "87-3-127", inserted "and subsection (2) of this section"; in (2), at beginning, substituted "commission has" for "department shall have" and after "hunting" inserted "and chasing"; and made minor changes in style. Amendment effective March 12, 1997.

Collateral References

35 Am. Jur. 2d Fish and Game §47.

87-3-125. Restrictions on use of motor vehicles while hunting.

Collateral References

35 Am. Jur. 2d Fish and Game §47

87-3-126. Restrictions on use of aircraft or boats.

Case Notes

Airborne Hunting — Non-Indian Hunters on Indian Reservations: The Airborne Hunting Act, 16 U.S.C. §742j-1, was declared unconstitutional in a challenge by non-Indian hunters caught hunting on an Indian reservation. The statute was found to be an unlawful preemption of reserve state regulatory authority. The federal government is not empowered to displace Montana's regulation in this area. U.S. v. Helsley, 463 F. Supp. 1111 (D.C. Mont. 1979), reversed in U.S. v. Helsley, 615 F2d 784 (9th Cir. 1979).

Collateral References
35 Am. Jur. 2d Fish and Game §47.

87-3-127. Taking of stock-killing animals.

Compiler's Comments
2001 Amendment: Chapter 316 in (1) in first sentence near beginning inserted "their agents", substituted "a federal agency" for "the federal fish and wildlife service", and in two places before "bears" inserted "black"; and made minor changes in style. Amendment effective April 21, 2001.

Collateral References
35 Am. Jur. 2d Fish and Game §37.

87-3-128. Exceptions — department personnel.

Collateral References
Fish *key* 13(1); Game *key* 7.
36A C.J.S. Fish §28; 38 C.J.S. Game §§8, 22 through 28, 30, 51, 76.

87-3-130. Taking of wildlife to protect persons or livestock.

Compiler's Comments
2001 Amendments — Composite Section: Chapter 275 in (1) in first and third sentences after "protected by this" substituted "title" for "chapter" and in third sentence at end inserted "and surrender or arrange to surrender the wildlife to the department"; in (2) in introductory clause after "A person may not" deleted "intentionally" and after "supplemental feed" inserted "attractants"; inserted (2)(a) prohibiting attracting bears; inserted (2)(b) regarding failure to properly store supplemental feed attractants; in (2)(c) at beginning inserted "purposely or knowingly providing supplemental feed attractants" and at end after "transmission of disease" inserted "or that constitutes a threat to public safety"; inserted (3) concerning person engaged in feeding of livestock; inserted (5)(b) defining supplemental feed attractant; and made minor changes in style. Amendment effective April 20, 2001.

Chapter 316 in (1) in first sentence substituted "if the wildlife is attacking" for "if the wildlife is molesting, assaulting" and at end inserted exceptions for grizzly bear attacking or killing livestock and inserted second sentence concerning wolves and mountain lions attacking or killing a domestic dog; and made minor changes in style. Amendment effective April 21, 2001.

1995 Amendments: Chapter 206 inserted (3) defining livestock to include ostriches, rheas, and emus; and made minor changes in style.

Chapter 540 inserted (2) prohibiting the intentional supplemental feeding of game animals; and made minor changes in style. Amendment effective April 27, 1995.

Applicability: Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

Coordination Instruction: Section 3(2)(a), Ch. 540, L. 1995, provided: "If Senate Bill No. 312 is passed and approved and if it transfers to the department of livestock primary management of publicly owned wild buffalo or bison that enter Montana on private or public land, then: (a) [section 1 of this act] [amending 87-3-130] is amended to read" (see 1995 Session Law for text). Senate Bill No. 312 was approved April 10, 1995, as Ch. 346, L. 1995; therefore, the coordinated version of 87-3-130 in sec. 3, Ch. 540, L. 1995, has been appropriately codified.

Case Notes
Claim of Defense of Person Invalid After Seventy-Two Hours: The District Court did not err in refusing to submit to the jury the issue of whether defendant shot a bobcat in defense of another person when defendant failed to notify the Department within 72 hours, as required by this section. St. v. Gibbs, 244 M 251, 797 P2d 928, 47 St. Rep. 1584 (1990).

Collateral References
4 Am. Jur. 2d Animals §48; 35 Am. Jur. 2d Fish and Game §37.
Right to kill game in defense of person or property. 93 ALR 2d 1366.
Wildlife Damage to Agriculture, Interim Report, Montana Legislative Council (1986).

87-3-134. Restriction on use of electronic motion-tracking device while hunting.

Compiler's Comments
Effective Date: This section is effective October 1, 1999.

87-3-135. Restrictions on use of archery equipment.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 22, L. 1991, provided: "A statement of intent is required for this bill because 87-1-301(2) grants to the fish and game commission [now fish, wildlife, and parks commission] the authority to adopt rules regarding the use and type of archery equipment that may be employed for hunting and fishing purposes. It is intended that this authority be permissive rather than mandatory in order to allow but not require the commission to address any need for restrictions or limitations on archery equipment, with adequate opportunity for public hearing and comment. The legislature is aware that this rulemaking power is expressed in broad and general language; however, this is necessary because bow hunting technology is an emerging field for which detailed and precise standards have not yet been fully developed. The legislature recognizes that the commission has the power to determine the extent and nature of hunting and fishing privileges and that the commission's expertise makes it the proper forum for addressing the need for archery equipment regulation."

87-3-141. Definitions.

Compiler's Comments

1997 Amendment: Chapter 453 inserted definition of fishing; in definition of wild animal, after "game animal", inserted "migratory game bird, upland game bird" and at end inserted "or a fish"; and made minor changes in style.

Case Notes

Defendant Without Standing to Challenge Constitutionality of Hunter Harassment Law on Basis of Vagueness: Lilburn alleged that the hunter harassment law is unconstitutionally vague because it leaves several key terms undefined so that there is no statutory guidance to law enforcement officers or the public as to what type of conduct is prohibited. The Supreme Court held that Lilburn's conduct in standing between a hunter and a bison clearly was conduct that disturbed the hunter in the taking of game and that since Lilburn's conduct is clearly prohibited, he did not have standing to raise a facial vagueness challenge. St. v. Lilburn, 265 M 258, 875 P2d 1036, 51 St. Rep. 507 (1994), followed in St. v. Stubblefield, 283 M 292, 940 P2d 444, 54 St. Rep. 605 (1997).

Hunter Harassment Law Not Violation of Free Speech Rights or Overbroad: Lilburn challenged the hunter harassment law on the basis that its prohibition of "dissuading" a hunter from taking a wild animal is content-based and designed to prevent the message contained in the dissuading language. The Supreme Court held that the Legislature did not use the term "dissuade" in isolation and that, reading the statute as a whole, it is clear that the conduct proscribed is the "disturbance" of a hunter engaged in a lawful activity. The Supreme Court also held that the law is not overbroad and that, to the extent that the statute might reach constitutionally protected expression, whatever overbreadth might exist should be cured on a case-by-case analysis of the fact situations. St. v. Lilburn, 265 M 258, 875 P2d 1036, 51 St. Rep. 507 (1994).

87-3-142. Harassment prohibited.

Compiler's Comments

1997 Amendment: Chapter 453 in (1) and (3), after "animal", inserted "or fishing"; in (2), after "taking", inserted "or its capture"; in (3), after "intent to", deleted "dissuade the individual or otherwise" and at end inserted "or the capture of the fish"; in (4) inserted second sentence concerning normal operations and lawful uses of water; and made minor changes in style.

Case Notes

Defendant Without Standing to Challenge Constitutionality of Hunter Harassment Law on Basis of Vagueness: Lilburn alleged that the hunter harassment law is unconstitutionally vague because it leaves several key terms undefined so that there is no statutory guidance to law enforcement officers or the public as to what type of conduct is prohibited. The Supreme Court held that Lilburn's conduct in standing between a hunter and a bison clearly was conduct that disturbed the hunter in the taking of game and that since Lilburn's conduct is clearly prohibited, he did not have standing to raise a facial vagueness challenge. St. v. Lilburn, 265 M 258, 875 P2d 1036, 51 St. Rep. 507 (1994), followed in St. v. Stubblefield, 283 M 292, 940 P2d 444, 54 St. Rep. 605 (1997).

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language. The Supreme Court held that the Legislature did not use the term "dissuade" in isolation and that, reading the statute as a whole, it is clear that the conduct proscribed is the "disturbance" of a hunter engaged in a lawful activity. The Supreme Court also held that the law is not overbroad and that, to the extent that the statute might reach constitutionally protected expression, whatever overbreadth might exist should be cured on a case-by-case analysis of the fact situations. St. v. Lilburn, 265 M 258, 875 P2d 1036, 51 St. Rep. 507 (1994).

Law Review Articles

Free Speech in the Wild; Animal-Rights Activists Challenge Hunter-Harassment Laws, Overland, 77 A.B.A. J. 35 (1991).

The Right to Arm Bears: Activists' Protests Against Hunting, Ugalde, 45 U. Miami L. Rev. 1109 (1991).

Collateral References

38 C.J.S. Game §60.

Validity and construction of statutes prohibiting harassment of hunters, fishermen, or trappers. 17 ALR 5th 837.

Civil liability for insulting or abusive language—modern status. 20 ALR 4th 773.

87-3-143. Penalty.

Compiler's Comments

1993 Amendment: Chapter 589 inserted second sentence concerning penalty for second or subsequent violation. Amendment effective April 29, 1993.

Part 2
Fish

87-3-201. Department control over fish hatcheries.

Collateral References

Fish *key* 8.

36A C.J.S. Fish §26.

35 Am. Jur. 2d Fish and Game §29.

87-3-202. Supervision over fish hatcheries by director.

Administrative Rules

Title 12, chapter 7, subchapter 6, ARM Fish planting policies.

Collateral References

Fish *key* 11.

36A C.J.S. Fish §37.

87-3-203. Restrictions on use of fish as bait.

Collateral References

Fish *key* 8, 13(1).

36A C.J.S. Fish §§26, 28.

35 Am. Jur. 2d Fish and Game §47.

87-3-204. Restrictions on fishing methods.

Compiler's Comments

1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

1989 Amendment: Inserted (6)(g) permitting a person to ice fish with unattended line or rod if within visual contact with line or rod. Amendment effective March 21, 1989.

1987 Amendment: In (6)(b) substituted language that reads: "the taking of paddlefish, channel catfish, and nongame fish with longbow and arrow, under such rules and regulations as the fish and game commission (now fish, wildlife, and parks commission) may prescribe" for "the taking of paddlefish with longbow and arrow when the department declares an open season when paddlefish may be taken by longbow and arrow".

1983 Amendment: Inserted (6)(f) relating to the taking of whitefish by nets or traps.

Statement of Intent: The statement of intent attached to SB 387 (Ch. 267, L. 1983) provided: "A statement of intent is required for Senate Bill 387 because rulemaking authority is granted to the Montana Fish and Game Commission [now Fish, Wildlife, and Parks Commission] to prescribe rules and regulations for the taking of Whitefish by nets or traps in the Kootenai River and in its tributary systems within one mile of the Kootenai River. It is proposed that such rules will encompass the following:

1. method of taking the fish;
2. permit requirements for those taking the fish; and
3. the times of taking the fish."

Administrative Rules

Title 12, chapter 7, subchapter 1, ARM Commercial fishing permit.
Title 12, chapter 7, subchapter 2, ARM Commercial minnow seining license.

Case Notes

Complaint: Complaint charging offense of unlawfully taking fish from stream was held sufficient. St. v. Russell, 52 M 583, 160 P 655 (1916).

Collateral References

Fish *key* 13(2).
36A C.J.S. Fish §30.
35 Am. Jur. 2d Fish and Game §47.

87-3-205. Unlawful to possess net or seine — exceptions.

Collateral References

Fish *key* 13(2).
36A C.J.S. Fish §30.
35 Am. Jur. 2d Fish and Game §47.

87-3-206. Unlawful to use explosives or poisons in taking fish.

Collateral References

35 Am. Jur. 2d Fish and Game §47.

87-3-207. Unlawful to place caged fish in public waters — exception.

Administrative Rules

ARM 12.7.301 Raising fish in public waters.

Collateral References

35 Am. Jur. 2d Fish and Game §§6, 11, 12, 29.

87-3-209. Intrastate movement of diseased fish or eggs unlawful.

Administrative Rules

Title 12, chapter 7, subchapter 5, ARM Importation of fish.

87-3-210. Permit required for importation of nonsalmonid fish or eggs.

Administrative Rules

Title 12, chapter 7, subchapter 5, ARM Importation of fish.

87-3-221. Importation of salmonid fish or eggs unlawful — exception — certification — permit.

Compiler's Comments

1989 Amendment: In (1) substituted "source" for "hatchery where reared", after "certification" deleted "is provided", after "that the" deleted "importation or", after "free of" substituted "all fish pathogens specified by" for "such infectious organisms as", after "department" deleted "may specify" and inserted "as posing a threat to existing fisheries accompanies the shipment", in second sentence, after "made", deleted "in the state of origin", after "pathologist" deleted reference to designation by Secretary of Interior or state Fish, Wildlife, and Parks Director, inserted "approved by the", in fourth sentence, after "inspection", deleted "of the hatchery of origin", after "as the" deleted "state fish, wildlife, and parks", and deleted last sentence requiring copy of certification to accompany shipment; inserted (2) requiring permits for importation of salmonid fish or eggs; and made minor changes in style.

Administrative Rules
ARM 12.7.503 Certification inspection procedures.
ARM 12.7.504 Approved pathologists.
ARM 12.7.505 Import permits.
ARM 12.7.506 Shipment inspections.
ARM 12.7.507 Hatchery or culture facility inspection, quarantine, and disinfection.

Collateral References
35 Am. Jur. 2d Fish and Game §42.

87-3-222. When certification unnecessary.

Compiler's Comments
1989 Amendment: In (1) inserted "or 87-3-209 may" and after "manner" substituted "that kills those fish pathogens specified by the department as posing a threat to fisheries" for "whereby such infectious organisms as the department may specify have been killed"; in (2) substituted "dead salmonid fish or eggs" for "salmon caught and brought directly into North America and", after "processing" deleted "or sale", after "wild" deleted "in North America shall be", and inserted second sentence prohibiting placement of uncertified salmonid fish, parts, or eggs into surface waters; and made minor changes in style and grammar.

Administrative Rules
ARM 12.7.505 Import permits.

87-3-223. Authorization for rules and personnel.

Administrative Rules
Title 12, chapter 7, subchapter 5, ARM Importation of fish.

87-3-224. Enforcement.

Compiler's Comments
1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.
1989 Amendment: Inserted "87-3-209 and 87-3-210 or", in second sentence, after "salmonid", inserted "and nonsalmonid", and made minor changes in style.
Severability Clause: Section 53, Ch. 9, L. 1977, read: "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Administrative Rules
ARM 12.7.506 Shipment inspections.
ARM 12.7.507 Hatchery or culture facility inspection, quarantine, and disinfection.

87-3-225. Inspection, quarantine, and disinfection of fish hatcheries and culture facilities.

Administrative Rules
ARM 12.7.507 Hatchery or culture facility inspection, quarantine, and disinfection.

87-3-226. Duty to report fish pathogens.

Administrative Rules
ARM 12.7.502 Designated pathogens.
ARM 12.7.504 Approved pathologists.

87-3-235. Fort Peck multispecies fish hatchery established.

Compiler's Comments
Contingent Voidness: Section 3, Ch. 559, L. 1999, provided: "If federal funds are not committed for the purposes of [this act] [87-3-235 and 87-3-236] by June 30, 2001, then [this act] is void." The federal government has committed funds for the Fort Peck fish hatchery project.
Effective Date: This section is effective October 1, 1999.

87-3-236. Warm water game fish surcharge and stamp — warm water game fish defined — accounts established — dedication of revenue to Fort Peck multispecies fish hatchery.

Compiler's Comments

Contingent Voidness: Section 3, Ch. 559, L. 1999, provided: "If federal funds are not committed for the purposes of [this act] [87-3-235 and 87-3-236] by June 30, 2001, then [this act] is void." The federal government has committed funds for the Fort Peck fish hatchery project.

Effective Date: This section is effective October 1, 1999.

Part 3
Game Animals

87-3-301. Shotgun loads regulated by department.

Compiler's Comments

1995 Amendment: Chapter 417 after "hunt" deleted "kill, or shoot"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

1987 Amendment: After "deer" inserted "or elk" and after "except with" inserted "weapon type and".

Collateral References

35 Am. Jur. 2d Fish and Game §47.

87-3-302. Colored garments required on big game hunters.

Collateral References

35 Am. Jur. 2d Fish and Game §29.

Hunter's civil liability for unintentionally shooting another person. 26 ALR 3d 561.

87-3-303. Policy toward nonresident big game hunters.

Collateral References

35 Am. Jur. 2d Fish and Game §§34, 35.

87-3-304. Landowner's permission required for hunting — penalty.

Compiler's Comments

1999 Amendment: Chapter 48 in (1) near end substituted "taking or attempting to take nongame wildlife or predatory animals or hunting" for "hunting big game animals"; inserted (2) establishing a penalty for a first offense; and made minor changes in style. Amendment effective July 1, 1999.

Preamble: The preamble attached to Ch. 48, L. 1999, provided: "WHEREAS, the act of hunting on private land is a privilege and not a right; and

WHEREAS, it is common courtesy to ask permission before entering private property; and

WHEREAS, increased communication normally leads to less confrontation; and

WHEREAS, with increased hunting pressure placed on private land, it is essential to maintain good rapport between landowners and hunters."

Attorney General's Opinions

Hunting of Specific Animal — Violation if Other Animal Hunted: A landowner may refuse permission entirely or give limited permission to hunt at certain times, in certain areas, or for certain kinds of animals. A hunter given explicit permission to hunt only for a specific kind of big game animal who exceeds the permission by hunting another kind of animal may be charged under this section with failure to obtain the landowner's permission. 41 A.G. Op. 65 (1986).

Hunting Trespass Not Repealed: Montana's criminal trespass statutes, 45-6-201 and 45-6-203, do not repeal or affect 87-3-304, which makes it unlawful to hunt big game animals on private property without permission, because the statutes do not relate to the same conduct. 37 A.G. Op. 144 (1978).

Collateral References

38 C.J.S. Game §§5, 59.

35 Am. Jur. 2d Fish and Game §§16 through 21.

Effect of statute limiting landowner's liability for personal injury to recreational user. 47 ALR 4th 262.

Entry on private lands in pursuit of wounded game as criminal trespass. 41 ALR 4th 805.

87-3-305. Unlawful to hunt deer within city or town boundaries.

Compiler's Comments

1995 Amendment: Chapter 417 substituted "unlawful to hunt or attempt to hunt" for "unlawful to shoot, kill, take, or cause to be shot, killed, taken, or captured or to attempt to shoot, kill, take, or capture". Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Collateral References

35 Am. Jur. 2d Fish and Game §47.

87-3-306. Unlawful to destroy evidence of sex.

Collateral References

35 Am. Jur. 2d Fish and Game §29.

87-3-308. Development of maps identifying land ownership boundaries.

Compiler's Comments

Preamble: The preamble attached to Ch. 48, L. 1999, provided: "WHEREAS, the act of hunting on private land is a privilege and not a right; and

WHEREAS, it is common courtesy to ask permission before entering private property; and

WHEREAS, increased communication normally leads to less confrontation; and

WHEREAS, with increased hunting pressure placed on private land, it is essential to maintain good rapport between landowners and hunters."

Effective Date: Section 4, Ch. 48, L. 1999, provided: "[This act] is effective July 1, 1999."

Part 4
Game Birds

Part Law Review Articles

The Migratory Bird Treaty Act: Steel Shot Versus Lead Shot for Hunting Migratory Waterfowl, Lombardi, 22 Akron L. Rev. 343 (1989).

87-3-401. Restrictions on rifles for bird hunting.

Compiler's Comments

1995 Amendment: Chapter 194 inserted last sentence prohibiting use of rifles to hunt wild turkey during spring wild turkey season.

Collateral References

35 Am. Jur. 2d Fish and Game §47.

87-3-402. Unlawful to violate closed season on certain game birds.

Compiler's Comments

1995 Amendment: Chapter 417 near beginning substituted "hunt or attempt to hunt" for "hunt, shoot, kill, capture, possess, or cause to be hunted, killed, or captured or attempt to shoot, kill, or capture" and before "open season" substituted "commission provides" for "department shall provide"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Collateral References

35 Am. Jur. 2d Fish and Game §46.

87-3-403. Migratory game birds — closed season and bag limits.

Law Review Articles

Migratory Species in International Law, De Klemm, 29 Nat. Resources J. 935 (1989).

The Migratory Bird Treaty Act: Steel Shot Versus Lead Shot for Hunting Migratory Waterfowl, Lombardi, 22 Akron L. Rev. 343 (1989).

Collateral References

35 Am. Jur. 2d Fish and Game §§46, 48.

Part 5
Fur-Bearing Animals

87-3-501. Open and closed season for fur-bearing animals — exception.

Compiler's Comments

1995 Amendment: Chapter 417 in (1), in first sentence, substituted "trap or hunt or attempt to trap or hunt any fur-bearing animal" for "shoot, trap, kill, or capture or cause to be shot, trapped, killed, or captured or to attempt to shoot, trap, kill, or capture any marten or sable, otter, mink, muskrat, beaver, fisher, Canada lynx, or black-footed ferret" and at end substituted "fur-bearing animal" for "marten or sable, otter, mink, muskrat, beaver, fisher, Canada lynx, or black-footed ferret"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Collateral References

35 Am. Jur. 2d Fish and Game §46.

87-3-504. Metal tags required on traps.

Compiler's Comments

2001 Amendment: Chapter 275 near beginning after "predatory animals" substituted "or any other animals" for "for their pelts", near middle after "name and address" inserted "or wildlife conservation license number", and near end after "used by landowners" substituted "trapping on their own land or on an irrigation" for "trapping with permit on their own land and irrigation"; and made minor changes in style. Amendment effective April 20, 2001.

87-3-505. Penalty.

Collateral References

35 Am. Jur. 2d Fish and Game §§52 through 54.

CHAPTER 4
COMMERCIAL ACTIVITIES

Part 2
Taxidermists

87-4-201. Taxidermist's license, fee, and penalty.

Collateral References

Licenses *key* 11(1), 25.
53 C.J.S. Licenses §§30, 35.
35 Am. Jur. 2d Fish and Game §45.

Part 3
Fur Dealers

Part Collateral References

35 Am. Jur. 2d Fish and Game §§41, 45.

87-4-301. Fur dealers defined.

Collateral References

Licenses *key* 7(3), 10.
53 C.J.S. Licenses §30.

87-4-302. Records and inspection.

Collateral References

Licenses *key* 25.
53 C.J.S. Licenses §35.

87-4-303. Persons required to have fur dealer's license.

Collateral References
Licenses *key* 11(1), 19(3).
53 C.J.S. Licenses §30.

87-4-304. License classification and fees.

Compiler's Comments
1991 Amendment: In (1), after "licenses", substituted "may" for "shall"; and made minor changes in style.
1989 Amendment: In (1)(b) substituted the reciprocal fee provisions for former fee of $50.

Case Notes
Not Incumbent Upon Agent to Procure or Possess License: When defendant had been convicted in Justice Court of buying furs for a fur dealer without a license, a misdemeanor, and again found guilty in District Court on appeal, the complaint did not state a public offense since under this section as amended in 1941 it was not incumbent upon the agent to procure or possess a license for buying furs but rather upon the fur dealer to procure a license for himself and his agent. St. v. Salina, 116 M 478, 154 P2d 484 (1944).

Collateral References
Licenses *key* 29.
53 C.J.S. Licenses §48.

87-4-305. Issuance and expiration of licenses.

Collateral References
Licenses *key* 22, 36.
53 C.J.S. Licenses §§39, 42.

87-4-306. Violations.

Collateral References
Licenses *key* 40.
53 C.J.S. Licenses §66.

Part 4
Alternative Livestock Ranches

Part Administrative Rules
Title 12, chapter 6, subchapter 15, ARM Game farms.

Part Case Notes
Use of New Licensing Procedures Not Retroactive Application of Law and Not Violation of Department's Internal Policy: The Wallaces argued that the Department of Fish, Wildlife, and Parks had violated the law by retroactively applying license approval criteria for game farm (now alternative livestock ranch) approval to them when they had filed their license application prior to 1993 legislative changes to the licensing law. The Wallaces also argued that the Department had not followed its own internal policies that required it to act on the application within 60 days of receipt. The Supreme Court held that the Department had correctly applied the new licensing criteria because a license is a privilege, not a vested right, the Department is required to comply with the law circumscribing its powers, and as a general rule, an agency is required to make its decisions on the law as it exists at the time that the decision is made, despite the fact that the law may have changed. The Supreme Court also held that the 60-day requirement to approve or disapprove a license application had been a statutory requirement under the previous law and had ceased to be a requirement when the amendments to the law became effective. Wallace v. Dept. of Fish, Wildlife, and Parks, 269 M 364, 889 P2d 817, 52 St. Rep. 30 (1995). See also Harlem v. St. Highway Comm'n, 149 M 281, 425 P2d 718 (1967), and Saint Vincent Hosp. v. Blue Cross, 261 M 56, 862 P2d 6 (1993).

Part Attorney General's Opinions
Wild Game Animals — Removal: When the fence of a game farm (now alternative livestock ranch) permittee encloses native wild big game animals, these animals remain the property of the state and may be hunted and taken only in compliance with state law. The state has no

responsibility to remove the wild game animals from the enclosure. 38 A.G. Op. 68 (1980). Note: Portions of this opinion have been obviated by Ch. 570, L. 1983.

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Part Law Review Articles

Taking Aim at Canned Hunts Without Catching Game Ranches in the Crossfire, Wrage, 30 Loy. L.A.L. Rev. 893 (1997).

Part Collateral References

Game *key* 5.

38 C.J.S. Game §§52, 53.

35 Am. Jur. 2d Fish and Game §40.

Applicability to domesticated or captive game, of game laws relating to closed season and the like. 74 ALR 2d 974.

87-4-406. Definitions.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 322 in definition of game farm animal after "caribou" deleted "black bear, mountain lion". Amendment effective October 1, 1999. The amendment was rendered void by Ch. 574, which deleted the definition of game farm animal.

Chapter 574 inserted definitions of alternative livestock and alternative livestock ranch; in definition of facilities at end substituted "alternative livestock" for "game farm animals"; deleted former definition of game farm that read: ""Game farm" means the enclosed land area upon which game farm animals may be kept for purposes of obtaining, rearing in captivity, keeping, or selling game farm animals or parts of game farm animals, as authorized under this part"; deleted former definition of game farm animal that read: ""Game farm animal" means a privately owned caribou, black bear, mountain lion, white-tailed deer, mule deer, elk, moose, antelope, mountain sheep, or mountain goat indigenous to the state of Montana, a privately owned reindeer, or any other cloven-hoofed ungulate as classified by the department"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 inserted definition of cloven-hoofed ungulate; in definition of game farm animal inserted "a privately owned reindeer"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 315 inserted definition of facilities; in definition of game farm, in two places before "animals", inserted "farm"; deleted former definition of game farm shooting license that read: ""Game farm shooting license" means the license required under 87-4-421 for a game farm operator to hunt the game farm animals indigenous to the state of Montana on his game farm"; and made minor changes in style. Amendment effective April 12, 1993.

1985 Amendment: In (4) substituted "black bear" for "bear".

Administrative Rules

ARM 12.6.1520 Definitions.

87-4-407. License required — moratorium — penalty — seizure of illegally possessed animals.

Compiler's Comments

2000 Amendment by Initiative: Initiative Measure No. 143 in (1) at end of first sentence inserted "prior to November 7, 2000", inserted second sentence prohibiting new licenses, and deleted former second sentence that read: "The department may not accept any new applications for an initial alternative livestock ranch license until a live test for chronic wasting disease is developed and is approved by the department of livestock"; and made minor changes in style. Amendment effective November 7, 2000.

Severability: Section 10, Initiative Measure No. 143, was a severability clause.

2000 Amendment: Chapter 1 in (1) inserted second sentence imposing moratorium on new applications until a live test for chronic wasting disease is approved. Amendment effective May 11, 2000.

Saving Clause: Section 3, Ch. 1, Sp. L. May 2000, was a saving clause.

1999 Amendment: Chapter 574 in (1) after "operate" substituted "an alternative livestock ranch" for "a game farm" and after "obtaining" substituted "an alternative livestock ranch" for "a

game farm"; and in (2) near beginning after "operates" substituted "an alternative livestock ranch" for "a game farm". Amendment effective October 1, 1999.

1993 Amendment: Chapter 315 inserted (2) providing for a misdemeanor penalty; inserted (3) providing for seizure of illegally possessed animals; and made minor changes in style. Amendment effective April 12, 1993.

87-4-408. Jurisdiction.

Compiler's Comments

2000 Amendment by Initiative: Initiative Measure No. 143 in (1) near middle deleted "removal of game animals under 87-4-410"; and made minor changes in style. Amendment effective November 7, 2000.

Severability: Section 10, Initiative Measure No. 143, was a severability clause.

1999 Amendment: Chapter 574 in (1) near beginning after "jurisdiction over" substituted "alternative livestock ranches" for "game farms", after "fencing" substituted "classification of certain species under 87-4-424" for "classification of exotic species", and after "87-4-410" inserted "unlawful capture under 87-4-418"; in (2) after "jurisdiction over" substituted "alternative livestock ranches" for "game farms"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 in (1) inserted language concerning the Department's jurisdiction regarding licensing, recordkeeping, fencing, species classification, animal removal, inspection, and enforcement; in (2), at beginning, deleted "A game farm licensee must also comply with all applicable laws and rules administered by", after "livestock" inserted "has primary jurisdiction over game farms", after "transportation" inserted "importation, quarantine, hold orders, interior facilities", and after "health" inserted "and relating to the enforcement of the functions listed in this subsection"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: At end of (2) inserted language concerning compliance with laws and rules relating to marketing, inspection, transportation, and health.

Collateral References

4 Am. Jur. 2d Animals §20, et seq.

87-4-411. License renewal fees — deposit of fees.

Compiler's Comments

2000 Amendment by Initiative: Initiative Measure No. 143 in (1) substituted "The department shall charge an annual renewal" for "Except as provided in 87-4-407(1), the department shall charge an initial" and after "fee" deleted "and an annual renewal fee"; in (1)(a) deleted "an initial license fee of $200 and an annual renewal"; in (1)(b) deleted "an initial license fee of $300 and an annual renewal"; in (1)(c) deleted "an initial license fee of $400 and an annual renewal"; deleted former (2) that read: "(2) In addition to the fees assessed under subsection (1), the department shall charge applicants a fee of $4 an acre based on the total number of acres indicated in the application for a license. In cases of an application for a license modification, the fee applies only if an acreage expansion is proposed"; in (3)(a) after "(1)" deleted "and all of the fees collected pursuant to subsection (2)"; and made minor changes in style. Amendment effective November 7, 2000.

Severability: Section 10, Initiative Measure No. 143, was a severability clause.

2000 Amendment: Chapter 1 at beginning of (1) inserted exception clause. Amendment effective May 11, 2000.

Saving Clause: Section 3, Ch. 1, Sp. L. May 2000, was a saving clause.

1999 Amendment: Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm and substituted references to alternative livestock for references to game farm animals; in (1)(a) at end increased annual renewal fee from $50 to $100; in (1)(b) at end increased annual renewal fee from $100 to $200; in (1)(c) at end increased annual renewal fee from $200 to $400; inserted (2) establishing fee of $4 an acre; inserted (3) establishing fee of $50 for imported alternative livestock; in (4)(a) at beginning inserted "One-half of the fees collected pursuant to subsection (1) and all of the fees collected pursuant to subsection (2)"; inserted (4)(b) regarding deposit of remaining half of license fees; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 in (1) substituted "game farm license fee and an annual renewal fee based on the following scale" for "game farm license fee of $200 and shall charge an

annual renewal fee of $50"; and inserted (1)(a) through (1)(c) concerning an initial and renewal license fee schedule. Amendment effective July 1, 1995.

1993 Amendment: Chapter 315 increased initial license fee from $100 to $200 and annual renewal fee from $25 to $50; and made minor changes in style. Amendment effective April 12, 1993.

1983 Amendment: In (2), substituted "state special revenue fund" for "earmarked revenue fund".

87-4-412. Term of license — renewal — transfer prohibited.

Compiler's Comments

2000 Amendment by Initiative: Initiative Measure No. 143 in (2) substituted "not transferable" for "transferable with the consent of the department. The department's consent must be given if:

(a) the transferee meets the requirements of 87-4-426(1);

(b) the alternative livestock ranch and facilities are in compliance with requirements in place at the time the license was issued;

(c) the alternative livestock ranch is not under quarantine by the department;

(d) alternative livestock to be transferred are not prohibited under this part and department rules; and

(e) the transfer is not proposed as a means to evade a requirement imposed on the licensee." Amendment effective November 7, 2000.

Severability: Section 10, Initiative Measure No. 143, was a severability clause.

1999 Amendment: Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm; in (1) near beginning after "expires on" substituted "March 1" for "January 31"; in (2)(c) at end after "department" deleted "of livestock"; and in (2)(d) at beginning substituted "alternative livestock" for "game farm animals". Amendment effective October 1, 1999.

1993 Amendment: Chapter 315 at end of (1) substituted "complied with all recording and reporting requirements" for "not violated any provisions under which the license was granted"; and substituted (2) regarding transferability of game farm license for former language that read: "A game farm license is nontransferable." Amendment effective April 12, 1993.

87-4-413. Inspection.

Compiler's Comments

2000 Amendment by Initiative: Initiative Measure No. 143 deleted former (1) that read: "(1) Upon receipt of an application for an alternative livestock ranch license, the department shall inspect the land proposed to be covered by the license"; and made minor changes in style. Amendment effective November 7, 2000.

Severability: Section 10, Initiative Measure No. 143, was a severability clause.

1999 Amendment: Chapter 574 in (1) after "application for" substituted "an alternative livestock ranch" for "a game farm"; in (2) at beginning deleted "After issuance of a game farm license", after "inspect the" substituted "alternative livestock ranch" for "game farm", and after "licensee's" substituted "alternative livestock ranch records" for "game farm books"; and made minor changes in style. Amendment effective October 1, 1999.

87-4-414. Alternative livestock as private property — source — marking — fee shooting prohibited.

Compiler's Comments

2000 Amendment by Initiative: Initiative Measure No. 143 at end of (2) inserted exception clause prohibiting fee shooting. Amendment effective November 7, 2000.

Severability: Section 10, Initiative Measure No. 143, was a severability clause.

1999 Amendment: Chapter 574 throughout section substituted references to alternative livestock for references to game farm animals; in (1) near middle substituted "alternative livestock ranch" for "game farm"; in (6) at end of second sentence substituted "alternative livestock ranch" for "game farm"; in (7) at beginning after "Except" substituted "as otherwise provided in this part" for "for importation permits and health certificates required under 81-2-703" and at end substituted "alternative livestock ranch" for "game farm"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 in (2) substituted "handle" for "capture"; in (3), after "livestock", inserted "as required under subsection (4)"; inserted (4) concerning the Department's

responsibility for identification tags and the marking of game farm animals; inserted (5) concerning temporary waiver of identification and manner of identification; in (6) inserted second, third, and fourth sentences concerning keeping game farm animals on game farm, the obligations of a licensee not owning the game farm animal, and records and reports submitted by a licensee; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 315 in (1), after "lawfully", substituted "possessed" for "raised" and at end substituted "for which the licensee is responsible as provided by law" for "of the licensee"; in (2) substituted "harvest" for "kill"; in (3), before "ownership", substituted "indicates" for "facilitates" and after "ownership" inserted "and provides individual"; substituted (4) requiring that animals be lawfully obtained for former language that read: "Before allowing hunting of any game farm animals on a game farm, the game farm licensee must obtain a game farm shooting license from the department"; and made minor changes in style. Amendment effective April 12, 1993.

1991 Amendment: Inserted (3) concerning marking game farm animals to facilitate identification for inspection, transportation, reporting, and taxation purposes; and at beginning of (5) inserted exception clause concerning importation permits and health certificates.

Case Notes

Appropriateness of Intervention in Action Challenging Enforcement of Ballot Initiative: Two sporting groups sought to intervene in an action challenging the enforcement of a ballot initiative that prohibited the shooting of alternative livestock for a fee. The District Court denied the motion, and the groups appealed. After accepting supervisory control, the Supreme Court noted that an application for intervention as a matter of right must satisfy each of the following factors: (1) timeliness; (2) interest in the subject matter of the litigation; (3) a showing that protection of the interest may be impaired by disposition of the action; and (4) a showing that the interest is not adequately represented by an existing party. In the present case, timeliness was not disputed. Regarding the second factor, the Supreme Court cited Idaho Farm Bureau Fed'n v. Babbitt, 58 F3d 1392 (9th Cir. 1995), for the proposition that a public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure that the group has supported. The District Court did not address the third factor because it determined that the groups had no legally protectable interest in the litigation. However, the Supreme Court found that an adverse decision in the suit would impair the groups' interest in the management and protection of Montana's game animals, so the third factor was met. Finally, the District Court determined that the groups failed to demonstrate that the Attorney General, on behalf of the Department of Fish, Wildlife, and Parks, would not zealously defend the groups' position in the suit. The Supreme Court concluded that the groups that actively drafted and supported the initiative may be in the best position to defend their interpretation of the resulting legislation and may not have been adequately represented by the Department. Thus, all four factors were met, and the Supreme Court ordered the District Court to permit the groups to intervene in the case. Sportsmen for I-143 v. District Court, 2002 MT 18, 308 M 189, 40 P3d 400 (2002).

Attorney General's Opinions

Wild Game Animals — Removal: When the fence of a game farm (now alternative livestock ranch) permittee encloses native wild big game animals, these animals remain the property of the state and may be hunted and taken only in compliance with state law. The state has no responsibility to remove the wild game animals from the enclosure. 38 A.G. Op. 68 (1980). Note: Portions of this opinion have been obviated by Ch. 570, L. 1983. (See also 1999 amendment.)

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Collateral References

35 Am. Jur. 2d Fish and Game §§1, 2.

87-4-415. Transportation, sale, and disposal of alternative livestock — quarantine.

Compiler's Comments

1999 Amendment: Chapter 574 throughout section substituted references to alternative livestock for references to game farm animals; in (1) in first sentence substituted reference to alternative livestock ranch for reference to game farm, after "licensee shall" deleted "contact the department of livestock to", after "inspection" inserted "of the alternative livestock, which inspection must be completed", and at end after "agent" deleted "for all game farm animals,

except carnivores and omnivores", deleted former second sentence that read: "In the case of carnivores and omnivores, the game farm licensee shall contact the department to request an inspection by a department official", and in third sentence after "dead" substituted "alternative livestock" for "game farm animals, except carnivores and omnivores"; in (2)(a) after "subsection (1)" deleted "except inspection of carnivores and omnivores"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 in (1), near middle of first sentence, substituted "designated agent" for "stock inspector" and substituted third sentence concerning reporting of dead game farm animals for former third sentence that read: "This section applies to all game farm animals, whether alive or dead"; substituted (2) concerning inspection of game farm animals under subsection (1) and certificate of inspection for former (2) that read: "(2)(a) Inspection under subsection (1) must include examination of the game farm animal and all marks, tags, and tattoos to identify ownership prior to issuance of a certificate of inspection.

(b) A certificate of inspection must be made in triplicate and must specify:

(i) the date of inspection;

(ii) the place of origin and destination of the shipment;

(iii) the name and address of the owner of the game farm animals and of the purchaser or transferee;

(iv) the number, species, age, and sex of game farm animals transported or disposed of;

(v) ear tag numbers and tattoos on each animal; and

(vi) any other information that the department of livestock may require.

(c) A copy of the certificate must be:

(i) retained by the inspector;

(ii) furnished by the inspector to the owner or shipper of the game farm animals, to accompany the animals to their destination;

(iii) filed by the inspector with the department of livestock within 5 days of inspection; and

(iv) provided by the department of livestock to the department within 10 days of inspection"; and in (3), after "quarantine", inserted "or issue a hold order on". Amendment effective July 1, 1995.

1993 Amendment: Chapter 315 substituted (1) regarding inspection of game farm animals for former language that read: "Whenever the licensee of a licensed game farm sells or disposes of one or more game farm animals, he shall, at the same time, deliver to the recipient or otherwise cause to accompany each game farm animal or animals an invoice or bill of sale signed by the licensee or his agent stating the number of the game farm license, the date of acquisition or disposition, the species, the age, sex, and class of game animals disposed of, and the name and address of the transferee. This invoice or bill of sale, along with any required health certifications, authorizes transportation of the game farm animal or animals being sold, transferred, or disposed of"; and substituted (2) regarding inspection criteria for former language that read: "Within 10 days after movement or sale, the licensee or his agent shall mail postpaid a duplicate of the invoice or bill of sale to the department of livestock and the department." Amendment effective April 12, 1993.

1991 Amendment: In (1), near middle of first sentence before "disposition", inserted "acquisition or" and before "disposed" substituted "age, sex, and class of game animals" for "number" and in second sentence, after "bill of sale", inserted "along with any required health certifications"; at beginning of (2) substituted "Within 10 days after movement or sale" for "Within a reasonable time after disposition"; inserted (3) concerning Department of Livestock quarantining game farm animals pending inspection and concerning notification to Department of Livestock by Department of Fish, Wildlife, and Parks of importation or transportation of game farm animal with wildlife disease; and made minor changes in style.

Administrative Rules

ARM 12.6.1537 Transportation — carnivores and omnivores.

Collateral References

35 Am. Jur. 2d Fish and Game §§42, 49, 50.

Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself. 44 ALR 3d 1008.

87-4-416. Sale of carcass and meat — regenerative parts excluded.

Compiler's Comments

1999 Amendment: Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm and substituted references to alternative livestock for

references to game farm animals; in (1) in first sentence after "carcass" deleted "parts, or byproducts" and in third sentence after "carcass" deleted "parts, or byproducts"; inserted (3) excluding sale of regenerative parts from statutory requirements; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 315 in (1), at end of first sentence, substituted "in accordance with the provisions of 87-4-415" for "only upon preparing an invoice or bill of sale and attaching", in second sentence substituted "certificate of inspection" for "it" and at end, after "container", deleted "and keeping a copy for his records", and in third sentence, in two places, substituted "certificate of inspection" for "invoice or bill of sale"; and made minor changes in style. Amendment effective April 12, 1993.

Administrative Rules

Title 12, chapter 6, subchapter 15, ARM Game farms.

Collateral References

35 Am. Jur. 2d Fish and Game §50.

Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself. 44 ALR 3d 1008.

87-4-417. Records and reporting — rules.

Compiler's Comments

1999 Amendment: Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm and substituted references to alternative livestock for references to game farm animals; in (1) in introductory clause after "deaths" substituted "on forms provided by the department" for "of game farm animals"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 in (1), after "sales", inserted "births, and deaths"; in (1)(c), after "sold", inserted "or born or that died. However, a calf or fawn that dies prior to being marked pursuant to 87-4-414(4) need not be identified"; in (2), at beginning, inserted "Unless a different reporting frequency has been established pursuant to subsection (3)", in two places, after "January 1", deleted "April 1", in two places substituted "July 1" for "September 1", near end, before "bought", inserted "that escaped, that were", and after "sold" substituted "transferred, recaptured, or born, or that died" for "or propagated"; inserted (3) concerning the Department establishing rules for reporting frequency; and made minor changes in style. Amendment effective July 1, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 503, L. 1995, provided: "A statement of intent is required for this bill in order to clarify rulemaking authority of the department of fish, wildlife, and parks and the department of livestock with regard to the administration and regulation of game farms [now alternative livestock ranches]. It is intended that rules promulgated pursuant to Title 87, chapter 4, part 4, be adopted in accordance with the Montana Negotiated Rulemaking Act, Title 2, chapter 5, part 1.

(1) It is intended that the department of fish, wildlife, and parks have primary authority with regard to rules governing:

(a) game farm [now alternative livestock ranch] licensure;

(b) reporting requirements;

(c) exterior fencing requirements;

(d) classification of species the importation of which may present a threat to the state's wildlife population;

(e) general enforcement of game farm [now alternative livestock ranch] licensing violations; and

(f) the definition of "reasonable time" in the context of 87-4-419(2), which must reflect specific seasonal issues related to breeding and disease.

(2) It is intended that the department of livestock have primary authority with regard to rules governing:

(a) transportation and identification of game farm animals [now alternative livestock];

(b) health inspection and game farm [now alternative livestock ranch] quarantines, including interior facilities; and

(c) importation restrictions on exotic species.

(3) It is intended that the department of livestock's rules address the issue of immediate depopulation of game farm animals [now alternative livestock] that test positive for tuberculosis.

(4) It is intended that both the department of fish, wildlife, and parks and the department of livestock consider the feasibility of using DNA as an additional method of identification of game farm animals [now alternative livestock].

(5) It is intended that the game farm advisory council [now alternative livestock advisory council] advise both the department of fish, wildlife, and parks and the department of livestock regarding the administration of game farm [now alternative livestock ranch] operations, which may include input into the rules adopted pursuant to [this act].

(6) It is the intent of the legislature that in adopting rules pursuant to 87-4-426(6) [now repealed], the department of fish, wildlife, and parks provide for a timely and simplified process for minor amendments to an existing license. This may include, when appropriate, a categorical exclusion under the provisions of Title 75, chapter 1, part 1."

1993 Amendment: Chapter 315 at beginning of (2) substituted "Within 2 weeks after January 1, April 1, and September 1" for "On or before January 31", near middle, after "January 1", inserted "April 1, and September 1", near end, after "sold", inserted "or propagated", and at end substituted "reporting period" for "past year"; and made minor changes in style. Amendment effective April 12, 1993.

1991 Amendment: At beginning of (1)(c), before "identification", inserted "individual".

Administrative Rules

ARM 12.6.1539 Game farm records and reports.

87-4-418. Unlawful capture.

Compiler's Comments

1999 Amendment: Chapter 574 at end substituted "an alternative livestock ranch" for "a game farm except as provided in 87-4-410"; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

ARM 12.6.1543 Confiscation procedures.

Case Notes

Evidence Sufficient to Support Conviction for Game Farm (now Alternative Livestock Ranch) Violations: Evidence of the presence of wild elk on Brogan's game farm (now alternative livestock ranch), gathered by wardens through direct observation and supported by circumstantial evidence, such as animal tracks, the presence of hay near gates, the absence of electric power in the game farm (now alternative livestock ranch) fence, and Brogan's evasive conduct, was sufficient to support Brogan's conviction for capturing wild elk for use on the game farm (now alternative livestock ranch) and for failure to maintain fences. St. v. Brogan, 261 M 79, 862 P2d 19, 50 St. Rep. 1204 (1993).

87-4-419. Escape from alternative livestock ranch — effect.

Compiler's Comments

1999 Amendment: Chapter 574 in (1) after "escapes from" substituted "an alternative livestock ranch" for "a game farm" and in two places substituted references to alternative livestock for references to game farm; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 in second sentence of (1), after "time", inserted "the department may kill the animal. If recapture or killing of the animal is unsuccessful within a reasonable time"; inserted (2) requiring the Department to adopt a rule defining reasonable time; and made minor changes in style. Amendment effective July 1, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 503, L. 1995, provided: "A statement of intent is required for this bill in order to clarify rulemaking authority of the department of fish, wildlife, and parks and the department of livestock with regard to the administration and regulation of game farms [now alternative livestock ranches]. It is intended that rules promulgated pursuant to Title 87, chapter 4, part 4, be adopted in accordance with the Montana Negotiated Rulemaking Act, Title 2, chapter 5, part 1.

(1) It is intended that the department of fish, wildlife, and parks have primary authority with regard to rules governing:

(a) game farm [now alternative livestock ranch] licensure;

(b) reporting requirements;

(c) exterior fencing requirements;

(d) classification of species the importation of which may present a threat to the state's wildlife population;

(e) general enforcement of game farm [now alternative livestock ranch] licensing violations; and

(f) the definition of "reasonable time" in the context of 87-4-419(2), which must reflect specific seasonal issues related to breeding and disease.

(2) It is intended that the department of livestock have primary authority with regard to rules governing:

(a) transportation and identification of game farm animals [now alternative livestock];

(b) health inspection and game farm [now alternative livestock ranch] quarantines, including interior facilities; and

(c) importation restrictions on exotic species.

(3) It is intended that the department of livestock's rules address the issue of immediate depopulation of game farm animals [now alternative livestock] that test positive for tuberculosis.

(4) It is intended that both the department of fish, wildlife, and parks and the department of livestock consider the feasibility of using DNA as an additional method of identification of game farm animals [now alternative livestock].

(5) It is intended that the game farm advisory council [now alternative livestock advisory council] advise both the department of fish, wildlife, and parks and the department of livestock regarding the administration of game farm [now alternative livestock ranch] operations, which may include input into the rules adopted pursuant to [this act].

(6) It is the intent of the legislature that in adopting rules pursuant to 87-4-426(6) [now repealed], the department of fish, wildlife, and parks provide for a timely and simplified process for minor amendments to an existing license. This may include, when appropriate, a categorical exclusion under the provisions of Title 75, chapter 1, part 1."

Administrative Rules

ARM 12.6.1538 Egress amd ingress.

87-4-420. Taxation.

Compiler's Comments

1999 Amendment: Chapter 574 at beginning after "All" substituted "alternative livestock" for "game farm animals", after "raised on" substituted "an alternative livestock ranch" for "a game farm", and at end inserted "similar to other livestock". Amendment effective October 1, 1999.

87-4-422. Rulemaking.

Compiler's Comments

1999 Amendment: Chapter 574 in (1) after "regulation of" substituted "alternative livestock ranches" for "game farms"; substituted (2) regarding adoption and enforcement of rules for former text that read: "The department of livestock may adopt rules addressing the transportation and importation of game farm animals, restrictions on importation, identification, sale of game farm animal parts, quarantine, hold orders, interior facilities, health regulations, and the care and maintenance of game farm animals"; deleted former (3) that read: "(3) Rules promulgated pursuant to this part must be adopted in accordance with the Montana Negotiated Rulemaking Act, Title 2, chapter 5, part 1"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 in (1), after "part", inserted "over which the department has primary jurisdiction"; substituted (2) concerning the adoption of rules addressing transportation, importation, identification, sale, quarantine, hold orders, interior facilities, and the health, care, and maintenance of game farm animals for former (2) that read: "(2) The rules may address but are not limited to the classifying of cloven-hoofed ungulates, requirements for facilities, reporting and recordkeeping requirements, transportation and importation, restrictions on importation, identification, sale of animal parts, and the care and maintenance of game farm animals"; and inserted (3) concerning rules adopted pursuant to this part being in accordance with Title 2, chapter 5, part 1. Amendment effective July 1, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 503, L. 1995, provided: "A statement of intent is required for this bill in order to clarify rulemaking authority of the department of fish, wildlife, and parks and the department of livestock with regard to the administration and regulation of game farms [now alternative livestock ranches]. It is intended that rules promulgated pursuant to Title 87, chapter 4, part 4, be adopted in accordance with the Montana Negotiated Rulemaking Act, Title 2, chapter 5, part 1.

(1) It is intended that the department of fish, wildlife, and parks have primary authority with regard to rules governing:

(a) game farm [now alternative livestock ranch] licensure;

(b) reporting requirements;

(c) exterior fencing requirements;

(d) classification of species the importation of which may present a threat to the state's wildlife population;

(e) general enforcement of game farm [now alternative livestock ranch] licensing violations; and

(f) the definition of "reasonable time" in the context of 87-4-419(2), which must reflect specific seasonal issues related to breeding and disease.

(2) It is intended that the department of livestock have primary authority with regard to rules governing:

(a) transportation and identification of game farm animals [now alternative livestock];

(b) health inspection and game farm [now alternative livestock ranch] quarantines, including interior facilities; and

(c) importation restrictions on exotic species.

(3) It is intended that the department of livestock's rules address the issue of immediate depopulation of game farm animals [now alternative livestock] that test positive for tuberculosis.

(4) It is intended that both the department of fish, wildlife, and parks and the department of livestock consider the feasibility of using DNA as an additional method of identification of game farm animals [now alternative livestock].

(5) It is intended that the game farm advisory council [now alternative livestock advisory council] advise both the department of fish, wildlife, and parks and the department of livestock regarding the administration of game farm [now alternative livestock ranch] operations, which may include input into the rules adopted pursuant to [this act].

(6) It is the intent of the legislature that in adopting rules pursuant to 87-4-426(6) [now repealed], the department of fish, wildlife, and parks provide for a timely and simplified process for minor amendments to an existing license. This may include, when appropriate, a categorical exclusion under the provisions of Title 75, chapter 1, part 1."

1993 Amendment: Chapter 315 at end of (1) inserted "and to coordinate regulation of game farms with the department of livestock"; in (2), after "ungulates", substituted "requirements for facilities" for "fencing requirements", after "reporting" inserted "and recordkeeping", after "importation" inserted "restrictions on importation", and at end deleted "and game farm shooting licenses"; and made minor changes in style. Amendment effective April 12, 1993.

1983 Statement of Intent: The statement of intent attached to SB 448 (Ch. 570, L. 1983) provided: "This bill requires the Department of Fish, Wildlife, and Parks to make rules for game animal farms under section 17 [87-4-422], game bird farms under section 32 [87-4-913], and fur farms under section 47 [87-4-1012]. It is the intent of the Legislature that these rules address procedural items necessary for a timely and efficient processing of applications and licenses and provide the information necessary for administration of the criteria provided in those sections. It is intended that the license fees to be set by the Department be in an amount commensurate with the costs of processing the applications and administering the provisions of the act."

Administrative Rules

Title 12, chapter 6, subchapter 15, ARM Game farms.

ARM 12.6.1544 Waivers.

87-4-423. Revocation of license — procedure — disposition of animals.

Compiler's Comments

1999 Amendment: Chapter 574 in (4)(a) in three places substituted references to alternative livestock for references to game farm animals. Amendment effective October 1, 1999.

1993 Amendment: Chapter 315 substituted (1) regarding revocation proceedings for former language that read: "A game farm license may be revoked for failure to operate the game farm according to the provisions of this part or rules adopted under this part"; inserted (2) concerning initiation of revocation or disciplinary proceedings; near beginning of first sentence of (3), after "violation", inserted "of recordkeeping or reporting requirements that is not a material violation or an attempt to deceive" and inserted second sentence that read: "Upon failure of the licensee to correct the violation, the department may institute revocation proceedings"; deleted former (3) that read: "(3) Upon failure of the licensee to correct the violation, the department may institute revocation proceedings. If the department institutes revocation proceedings, it shall provide

reasonable notice and opportunity for a hearing to the licensee. After hearing and upon proof of violation, the department may revoke the game farm license"; and substituted (4) regarding disposal or seizure of game farm animals following license revocation for former language that read: "In addition to the revocation of a license allowed by this section, a person who violates this part or a rule adopted under this part is subject to a fine of not more than $500 or imprisonment in the county jail for not more than 1 year, or both." Amendment effective April 12, 1993.

1991 Amendment: Near middle of (2), after "statement", deleted "of a specific time in which" and at end, after "corrected", inserted language concerning a 30-day period to correct violation unless Department approves longer period; inserted (4) concerning fine and imprisonment in addition to license revocation for violations; and made minor change in style.

Administrative Rules

ARM 12.6.1543 Confiscation procedures.

87-4-424. Classification — restrictions on importation of certain species.

Compiler's Comments

1999 Amendment: Chapter 574 in (1)(a) after "escaped" substituted "alternative livestock" for "game farm animals"; and in (2) in first sentence after "purposes of" substituted "alternative livestock ranching" for "game farming". Amendment effective October 1, 1999.

1995 Amendment: Chapter 503 in (1), at beginning, substituted "In order to properly regulate importation" for "The department or the department of livestock may restrict from importation for purposes of game farming any species or subspecies and their hybrids with native species that are determined through scientific investigation to pose a threat to native wildlife or livestock through nonspecific genetic dilution, habitat degradation or competition caused by feral populations of escaped game farm animals, parasites, or disease"; inserted (1)(a) and (1)(b) concerning the classification of cloven-hoofed ungulates posing a threat to native wildlife or livestock; and inserted (2) concerning the restriction of importation of animals posing a threat to native species or livestock and importation permitted by the Department of Livestock. Amendment effective July 1, 1995.

1993 Amendment: Chapter 315 near end, after "dilution", inserted "habitat degradation or competition caused by feral populations of escaped game farm animals". Amendment effective April 12, 1993.

Administrative Rules

ARM 12.6.1540 Classification of prohibited and restricted species.

ARM 12.6.1541 Possession of prohibited species.

ARM 12.6.1543 Confiscation procedures.

87-4-427. Revocation of license — criteria — penalties.

Compiler's Comments

1999 Amendment: Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm and substituted references to alternative livestock for references to game farm animals; and made minor changes in style. Amendment effective October 1, 1999.

Effective Date: Section 18, Ch. 315, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 12, 1993.

Case Notes

Revocation of License — Statute Not Retroactive — Revocation Not Violation of Double Jeopardy: Revocation of a license under a 1993 statute for prior convictions did not deprive a game farm (now alternative livestock ranch) operator of a vested right or attach additional disabilities to the prior convictions. This section serves a remedial purpose and is not a punitive or penal statute. The Department of Fish, Wildlife, and Parks' revocation of the license was not punishment and did not violate double jeopardy rights. In re Game Farm License No. 319 of Brogan, 283 M 413, 942 P2d 100, 54 St. Rep. 670 (1997).

87-4-428. Right to administrative hearing.

Compiler's Comments

2000 Amendment by Initiative: Initiative Measure No. 143 deleted former (1) that read: "(1) An applicant must be given notice and an opportunity for a hearing on a proposed denial or issuance with stipulations of an alternative livestock ranch license pursuant to 87-4-426 before the department may deny a license or grant a license with stipulations"; in (2) after "license" deleted

"withhold consent to the transfer of a license"; and made minor changes in style. Amendment effective November 7, 2000.

Severability: Section 10, Initiative Measure No. 143, was a severability clause.

1999 Amendment: Chapter 574 in (1) near middle after "stipulations of" substituted "an alternative livestock ranch" for "a game farm". Amendment effective October 1, 1999.

Effective Date: Section 18, Ch. 315, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 12, 1993.

87-4-432. Alternative livestock advisory council — appointment of members — duties.

Compiler's Comments

1999 Amendment: Chapter 574 in (1) at beginning after "There is" substituted "an alternative livestock" for "a game farm", after "department" deleted "and the department of livestock", and after "administration of" substituted "alternative livestock ranches" for "game farms"; in (2) in introductory clause at beginning after "The" substituted "alternative livestock" for "game farm"; in (2)(c) after "representative of the" substituted "alternative livestock" for "game farm"; in (3) at beginning after "Members of the" substituted "alternative livestock" for "game farm" and after "serve" inserted "staggered"; in (4) at beginning after "The" substituted "alternative livestock" for "game farm"; and deleted former (5) that read: "(5) Council members are not entitled to compensation or travel expenses as provided in 2-15-122." Amendment effective October 1, 1999.

Effective Date: Section 15, Ch. 503, L. 1995, provided: "[This act] is effective July 1, 1995."

87-4-433. Programmatic environmental review.

Compiler's Comments

2000 Amendment by Initiative: Initiative Measure No. 143 deleted former (4) that read: "(4) For an alternative livestock ranch license application that is received after July 1, 2001, the department shall conduct an environmental review, if required, using the programmatic and tiering environmental impacts to the programmatic." Amendment effective November 7, 2000.

Severability: Section 10, Initiative Measure No. 143, was a severability clause.

Effective Dates: Section 31(1), Ch. 574, L. 1999, provided that subsection (4) of this section is effective October 1, 1999. Section 31(2), Ch. 574, L. 1999, provided that subsections (1) through (3) of this section are effective July 1, 1999.

Part 5
Shooting Preserves

Part Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Part Law Review Articles

Taking Aim at Canned Hunts Without Catching Game Ranches in the Crossfire, Wrage, 30 Loy. L.A.L. Rev. 893 (1997).

Part Collateral References

Applicability to domesticated or captive game, of game laws relating to closed season and the like. 74 ALR 2d 974.

87-4-501. Authorization for licenses, permits, rules, and regulations.

Administrative Rules

ARM 12.6.1201 Shooting preserve bird tags.

Collateral References

35 Am. Jur. 2d Fish and Game §§29, 40, 45.

87-4-504. Bird license or stamp required.

Compiler's Comments

1991 Amendment: At end inserted clause relating to 3-day nonresident shooting preserve bird hunting stamp.

1987 Amendment: Inserted "upland" before "game".

87-4-521. Duration of season.

Compiler's Comments

1991 Amendment: At beginning deleted "In order to give a reasonable opportunity for a fair return on a sizeable investment", after "preserves" deleted "shall be no less than 120 consecutive days, as designated by the department, during", changed season from 4-month to 7-month period, and changed season's end from December to March 31; and made minor changes in style.

Collateral References

35 Am. Jur. 2d Fish and Game §46.

87-4-522. Game hunted in preserve.

Administrative Rules

ARM 12.6.1202 Game hunted in preserve.

87-4-523. Amount of game recoverable.

Collateral References

35 Am. Jur. 2d Fish and Game §48.

87-4-525. Tagging of game.

Administrative Rules

ARM 12.6.1201 Shooting preserve bird tags.

87-4-527. Wild game on preserve.

Compiler's Comments

1991 Amendment: Near beginning, after "applicable", inserted "license"; and made minor changes in style.

Part 6
Fish Ponds, Seining, and Commercial Taking of Aquatic Fish Food Organisms

87-4-601. Sale of fish or spawn unlawful — exceptions.

Compiler's Comments

1993 Amendment: Chapter 196 in (3)(a), at beginning of first sentence, substituted description concerning Yellowstone River for "at the Intake fishing access site north of Glendive", deleted former second sentence containing definition of the Intake fishing access site as "the area from the face of Intake dam downstream to the confluence of Cottonwood Creek and the Yellowstone River", in second sentence, after "paddlefish", inserted "may be", substituted "only to" for "into", and before "donation" deleted "cleaning or"; in (3)(d)(i) reduced amount to "Forty percent" from "One-half", after "marketing" deleted "and administration", and after "fishing access" inserted "administration"; in (3)(d)(ii) increased amount to "Sixty percent" from "The other half", after "marketing" deleted "and administration", and inserted reference to nonprofit organization's administrative costs; and made minor changes in style. Amendment effective March 25, 1993.

Extension of Termination Date: Section 2, Ch. 196, L. 1993, amended sec. 5, Ch. 409, L. 1989, by extending the termination date imposed by that chapter. Amendment effective March 25, 1993.

1991 Amendments — Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

Chapter 68 in (3)(a) of temporary version inserted second through fifth sentences defining Intake fishing access site and clarifying paddlefish and roe that are acceptable for donation to the program. Amendment effective March 13, 1991.

1989 Amendment: In (1), near beginning, inserted reference to subsection (3); and inserted (3) providing rules and procedure for donation of paddlefish roe to nonprofit corporation for use in caviar production and designating how profits are to be used (see 1989 Session Law for text). Amendment effective July 1, 1989, and terminates June 30, 1993.

1989 Statement of Intent: The statement of intent attached to Ch. 409, L. 1989, provided: "A statement of intent is required for this bill because 87-4-601(3) grants rulemaking authority to the department of fish, wildlife, and parks to implement the paddlefish roe donation program. The

legislature intends that the priority in implementing the provisions of this bill be on maintaining the paddlefish fishery. At a minimum, it is intended that the rules address the following:

(1) a process for the selection of a Montana nonprofit corporation to accept roe donations and to process and market the paddlefish roe;

(2) recordkeeping required of the selected corporation and commercial buyers to assure proper administration of the program;

(3) a process for development of recommendations and review of projects in expending funds raised through the paddlefish roe program;

(4) a provision that the total number of paddlefish taken in the Yellowstone River Basin may not exceed 3,500 in any year; and

(5) any other topics necessary for administration of the program."

1987 Amendment: Inserted (2)(e) relating to the sale of fish eggs.

1983 Amendment: Inserted (2)(d) relating to the taking of whitefish by nets or traps.

Administrative Rules

Title 12, chapter 7, subchapter 9, ARM Sale of excess fish eggs.

Title 12, chapter 7, subchapter 10, ARM Paddlefish egg donations and marketing.

Collateral References

Fish *key* 13(1).

36A C.J.S. Fish §28.

35 Am. Jur. 2d Fish and Game §50.

87-4-602. Seining licenses.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Administrative Rules

Title 12, chapter 7, subchapter 1, ARM Commercial fishing permit.

Title 12, chapter 7, subchapter 2, ARM Commercial minnow seining license.

Collateral References

35 Am. Jur. 2d Fish and Game §45.

87-4-603. Fish pond license for artificial lake or pond — records.

Compiler's Comments

1999 Amendment: Chapter 108 in first sentence in (1) and in (2)(a) after reference to artificial lake or pond inserted reference to private fish pond; in (2)(a) substituted current definition of artificial lake or pond or private fish pond for former text that read: "does not include a natural pond or body of water, including streams and rivers, created by natural means or any portion of the streambed or lakebed of a natural pond or body of water. It includes only bodies of water created by artificial means or diversion of water that do not exceed 500 acres of surface area"; inserted (2)(b) excluding certain water from definition of artificial lake or pond or private fish pond; inserted (3) requiring applicant to provide verification regarding game fish or fish species in instream private fish pond; and made minor changes in style. Amendment effective March 18, 1999.

1995 Amendment: Chapter 425 in (1), in second sentence after "pond with", substituted "fish" for "fry"; in (2), after "water", inserted "including streams and rivers"; inserted (5) concerning request for inspection to determine presence of disease or illegal introduction of species and notice of intent to enter; inserted (6) concerning action taken because of disease or illegal introduction, including emergency action; and made minor changes in style. Amendment effective April 13, 1995.

Preamble: The preamble attached to Ch. 425, L. 1995, provided: "WHEREAS, whirling disease was recently discovered in the world famous fishery of the upper Madison River and is the leading suspect for the 90% reduction in the numbers of wild rainbow trout in those waters; and

WHEREAS, Governor Racicot, in a recent communication to concerned parties, stated, "There is genuine reason to believe whirling disease is the worst disease threat our wild trout have ever faced"; and

WHEREAS, Governor Racicot has further stated that it is essential for the Department of Fish, Wildlife, and Parks to mobilize an unprecedented effort to research and combat this disease; and

WHEREAS, the wild trout fisheries in Montana provide in excess of $125 million in annual benefits to the state's economy; and

WHEREAS, the wild trout fisheries provide inestimable recreational pleasures for the citizens of the state; and

WHEREAS, there is significant potential for whirling disease to spread to other blue ribbon trout waters of the state; and

WHEREAS, the Department of Fish, Wildlife, and Parks currently lacks both the authority and the staffing to combat a similar spread of disease; and

WHEREAS, whirling disease primarily results from the introduction of infected hatchery or wild fish; and

WHEREAS, the illegal introduction and movement of fish pose a serious threat to Montana's wild fisheries, including native fisheries; and

WHEREAS, many landowners with fish ponds and hatcheries need reassurance that their fish are disease-free."

1989 Amendment: In (1), in third sentence after "pond", inserted "and otherwise condition the license", in fourth sentence, after "this state", inserted "or violate the conditions of his license", after "will" inserted "submit an annual", after "report" inserted "on transactions", after "director" deleted reference to quantity of fish, eggs, and spawn taken, and deleted former fifth and sixth sentences regarding requirement for annual oath, requirement for record of species and pounds of fish, eggs, and fry sold, date of transaction, and purchaser; inserted (3) authorizing Department to condition license to require device to prevent escape of fish; inserted (4) requiring licensed seller to keep and file annually a record of species and quantities sold or purchased, date of sale or purchase, purchaser's or seller's name, and transfer locations; and made minor changes in style.

Case Notes

Artificial Ponds: State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) abused discretion in failing to renew previously issued licenses for ponds that were entirely artificial and manmade within meaning of statute. (See 1999 amendment.) Paradise Rainbow v. Fish & Game Comm'n, 148 M 412, 421 P2d 717 (1966).

Collateral References

Fish *key* 5(1), 10(1).

36A C.J.S. Fish §§4, 9, 36.

35 Am. Jur. 2d Fish and Game §§16 through 21, 38, 39, 45.

Applicability of state fishing license laws or other public regulations to fishing in private lake or pond. 15 ALR 2d 754.

87-4-605. Records and report of whitefish sales by fishing license holders.

Collateral References

35 Am. Jur. 2d Fish and Game §50.

87-4-609. Regulation of commercial taking of aquatic fish food organisms — permit — rulemaking authority.

Compiler's Comments

1993 Amendment: Chapter 456 in (1), after "distribution, of", inserted "crayfish for fishing bait" and after "crayfish" inserted "from private fish ponds regulated under 87-4-603".

1989 Statement of Intent: The statement of intent attached to Ch. 246, L. 1989, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the department of fish, wildlife, and parks in [section 1] [87-4-609] to regulate the taking, for sale or commercial distribution, of aquatic fish food organisms. Even though the bill provides for approval of permits for this activity on a case-by-case basis, the legislature anticipates that commercial activities for certain aquatic fish food organisms may increase to the extent that there is a need for general rulemaking. It is further anticipated that if this occurs, the department will have gathered sufficient information through the permit system and other monitoring to have sufficient knowledge to adopt appropriate rules to prevent overharvest of these organisms and conflicts with other uses of the waters.

[Section 2] [87-4-610] allows the department by rule to set reasonable fees for permits and for the use of traps, nets, or seines in the taking of aquatic fish food organisms for commercial purposes. It is intended that any fees should not exceed an amount necessary to meet administrative and monitoring costs of the department."

Effective Date: Section 5, Ch. 246, L. 1989, provided: "[This act] is effective on passage and approval." Approved March 22, 1989.

87-4-610. Fees for commercial taking of aquatic fish food organisms — use of fees.

Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 246, L. 1989, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the department of fish, wildlife, and parks in [section 1] [87-4-609] to regulate the taking, for sale or commercial distribution, of aquatic fish food organisms. Even though the bill provides for approval of permits for this activity on a case-by-case basis, the legislature anticipates that commercial activities for certain aquatic fish food organisms may increase to the extent that there is a need for general rulemaking. It is further anticipated that if this occurs, the department will have gathered sufficient information through the permit system and other monitoring to have sufficient knowledge to adopt appropriate rules to prevent overharvest of these organisms and conflicts with other uses of the waters.

[Section 2] [87-4-610] allows the department by rule to set reasonable fees for permits and for the use of traps, nets, or seines in the taking of aquatic fish food organisms for commercial purposes. It is intended that any fees should not exceed an amount necessary to meet administrative and monitoring costs of the department."

Effective Date: Section 5, Ch. 246, L. 1989, provided: "[This act] is effective on passage and approval." Approved March 22, 1989.

Part 7
Sale of Game in Commercial Trade

Part Collateral References

35 Am. Jur. 2d Fish and Game §50.

Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself. 44 ALR 3d 1008.

87-4-701. Definitions.

Collateral References

Fish *key* 13(1); Game *key* 2, 4, 7.

36A C.J.S. Fish §28; 38 C.J.S. Game §§2, 8, 22 through 28, 30, 47, 48, 51, 76.

87-4-702. Possession of game by merchants, hotelkeepers, or restaurant keepers.

Compiler's Comments

1985 Amendment: In (1), at beginning inserted exception clause, and made minor changes in phraseology; inserted (2) prohibiting sale of any part of a grizzly bear.

Collateral References

Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself. 44 ALR 3d 1008.

Part 8
Menageries and Zoos

Part Collateral References

What constitutes offense of cruelty to animals—modern cases. 6 ALR 5th 733.

Landlord's liability to third person for injury resulting from attack off leased premises by dangerous or vicious animal kept by tenant. 89 ALR 4th 374.

Landlord's liability to third person for injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant. 87 ALR 4th 1004.

Governmental liability from operation of zoo. 92 ALR 3d 832.

Zoo as nuisance. 58 ALR 3d 1126.

Owner's or keeper's liability for personal injury or death inflicted by wild animal. 21 ALR 3d 603.

87-4-801. Definitions.

Compiler's Comments

1999 Amendment: Chapter 322 in definition of roadside menagerie in first sentence near beginning after ""Roadside menagerie"" deleted "or zoo" and at end after "trade" inserted "on or off the facility premises" and near middle of second sentence after "institution or" deleted "in a zoological garden chartered as a nonprofit corporation by the state and does not include animals

exhibited" and at end after "circus" inserted "based outside of Montana"; inserted definitions of wild animal menagerie and zoo; and made minor changes in style. Amendment effective October 1, 1999.

87-4-802. Department regulations.

Compiler's Comments

1999 Amendment: Chapter 322 near middle after "roadside menageries" inserted "wild animal menageries, and zoos" and at end inserted "and for the licensing of roadside menageries, wild animal menageries, and zoos"; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

Title 12, chapter 6, subchapter 13, ARM Roadside zoo regulations.

87-4-803. Permits.

Compiler's Comments

1999 Amendment: Chapter 322 in (1) in first sentence near beginning after "department" substituted "may" for "shall" and after "roadside menageries" substituted "wild animal menageries, and zoos" for "or zoos", in second sentence after "roadside menagerie" inserted "or wild animal menagerie", at end of sixth sentence after "fee" inserted "and submission of a renewal application", and at end of eighth sentence after "misdemeanor" inserted "and may be denied a permit"; inserted (2) outlining required permit application information; inserted (3) requiring that a renewal application include an accounting of wild animals on the facility; in (5) after "person" deleted "unless the roadside menagerie or zoo to which it pertains is also transferred to the same person. The director's approval must be obtained prior to such permit transfer and prior to a transfer of any wild animals held under the permit"; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

ARM 12.6.1301 Records and display of permit.

Collateral References

35 Am. Jur. 2d Fish and Game §45.

87-4-804. Permit to obtain wild animals.

Compiler's Comments

1999 Amendment: Chapter 322 in (1) after "for a" inserted "roadside menagerie, wild animal" and after "except" inserted "as authorized by the department"; in (2) in first sentence of introductory clause after "Application for" substituted "a capture permit" for "such permit" and after "permit" substituted "may be made only by a zoo and must" for "shall" and in second sentence after "issue" substituted "a capture permit" for "such permit"; in (3) after "by capture" inserted "for use in zoos"; in (4) substituted language regarding obtaining captive-bred animals for former text that read: "Nongame animals may be bought, sold, or transferred under such regulations as the department may prescribe"; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

ARM 12.6.1306 Stock obtained lawfully.

ARM 12.6.1307 Disposing of wildlife stock.

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Collateral References

35 Am. Jur. 2d Fish and Game §40.

87-4-806. Inspection, permit revocation, and redemption of wildlife.

Compiler's Comments

1999 Amendment: Chapter 322 in first sentence after "roadside menageries" substituted "wild animal menageries, and zoos" for "or zoos" and after "connection" substituted "with any roadside menagerie, wild animal menagerie, or zoo must" for "therewith shall" and in second sentence after "found that the" inserted "roadside menagerie, wild animal"; and made minor changes in style. Amendment effective October 1, 1999.

87-4-807. Enforcement and penalty.

Administrative Rules
ARM 12.6.1309 Enforcement.

Collateral References
35 Am. Jur. 2d Fish and Game §§52 through 54.

87-4-808. Fines, bonds, penalties, and fees.

Compiler's Comments
2001 Amendment: Chapter 257 substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.
Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."
1987 Amendment: In first sentence, after "penalties", inserted "except those obtained by a justice's court".
1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Collateral References
35 Am. Jur. 2d Fish and Game §§52 through 54.

Part 9
Game Bird Farms

Part Administrative Rules
Title 12, chapter 6, subchapter 16, ARM Game bird farms.

Part Collateral References
35 Am. Jur. 2d Fish and Game §40.
Applicability to domesticated or captive game, of game laws relating to closed season and the like. 74 ALR 2d 974.

87-4-902. Exemption.

Compiler's Comments
Sunset Repealed: Section 1, Ch. 227, L. 1989, repealed sec. 4, Ch. 262, L. 1985, which provided that subsection (2) of this section was to terminate September 30, 1989. Repealed effective March 22, 1989.
1985 Amendment: Inserted (2) relating to holder of migratory game bird avicultural permit. Amendment terminates September 30, 1989 (sec. 4, Ch. 262, L. 1985). Termination provision repealed effective March 22, 1989. See 1989 compiler's comment.

87-4-905. License and renewal fee — deposit of fees.

Compiler's Comments
1983 Amendment: In (2), substituted "state special revenue fund" for "earmarked revenue fund".

87-4-909. Game farm birds as private property.

Collateral References
35 Am. Jur. 2d Fish and Game §§1, 2.

87-4-910. Transportation of birds.

Collateral References
35 Am. Jur. 2d Fish and Game §§42, 49.

87-4-911. Sale of meat.

Administrative Rules
Title 12, chapter 6, subchapter 16, ARM Game bird farms.

Collateral References
35 Am. Jur. 2d Fish and Game §50.
Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself. 44 ALR 3d 1008.

87-4-913. Rulemaking.

Compiler's Comments

Statement of Intent: The statement of intent attached to SB 448 (Ch. 570, L. 1983) provided: "This bill requires the Department of Fish, Wildlife, and Parks to make rules for game animal farms under section 17 [87-4-422], game bird farms under section 32 [87-4-913], and fur farms under section 47 [87-4-1012]. It is the intent of the Legislature that these rules address procedural items necessary for a timely and efficient processing of applications and licenses and provide the information necessary for administration of the criteria provided in those sections. It is intended that the license fees to be set by the Department be in an amount commensurate with the costs of processing the applications and administering the provisions of the act."

Administrative Rules

Title 12, chapter 6, subchapter 16, ARM Game bird farms.

Part 10
Fur Farms

Part Law Review Articles

The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC 'Ban' on Furs From Animals Taken by Leghold Traps, Nolkaemper, 8 J. Envtl. L. 237 (1996).

Part Collateral References

35 Am. Jur. 2d Fish and Game §§40, 41.

87-4-1003. Application for license.

Administrative Rules

Title 12, chapter 6, subchapter 17, ARM Fur farms.

87-4-1004. License and renewal fee — deposit.

Compiler's Comments

1983 Amendment: In (2), substituted "state special revenue fund" for "earmarked revenue fund".

87-4-1008. Furbearers as private property.

Collateral References

35 Am. Jur. 2d Fish and Game §§1, 2.

87-4-1009. Transportation of furbearers.

Collateral References

35 Am. Jur. 2d Fish and Game §§42, 49.

87-4-1010. Sale of furs.

Collateral References

35 Am. Jur. 2d Fish and Game §50.

Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself. 44 ALR 3d 1008.

87-4-1012. Rulemaking.

Compiler's Comments

Statement of Intent: The statement of intent attached to SB 448 (Ch. 570, L. 1983) provided: "This bill requires the Department of Fish, Wildlife, and Parks to make rules for game animal farms under section 17 [87-4-422], game bird farms under section 32 [87-4-913], and fur farms under section 47 [87-4-1012]. It is the intent of the Legislature that these rules address procedural items necessary for a timely and efficient processing of applications and licenses and provide the information necessary for administration of the criteria provided in those sections. It is intended that the license fees to be set by the Department be in an amount commensurate with the costs of processing the applications and administering the provisions of the act."

Administrative Rules

Title 12, chapter 6, subchapter 17, ARM Fur farms.

CHAPTER 5
WILDLIFE PROTECTION

Chapter Case Notes

Media Coverage of Search Involving Alleged Wildlife Violation Outside Scope of Warrant — Open Fields Doctrine and Invited Informer Doctrine Inapplicable: Federal agents who suspected a wildlife violation searched the Bergers' ranch pursuant to a search warrant and to a written contract with two national broadcasting networks authorizing the filming and recording of the search for broadcast on environmental television shows. After Berger was convicted of one misdemeanor count of improper use of a pesticide, he sued both the networks and the federal agents for violations of constitutional rights. On appeal, the Ninth Circuit Court held that activities conducted pursuant to the search were not authorized by the open fields doctrine, which allows law enforcement officers to obtain evidence while on privately owned open fields, because Berger had a reasonable expectation of privacy with regard to outbuildings that were photographed and because that doctrine does not authorize trespass by third parties. Further, the invited informer doctrine, which allows the use of informers with recording devices to obtain information as part of a good faith government investigation, did not apply in this instance because the recording of Berger's conversations was used to assist commercial television, not to further law enforcement objectives. Pursuant to the joint action test, the networks were considered to be acting under color of law and, as such, were liable for damages as government actors for contractually engaging in a search enterprise that only the government could lawfully institute for the mutual benefit of both private and governmental interests in publicity. The case was reversed for further consideration of Berger's state claims of trespass and intentional infliction of emotional distress. Berger v. Hanlon, 129 F3d 505 (9th Cir. 1997).

Part 1
Nongame and Endangered Species

Part Law Review Articles

Endangered Species' Slippery Slope Back to the States: Existing Regulatory Mechanisms and Ongoing Conservation Efforts Under the Endangered Species Act, Cassidy, 32 Envtl. L. 175 (2002).

Contractual Ecosystem Management Under the Endangered Species Act: Can Federal Agencies Make Enforceable Commitments?, Melious & Thornton, 26 Ecology L.Q. 489 (1999).

Bennett v. Spear: Supreme Court Confirms Standing to Challenge Excessive Government Regulation Under Endangered Species Act, Feldman, 40 Advocate (Idaho) 20 (1997).

Biological Effectiveness and Economic Impacts of the Endangered Species Act (The Endangered Species Act and Private Property), Shogren & Hayward, 32 Land & Water L. Rev. 531 (1997).

Endangered Suits: Citizens' Claims Under the ESA (Endangered Species Act), Gels, 110 L.A. Daily J. 7 (1997).

Environmental Law—Can NEPA and the ESA Work Together? Designations of Critical Habitat for an Endangered Species Must Fulfill National Environmental Policy Act Requirements, Davis, 32 Land & Water L. Rev. 677 (1997).

Judicial Application of the Endangered Species Act and the Implications for Takings of Protected Species and Private Property (The Endangered Species Act and Private Property), Feldman & Brennan, 32 Land & Water L. Rev. 509 (1997).

NEPA's Stronghold: A Noose for the Endangered Species Act?, Patterson, 27 Cumb. L. Rev. 753 (1997).

Reforming the Endangered Species Act: Voluntary Conservation Agreements, Government Compensation and Incentives for Private Action, Frank, 22 Colum. J. Envtl. L. 137 (1997).

The Endangered Species Act: A Case Study in Takings & Incentives, Thompson, 49 Stan. L. Rev. 305 (1997).

The Evolution and Use of the Endangered Species Act (The Endangered Species Act and Private Property), Anderson, 32 Land & Water L. Rev. 487 (1997).

The Intent and Implementation of the ESA: A Matter of Scale (The Endangered Species Act and Private Property), Lockwood, 32 Land & Water L. Rev. 551 (1997).

The Ninth Circuit's Application of the Zone of Interests Test to Citizen Suits Under the Endangered Species Act, Wardrup, 48 Mercer L. Rev. 917 (1997).

Challenging Government Action Under the Endangered Species Act, Srinivasan, 10 Tulane Envtl. L.J. 139 (1996).

Does Preventing "Take" Constitute an Unconstitutional "Taking"? An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act, Foley, UCLA J. Envtl. L. & Pol'y 327 (1996).

Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act? (National Environmental Policy Act), Emery, 28 Ariz. St. L.J. 973 (1996).

Judicial Application of the Endangered Species Act and the Implications for Takings of Protected Species and Private Property, Feldman & Brennan, 26 Envtl. L. Rep. 10646 (1996).

The Endangered Species Act and Indian Water Rights, Vollmann, 11 Nat. Resources & Env't 39 (1996).

The Fifth Amendment Implications of Including Habitat Modification in the Definition of Harm to Endangered Species, Rockwell, 11 J. Land Use & Envtl. L. 573 (1996).

87-5-102. Definitions.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 301 inserted definition of commercial purposes; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 521 in definition of endangered species in (d) substituted "artificial factors" for "man-made factors"; in definition of management in first sentence substituted "conserving populations of wildlife consistent with other uses of land and habitat" for "increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such levels", in second sentence after "improvement" inserted "control", and in third sentence after "periodic" deleted "or total"; in definition of nongame wildlife inserted third sentence providing that prairie dogs are nongame wildlife that may be managed, controlled, and regulated, inserted fourth sentence concerning management and control by counties and departments of agriculture and natural resources and conservation if consistent with approved management plan, and inserted fifth sentence prohibiting interpretation of law to limit landowner's control of prairie dog concentrations on private lands; and made minor changes in style. Amendment effective May 1, 2001, and terminates October 1, 2007.

Preamble: The preamble attached to Ch. 301, L. 2001, provided: "WHEREAS, the Legislature finds it desirable to regulate or manage the collection, harvest, possession, or transportation of nongame wildlife for commercial purposes."

The preamble attached to Ch. 521, L. 2001, provided: "WHEREAS, Montana has a responsibility to ensure that a viable prairie dog population is maintained in the state for the long term, as well as to ensure the long-term existence of species associated with prairie dogs; and

WHEREAS, the Montana Prairie Dog Working Group is developing a conservation plan for prairie dogs in Montana to provide for management of populations and habitats in order to ensure both the long-term existence of prairie dogs and the control of prairie dogs to protect existing land uses; and

WHEREAS, the only existing statutory authority for prairie dog management is to control them as rodents under Title 7, chapter 22, part 22, MCA, and as vertebrate pests under section 80-7-1101, MCA; and

WHEREAS, the U.S. Fish and Wildlife Service (USFWS) has found that the black-tailed prairie dog is warranted for listing under the federal Endangered Species Act (ESA) over an 11-state area that includes Montana, but that listing of this species is precluded at the present time because other candidate species have a higher priority for listing; and

WHEREAS, the USFWS finding is based in part on the inadequacy of regulatory mechanisms that Montana and other states currently possess to ensure maintenance of viable prairie dog populations for the long term; and

WHEREAS, Montana and 10 other states have entered into an agreement to jointly develop management plans that address the needs of the species across virtually its entire range, thus improving the status of the black-tailed prairie dog to the point that it can be removed from consideration for listing under the ESA; and

WHEREAS, the USFWS will review the status of the black-tailed prairie dog on an annual basis; and

WHEREAS, it is desirable to enable the Department of Fish, Wildlife, and Parks and the Department of Agriculture to implement management actions contained in Montana's prairie dog

conservation plan while specifically protecting the current ability of landowners to manage prairie dogs on their lands; and

WHEREAS, it is desirable to facilitate long-term conservation of prairie dogs according to the conservation plan for prairie dogs in Montana while simultaneously reducing the likelihood that the black-tailed prairie dog will be listed under the ESA."

1983 Amendment: Inserted (1) defining account; and in second sentence of (4) after "habitat" deleted "acquisition and".

87-5-105. Regulations to manage nongame wildlife.

Compiler's Comments

2001 Amendment: Chapter 316 in (1) at end deleted last sentence that read: "The department may from time to time amend such regulations on the approval of the legislature by adding or deleting therefrom species or subspecies of nongame wildlife"; in (2) before "limitations" deleted "proposed" and at end inserted "that is designated in need of management", and deleted former last sentence that read: "The department may make such changes in the proposed regulations as are consistent with effective management of nongame wildlife as designated by the legislature"; and made minor changes in style. Amendment effective April 21, 2001.

Administrative Rules

ARM 12.2.501 Nongame wildlife in need of management.

Collateral References

35 Am. Jur. 2d Fish and Game §29.

87-5-107. List of endangered species.

Compiler's Comments

1987 Amendment: In (1)(b), near beginning before "include", substituted "The department may propose legislation to specifically" for "The department shall have authority to recommend that the legislature"; in (2), at beginning of second sentence before "to amend", substituted "The department may propose specific legislation" for "The department shall request the legislature"; and near end of (5) substituted "the department proposes" for "the department recommends".

Administrative Rules

ARM 12.5.201 Endangered species list.

Law Review Articles

Listing the Bull Trout Under the Endangered Species Act: The Passive-Aggressive Strategy of the United States Fish and Wildlife Service to Prevent Protecting Warranted Species, Bechtold, 20 Pub. Land & Resources L. Rev. 99 (1999).

The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times, Musiker, France, & Hallenbeck, 16 Pub. Land L. Rev. 87 (1995).

Endangered Species Conservation: What Should We Expect of Federal Agencies?, Fischman, 13 Pub. Land. L. Rev. 1 (1992).

The Meaning of "Species" Under the Endangered Species Act, Gleaves, Kuruc, & Montanio, 13 Pub. Land. L. Rev. 25 (1992).

Do Species and Nature Have Rights?, Huffman, 13 Pub. Land. L. Rev. 51 (1992).

Taking Stock: The Endangered Species Act in the Eye of a Growing Storm, Bean, 13 Pub. Land. L. Rev. 77 (1992).

The Endangered Species Act: On a Collision Course With Human Needs, Hardy, 13 Pub. Land L. Rev. 87 (1992).

Stay the Hand: New Direction for the Endangered Species Act, France & Tuholske, 7 Pub. Land L. Rev. 1 (1986).

Grizzly Bear Blues: A Case Study of the Endangered Species Act's Delisting Process: Recovery Plan Requirements, Kline, 31 Envtl. L. 371 (2001).

Listing Distinct Population Segments of Endangered Species: Has It Gone Too Far?, Geoffroy & Doyle, 16 Nat. Resources & Env't 82 (2001).

State and Local Government Vicarious Liability Under the ESA, Ruhl, 16 Nat. Resources & Env't 70 (2001).

The Pronounced Presence and Insistent Issues of the ESA, Quarles & Lundquist, 16 Nat. Resources & Env't 59 (2001).

Conserving Endangered Species on Private Lands (The Endangered Species Act and Private Property), Turner & Rylander, 32 Land & Water L. Rev. 571 (1997).

The Evolution and Use of the Endangered Species Act (The Endangered Species Act and Private Property), Anderson, 32 Land & Water L. Rev. 487 (1997).

Before the Crisis: Protection of Nonendangered Wildlife From the Impacts of Resource-Development Activities, Hardt, 26 Envtl. L. Rep. 10513 (1996).

Non-Endangered Wildlife and Mineral Operations—Opportunities and Obligations, Lindley & Hussin, 42 Rocky Mtn. Min. L. Inst. CH12 (1996).

Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process, Nolen, 26 Envtl. L. 771 (1996).

Salmon Recovery Plans: Some Fundamental Choices (The Second Annual Who Runs the River? Colloquium), Casavant, 26 Envtl. L. 663 (1996).

The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife, Caspersen, 23 Boston College Envtl. Aff. L. Rev. 357 (1996).

Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act, Davison, 10 J. Land Use & Envtl. L. 155 (1995).

A Native Returns: The Endangered Species Act and Wolf Reintroduction to the Northern Rocky Mountains, Zuccotti, 20 Colum. J. Envtl. L. 329 (1995).

Owners May Be Liable for Effects on Animals' Habitats, 213 N.Y.L. J. 1 (1995).

Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts, Drozdowski, 45 Case W. Reserve L. Rev. 553 (1995).

The Case Against Rights for Animals, Schmahmann & Polacheck, 22 B.C. Envtl. Aff. L. Rev. 747 (1995).

The National Biological Survey: A Step Along the Path to Ecosystem Conservation, Scanna, 4 N.Y.U. Envtl. L.J. 134 (1995).

Property Rights and the Endangered Species Act: A Renascent Assault on Land Use Regulation, Heyman, 25 Pac. L.J. 157 (1994).

That's My Story and I'm Stickin' to It: Is the "Best Available" Science Any Available Science Under the Endangered Species Act?, Bogert, 31 Idaho L. Rev. 85 (1994).

The Endangered Species Act and Federal Agency Inaction, Rizzo, 13 St. Louis U. Pub. L. Rev. 855 (1994).

Where the Wild Things Are: The Endangered Species Act and Private Property, Meltz, 24 Envtl. L. 369 (1994).

Conservation Obligations Under the Endangered Species Act: A Case Study of the Yellowstone Grizzly Bear, Kuehl, 64 U. Colo. L. Rev. 607 (1993).

The Endangered Species Act and Its Implementation by the U.S. Department of Interior and Commerce, Houck, 64 U. Colo. L. Rev. 277 (1993).

Endangered Species Act. (1991 Ninth Circuit Environmental Review), Carlough, 22 Envtl. L. 1169 (1992).

Is the "Endangered Species Act" Endangered?, Berschauer, 21 SW. U.L. Rev. 991 (1992).

Reflections on Owls, Salmon, and Suckers: Current Developments Under the Endangered Species Act, Achterman, 38 Rocky Mtn. Min. L. Inst. Proc. 5-1 (1992).

The Concept of Species and the Endangered Species Act, Grierson, 11 Va. Envtl. L.J. 463 (1992).

Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection, Ruhl, 44 Sw. L.J. 1393 (1991).

An Overview of Federal Wildlife Law, Parenteau & Baur, 4 Nat. Resources & Env't 3(9) (1990).

Conflicting Values: The Religious Killing of Federally Protected Wildlife, Boradiansky, 30 Nat. Resources J. 709 (1990).

Does the Endangered Species Act Deprive an Owner of Fundamental Constitutional Rights?, Klain, 12 Geo. Mason U.L. Rev. 421 (1990).

Evolution and Application of Critical Habitat Under the Endangered Species Act, Salzman, 14 Harv. Envtl. L. Rev. 311 (1990).

Property Rights and Endangered Species, Rolston, 61 U. Colo. L. Rev. 283 (1990).

Takings Under Endangered Species Act Section 9, Thornton, 4 Nat. Resources & Env't 7(5) (1990).

The International Applicability of Section 7 of the Endangered Species Act of 1973, Beiers, 29 Santa Clara L. Rev. 171 (1989).

Are All Species Created Equal? and Other Questions Shaping Wildlife Law, Linder, 12 Harv. Envtl. L. Rev. 157 (1988).

Regulated Taking of Threatened Species Under the Endangered Species Act, Saxe, 39 Hastings L.J. 399 (1988).

The Convention on International Trade in Endangered Species: Enforcement Theory and Practice in the United States, Kosloff & Trexler, 5 B.U. Int'l L.J. 327 (1987).

The Convention on International Trade in Endangered Species of Wild Fauna and Flora: Improving the Prospects for Preserving Our Biological Heritage, Heppes & McFadden, 5 B.U. Int'l L.J. 229 (1987).

The Effectiveness of Judicial Review Under the 1979 Amendments to the Endangered Species Act, Luhn, 7 J. of Energy L. & Policy 145 (1986).

The Endangered Species Act and Western Water Rights, Tarlock, 20 Land & Water L. Rev. 1 (1985).

Regulation of International Trade in Endangered Wildlife, Melick, 1 B.U. Int'l L.J. 249 (1982).

Collateral References

Validity, construction, and application of Endangered Species Act of 1973 (16 USCS 1531-1543). 32 ALR Fed. 332.

87-5-109. Taking of species for educational, scientific, or other purposes.

Compiler's Comments

1987 Amendment: At end of section changed "87-5-104" to "87-5-105".

87-5-111. Enforcement and penalty.

Collateral References

35 Am. Jur. 2d Fish and Game §§52 through 54.

87-5-112. Construction.

Compiler's Comments

1997 Amendment: Chapter 42 at beginning of second sentence substituted "this section may not be construed" for "this subsection may not be construed"; and made minor changes in style. Amendment effective March 12, 1997.

Subsection Not Codified — Severability Clause: Section 26-1809(2), R.C.M. 1947, a severability clause, was not codified in the MCA. This subsection has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 461, L. 1973.

87-5-116. Limited taking of certain nongame wildlife for commercial purposes — exceptions.

Compiler's Comments

Preamble: The preamble attached to Ch. 301, L. 2001, provided: "WHEREAS, the Legislature finds it desirable to regulate or manage the collection, harvest, possession, or transportation of nongame wildlife for commercial purposes."

Effective Date: This section is effective October 1, 2001.

87-5-121. Nongame wildlife account.

Compiler's Comments

1991 Amendment: At end of (2), after "account", deleted "except as provided in subsection (5)"; deleted former (5) that read: "(5) The department of revenue may deduct from collections an amount not to exceed $1 for each tax checkoff contribution for administering the voluntary checkoff program"; and made minor change in style.

1987 Amendment: In (2), at end, changed reference to subsection (6) to reference to subsection (5); deleted former (5) and (6) that read: "(5) Money derived from tax checkoff contributions to the account will replace license fee funding for nongame wildlife programs after June 30, 1985, and may not be used to replace money that would otherwise be appropriated for nongame wildlife programs.

(6) The department of revenue may deduct from collections an amount not to exceed $7,884 in fiscal year 1986 and $7,884 in fiscal year 1987 for administering the voluntary checkoff program. The department is authorized to spend the amounts and hire necessary personnel and shall provide an itemized accounting to the legislative finance committee of the cost of administering the checkoff program during fiscal years 1986 and 1987"; and inserted (5) based on contingency described below.

Contingency Authorization: Section 5, Ch. 589, L. 1987, provided: "The authorization for deduction of administrative costs for the department of revenue in 87-5-121(5) of this act is contingent on passage and approval by the 50th legislature of legislation to require a similar

deduction for administrative costs for all voluntary income tax checkoff programs authorized by law." (This contingency did not occur.)

1985 Amendment: In (2) in middle, inserted "and all interest earned by the fund before being expended under this section"; and in (6) in first sentence, after "exceed", substituted "$7,884 in fiscal year 1986 and $7,884 in fiscal year 1987" for "$6,638 in fiscal year 1984 and $4,238 in fiscal year 1985", in middle of second sentence substituted "legislative finance committee" for "49th legislature" and at end, after "fiscal years", substituted "1986 and 1987" for "1984 and 1985".

1983 Amendment: In (1), substituted "state special revenue fund" for "earmarked revenue fund".

Applicability: Section 7, Ch. 627, L. 1983, provided: "(1) This act applies to tax returns which by law are required to be filed after January 1, 1984.

(2) This act shall terminate December 31, 1987."

Law Review Articles

Evaluating Tax Policy Proposals for Funding Nongame Wildlife Programs, Loomis & Mangun, 11 Eval. Rev. 715 (1987).

87-5-122. Duties of commission.

Compiler's Comments

Statement of Intent: The statement of intent attached to HB 377 (Ch. 627, L. 1983) provided: "A statement of intent is required of this bill because rulemaking authority is granted to the Fish and Game Commission [now Fish, Wildlife, and Parks Commission] in section 4 [87-5-122] for the use of the nongame wildlife account and for the review and approval process for nongame wildlife program projects.

It is intended that the rules promulgated by the Commission would include adequate provisions for public notice and comment during the review and approval process. In addition, it is intended that the Commission would provide for adequate consultation with the Department of Agriculture prior to and during the review and approval process for nongame wildlife program projects."

87-5-131. Process for delisting of gray wolf — management following delisting.

Compiler's Comments

Effective Date: Section 11, Ch. 316, L. 2001, provided that this section is effective on passage and approval. Approved April 21, 2001.

Part 2
Wild Birds — Regulation of Raptors

87-5-201. Protection of wild birds and their nests and eggs.

Compiler's Comments

1983 Amendment: Inserted (2)(b) relating to parts of eagles used for Indian religious purposes.

Administrative Rules

ARM 12.9.301 Wild bird permits.

87-5-203. Regulation of raptors.

Case Notes

Vagueness: Where defendant was convicted of illegally possessing and transporting falcons, after having fraudulently obtained a permit to possess and transport falcons, conviction under 87-5-206(4) (repealed, 1991) and this section was sustained despite defendant's contention that the sections were unconstitutionally vague because they did not clearly prohibit possession or transportation with a fraudulently obtained permit. U.S. v. Doyle, 786 F2d 1440 (1986), certiorari denied, 479 US 984, 93 L Ed 2d 576, 107 S Ct 572 (1986).

87-5-204. License and rules for falconry and raptors.

Compiler's Comments

1991 Amendment: In (1), near beginning of first sentence, substituted "commission shall" for "department may", near middle, after "possession", inserted "by residents and nonresidents, selling or transfer of possession", at end, after "falconry", inserted "and set license qualifications and fees", and inserted second sentence requiring conformance with federal law; deleted former

(2) and (3) that read: "(2) The fee for a falconry license is $3 a year or any part of a year. A license expires April 30 each year.

(3) A license may not be issued to a person under the age of 12 years"; and made minor changes in style.

1991 Statement of Intent: The statement of intent attached to Ch. 243, L. 1991, provided: "A statement of intent is required for this bill because 87-5-204 and 87-5-210 require the fish and game commission [now fish, wildlife, and parks commission] to adopt rules regarding certain aspects of the use and breeding of raptors and the sport of falconry. Because the regulation of raptors and the sport of falconry are in large part regulated by federal law and because detailed and precise standards are rapidly changing, the rules must comply with federal law and regulations as adopted or amended from time to time. The legislature recognizes that the commission has the power to determine the extent and nature of measures that control wildlife in Montana and that the commission's expertise makes it the proper forum for addressing the regulation of raptors and the sport of falconry. At a minimum, the rules must address:

(1) the regulation of raptors and restrictions on taking, possessing, and selling raptors, including:

(a) the number of raptors that may legally be possessed;

(b) appropriate times and areas for trapping raptors and removing of raptors from the nest;

(c) notification requirements regarding transfer of ownership;

(d) permitting requirements regarding sale and transportation of raptors; and

(e) possession of and hunting with raptors by nonresidents;

(2) licenses and rules for falconry and the allowable uses of raptors in the sport of falconry, including:

(a) appropriate falconry license fees;

(b) age requirements regarding issuance of falconry licenses;

(c) the necessity of possessing other valid game licenses when practicing falconry; and

(d) the transfer and revocation of falconry licenses; and

(3) the regulation of captive breeding of raptors, including:

(a) appropriate breeding permit fees;

(b) transferability and revocation of breeding permits; and

(c) any other aspects of captive breeding considered appropriate by the commission."

1987 Amendment: In (4), in second sentence, inserted "upland" before "game" and following "license" inserted "or waterfowl stamp, as appropriate".

1983 Amendment: In last sentence of (1), inserted exception clause.

Administrative Rules

Title 12, chapter 6, subchapter 11, ARM Falconer license regulations.

Law Review Articles

Falconry: Legal Ownership and Sale of Captive-Bred Raptors, Kennedy, 4 Pace Envtl. L. Rev. 349 (1987).

Collateral References

35 Am. Jur. 2d Fish and Game §45.

87-5-205. Restrictions on species allowed for falconry.

Compiler's Comments

1999 Amendment: Chapter 383 at beginning of (1) substituted "Bald eagles, any raptors listed pursuant to 50 CFR, part 17, and any species that has been listed pursuant to 87-5-107" for "The peregrine falcon (Falco peregrinus), bald eagle (Haliaeetus leucocephalus), and osprey (Pandion haliaeetus)"; and made minor changes in style. Amendment effective April 20, 1999.

1987 Amendment: In (1) deleted "golden eagle (Aquila chrysaetos)" from list.

Administrative Rules

ARM 12.6.1101 Definitions.

ARM 12.6.1103 Falconry permit classes.

Case Notes

Application to Anatum Peregrine Falcon: Jury instruction that anatum peregrine falcon cannot be trapped legally for use in a falconry was not inaccurate under this section, and although there may be some ambiguity under Montana law, it is clear that by federal regulation anatum peregrine falcons are an endangered species and cannot be legally trapped for falconry. (See 1999

amendment.) U.S. v. Doyle, 786 F2d 1440 (1986), certiorari denied, 479 US 984, 93 L Ed 2d 576, 107 S Ct 572 (1986).

Law Review Articles

Falconry: Legal Ownership and Sale of Captive-Bred Raptors, Kennedy, 4 Pace Envtl. L. Rev. 349 (1987).

87-5-208. Nonresidents allowed raptors in state.

Compiler's Comments

1991 Amendment: In (1) substituted first sentence regarding practice of falconry by federally licensed nonresidents for former first sentence that read: "Nonresidents who are working, attending schools, or otherwise living temporarily in the state of Montana may obtain a Montana falconry license and bring raptors, legally acquired in other states or countries, into the state of Montana"; inserted (2) disallowing raptor capture in Montana by nonresidents; and made minor change in style.

1991 Statement of Intent: The statement of intent attached to Ch. 243, L. 1991, provided: "A statement of intent is required for this bill because 87-5-204 and 87-5-210 require the fish and game commission [now fish, wildlife, and parks commission] to adopt rules regarding certain aspects of the use and breeding of raptors and the sport of falconry. Because the regulation of raptors and the sport of falconry are in large part regulated by federal law and because detailed and precise standards are rapidly changing, the rules must comply with federal law and regulations as adopted or amended from time to time. The legislature recognizes that the commission has the power to determine the extent and nature of measures that control wildlife in Montana and that the commission's expertise makes it the proper forum for addressing the regulation of raptors and the sport of falconry. At a minimum, the rules must address:

(1) the regulation of raptors and restrictions on taking, possessing, and selling raptors, including:

(a) the number of raptors that may legally be possessed;

(b) appropriate times and areas for trapping raptors and removing of raptors from the nest;

(c) notification requirements regarding transfer of ownership;

(d) permitting requirements regarding sale and transportation of raptors; and

(e) possession of and hunting with raptors by nonresidents;

(2) licenses and rules for falconry and the allowable uses of raptors in the sport of falconry, including:

(a) appropriate falconry license fees;

(b) age requirements regarding issuance of falconry licenses;

(c) the necessity of possessing other valid game licenses when practicing falconry; and

(d) the transfer and revocation of falconry licenses; and

(3) the regulation of captive breeding of raptors, including:

(a) appropriate breeding permit fees;

(b) transferability and revocation of breeding permits; and

(c) any other aspects of captive breeding considered appropriate by the commission."

87-5-210. Captive breeding of raptors — permit — transfer and revocation — rules.

Compiler's Comments

1991 Amendment: In (1), near end of first sentence after "part", inserted "and with rules adopted by the commission" and inserted second sentence regarding adoption of permit qualifications and fees by rule"; deleted former (2) that read: "(2) The fee for a captive breeding permit is $20 a year"; at end of (2) substituted "commission" for "department"; in (3), near beginning of first sentence, substituted "commission shall" for "department may", after "rules" substituted "regarding" for "for the keeping of records on, the trapping, taking, possession, propagation, and release of, and the sale of progeny of", and inserted second sentence requiring conformance with federal law.

1991 Statement of Intent: The statement of intent attached to Ch. 243, L. 1991, provided: "A statement of intent is required for this bill because 87-5-204 and 87-5-210 require the fish and game commission [now fish, wildlife, and parks commission] to adopt rules regarding certain aspects of the use and breeding of raptors and the sport of falconry. Because the regulation of raptors and the sport of falconry are in large part regulated by federal law and because detailed and precise standards are rapidly changing, the rules must comply with federal law and regulations as adopted or amended from time to time. The legislature recognizes that the commission has the power to determine the extent and nature of measures that control wildlife in

Montana and that the commission's expertise makes it the proper forum for addressing the regulation of raptors and the sport of falconry. At a minimum, the rules must address:

(1) the regulation of raptors and restrictions on taking, possessing, and selling raptors, including:

(a) the number of raptors that may legally be possessed;

(b) appropriate times and areas for trapping raptors and removing of raptors from the nest;

(c) notification requirements regarding transfer of ownership;

(d) permitting requirements regarding sale and transportation of raptors; and

(e) possession of and hunting with raptors by nonresidents;

(2) licenses and rules for falconry and the allowable uses of raptors in the sport of falconry, including:

(a) appropriate falconry license fees;

(b) age requirements regarding issuance of falconry licenses;

(c) the necessity of possessing other valid game licenses when practicing falconry; and

(d) the transfer and revocation of falconry licenses; and

(3) the regulation of captive breeding of raptors, including:

(a) appropriate breeding permit fees;

(b) transferability and revocation of breeding permits; and

(c) any other aspects of captive breeding considered appropriate by the commission."

1987 Amendment: In (4) inserted "and the sale of progeny of" and made minor changes in grammar.

Report on Sale of Progeny of Raptors — 51st Legislature: Section 3, Ch. 532, L. 1987, read: "The department [of Fish, Wildlife, and Parks] shall report to the 51st legislature the results of the program regulating the sale of the progeny of raptors, including but not limited to the numbers of birds sold, a description of the enforcement efforts undertaken, and the cost of the program to the department."

Codification Without Instruction: This section was enacted without a codification instruction. The apparent intent was that it become an integral part of Title 87, chapter 5, part 2, and the Code Commissioner has codified it accordingly.

Statement of Intent: The statement of intent attached to HB 94 (Ch. 297, L. 1983), first adopted by the House Fish and Game Committee, read: "House Bill No. 94 requires a statement of intent because the proposed amendments [to the bill enacting this section] would provide the Department of Fish, Wildlife, and Parks with the authority to pass regulations on the taking and keeping of raptors for captive breeding purposes.

The reason for the Department to pass regulations controlling captive breeding is to avoid abuses which could endanger the birds captured or in some cases to protect species which are already rare or unusual in Montana. Accordingly, regulations may be adopted which would regulate the kinds of raptors which may be captured, the methods used to capture birds, the facilities in which the birds are kept and bred, the times of capture, the kinds of records to be kept regarding the bird, and the qualifications of the people requesting a captive breeding permit."

Administrative Rules

Title 12, chapter 6, subchapter 14, ARM Captive breeding of raptors.

Law Review Articles

Falconry: Legal Ownership and Sale of Captive-Bred Raptors, Kennedy, 4 Pace Envtl. L. Rev. 349 (1987).

Collateral References

35 Am. Jur. 2d Fish and Game §40.

Part 3
Grizzly Bear

Part Law Review Articles

Subdelegation of Authority Under the Endangered Species Act: Secretarial Authority to Subdelegate His Duties to a Citizen Management Committee as Proposed for the Selway-Bitterroot Wilderness Grizzly Bear Reintroduction, Hall, 20 Pub. Land & Resources L. Rev. 81 (1999).

Grizzly Bear Blues: A Case Study of the Endangered Species Act's Delisting Process: Recovery Plan Requirements, Kline, 31 Envtl. L. 371 (2001).

The Grizzly State of the Endangered Species Act: An Analysis of the ESA's Effectiveness in Conserving the Yellowstone Grizzly Bear Population, Sellers, 29 Land & Water L. Rev. 467 (1994).

The Taking of Threatened Species Under the Endangered Species Act, DeVeau, 30 Idaho L. Rev. 109 (1994).

Conservation Obligations Under the Endangered Species Act: A Case Study of the Yellowstone Grizzly Bear, Kuehl, 64 U. Colo. L. Rev. 607 (1993).

International Trade in Bear Gall Bladders: Forensic Source Inference, Espinoza, Shafer, & Hagey, 38 J. Forensic Sci. 1363 (1993).

The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings, Harrison, 58 U. Chi. L. Rev. 1101 (1991).

Part 4
Game Preserves and Closed Areas

Part Law Review Articles

The Antiwilderness Bias in American Property Law, Sprankling, 63 U. Chi. L. Rev. 519 (1996).

Wheelchair Accessibility in Wilderness Areas: The Nexus Between the ADA and the Wilderness Act (Americans with Disabilities Act of 1990), Bricker, 25 Envtl. L. 1243 (1995).

The National Wildlife Refuges: Theory, Practice, and Prospect, Fink, 18 Harv. Envtl. L. Rev. 1 (1994).

The Greater Yellowstone Ecosystem: Redefining America's Wilderness Heritage, Levenson, 22 Envtl. L. 1574 (1992).

Review and Management of Roadless Lands in Wilderness Planning, Ishee, 5 Nat. Resources & Env't 3(8) (1991).

Wildlife Constraints on Timber Harvesting, Rutzick, 5 Nat. Resources & Env't 10(6) (1991).

Managing the Balances of Nature: The Legal Framework of Wilderness Management, Rohlf & Honnold, 15 Ecology L.Q. 249 (1988).

The Morality of Wilderness: Federal Reserved Water Rights in Western Wilderness Areas, Colbourn, 6 Yale L. & Pol'y Rev. 157 (1988).

Water and Wilderness—Law and Politics, Leshy, 23 Land & Water L. Rev. 389 (1988).

Where the Wild Things Are: Public Entity Liability for Wild Animal Attacks on Public Lands, Steele, 22 Bev. Hills B.A.J. 181 (1988).

87-5-401. Creation of game preserves and general provisions.

Compiler's Comments

1981 Amendment: Inserted "otherwise" and substituted "part" for "section" in second sentence of (1).

Administrative Rules

Title 12, chapter 9, subchapter 2, ARM Game preserves.

Collateral References

Game *key* 3 ½.

38 C.J.S. Game §§45, 46.

35 Am. Jur. 2d Fish and Game §§29, 38.

87-5-402. Posting of notice and additional provisions.

Administrative Rules

Title 12, chapter 9, subchapter 2, ARM Game preserves.

Collateral References

Fish *key* 12; Game *key* 3 ½.

36A C.J.S. Fish §26; 38 C.J.S. Game §§45, 46.

35 Am. Jur. 2d Fish and Game §§6, 16.

87-5-404. Flathead Lake bird preserve — university of Montana-Missoula biological reserve.

Compiler's Comments

1995 Amendment: Chapter 417 in (2) and (3), near beginning, substituted "hunt, as defined in 87-2-101" for "kill, shoot, capture" and after "nests or to" substituted "hunt" for "shoot at, wound, or kill"; and made minor changes in style. Amendment effective July 1, 1995.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

87-5-405. Teton-Spring Creek bird preserve — special archery season.

Compiler's Comments

1981 Amendment: Added (2) relating to archery season in Teton-Spring Creek bird preserve.

Administrative Rules

ARM 12.9.211 Teton-Spring Creek bird preserve boundary adjustment.

87-5-406. Gates of the Mountains game preserve.

Compiler's Comments

1995 Amendment: Chapter 417 in (2), near beginning, substituted "hunt, as defined in 87-2-101" for "shoot, kill, capture" and after "nests or to" substituted "hunt" for "shoot at, wound, or kill"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 37, Ch. 417, L. 1995, was a severability clause.

Part 5
Stream Protection

Part Attorney General's Opinions

Application of Part to Government Projects Including Highway Contractor Discretionary Work Bridges: This part was enacted to regulate projects undertaken by governmental entities, and the Natural Streambed and Land Preservation Act of 1975 (Title 75, ch. 7, part 7) was enacted to control projects not subject to this part. Because highway projects are governmental undertakings, all activities in such a project that may impact upon a stream are within the jurisdiction of the Department of Fish, Wildlife, and Parks under this part, including activities such as temporary work bridges erected at a private contractor's discretion and not reflected on the Department of Highways' (now Department of Transportation's) construction plans. 40 A.G. Op. 71 (1984).

Application of Streambed Act: The Legislature did not intend to regulate any federally constructed projects under The Natural Streambed and Land Preservation Act of 1975. However, the mere location of a nonfederal project on federal land does not preempt state regulation under the Act. The Act is applicable to private projects on state lands, but state or local projects are regulated by the Fish and Game Commission (now Fish, Wildlife, and Parks Commission) under applicable statutes. As to Indian reservations, the Act does not apply to projects constructed by Indians within the reservations, but projects constructed by non-Indians on non-Indian land within a reservation may be regulated by the state if it does not interfere with tribal self-government. 37 A.G. Op. 15 (1977).

Part Law Review Articles

Water Law: A state cannot "appropriate" a minimum flow of water in a natural stream for preservation of fish. (Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P2d 798 (Colo. 1965)), Gordon, 27 Mont. L. Rev. 211 (1966).

87-5-501. State policy.

Law Review Articles

Recent Developments in Montana Land Use Law: See paragraph VIII D, Streambed Preservation. Goetz, 38 Mont. L. Rev. 165 (1977).

Section 404(a) of the Clean Water Act: The Army Corps of Engineers' Jurisdiction Over "All Other Waters", Lammens, 54 Fla. L. Rev. 147 (2002).

Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation, Adler 29 Envtl. L. 1 (1999).

Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands, Priolo, 30 Land & Water L. Rev. 91 (1995).

The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause, Leman, 28 U.C. Davis L. Rev. 1237 (1995).

The Movement in the United States to Restoration and Creation of Wetlands, Beck, 34 Nat. Resources J. 781 (1994).

Wetlands Protection. (Federal and State Coordination: A Survey of Administrative Law Schemes), 46 Admin. L. Rev. 447 (1994).

Federal Wetlands Law (Parts 1 through 3), Strand, 23 Envtl. L. Rep. 10185, 10284, 10354 (1993).

The Direction of Wetlands Regulations in the Next Five Years, Wood, 1993 Min. L. Series: Rocky Mtn. Min. L. Found. 5-1 (1993).

The Evolving Federal Wetland Program, Dickerson, 44 Sw. L.J. 1473 (1991).

Wetland Protection Under Section 404 of the Clean Water Act: An Enforcement Paradox, Griswold, 27 San Diego L. Rev. 139 (1990).

Regulation of Non-Adjacent Wetlands Under Section 404 of the Clean Water Act, Geltman, 23 New Eng. L. Rev. 615 (1989).

A New Tool for Wetlands Protection, 5 Envtl. F. 33(2) (1988).

Strengthening Wetland Protection Programs Through State Regulation, Jacobs, 21 U.C.D. L. Rev. 227 (1987).

Wetlands . . . An Endangered Species?, Palmisano, 6 Temp. Envtl. L. & Tech. J. 73 (1987).

87-5-502. Notice of construction or hydraulic projects.

Compiler's Comments

Purported Amendment: Section 1, Ch. 133, L. 1971, purported to amend this section but made no change.

Attorney General's Opinions

Notice of Planned Repairs and Maintenance of Bridges and Roads Required: Counties must give notice to the Department of Fish, Wildlife, and Parks of planned repairs and maintenance of bridges and roads in accordance with 87-5-502, except when an emergency threatens a bridge or road, in which case the provisions of 87-5-506 apply. The language of 7-14-2203 relating to county authority to make emergency repairs does not expressly or impliedly waive compliance with 87-5-502. 41 A.G. Op. 63 (1986).

Notice Required for Private Contractors of State: Under this section, the Department of Highways (now Department of Transportation) must notify the Department of Fish, Wildlife, and Parks of the construction of work bridges by private contractors on state highway projects when such bridges may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries. 40 A.G. Op. 71 (1984).

87-5-504. Notice of department findings and alternative plans.

Collateral References

Fish *key* 8.

36A C.J.S. Fish §31.

35 Am. Jur. 2d Fish and Game §44.

87-5-506. Vested water rights preserved and emergency actions excepted.

Attorney General's Opinions

Notice of Planned Repairs and Maintenance of Bridges and Roads Required: Counties must give notice to the Department of Fish, Wildlife, and Parks of planned repairs and maintenance of bridges and roads in accordance with 87-5-502, except when an emergency threatens a bridge or road, in which case the provisions of 87-5-506 apply. The language of 7-14-2203 relating to county authority to make emergency repairs does not expressly or impliedly waive compliance with 87-5-502. 41 A.G. Op. 63 (1986).

87-5-507. Irrigation projects excepted.

Attorney General's Opinions

Irrigation District Subject to Natural Streambed and Land Preservation Act: An irrigation district is a "person" within the meaning of 75-7-103(4) of The Natural Streambed and Land Preservation Act of 1975. 44 A.G. Op. 33 (1987).

87-5-508. Federal actions injuring fish and wildlife.

Law Review Articles

Federal Dominance as to Fisheries and Dams: Federal Power Commission v. Oregon, 349 US 435, 99 L Ed 1215, 75 S Ct 832 (1955), evidenced that the federal government can disregard the wishes of a state concerning its fisheries wherever it believes that the interests of the nation are best served by permitting a dam to be built, and this applies even where the waters are

nonnavigable, provided only that the powersite is on reserved lands of the United States. Jasperson, 18 Mont. L. Rev. 118 (1956).

87-5-509. Penalty and restoration.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Severability Clause: Section 2, Ch. 339, L. 1975, read: "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of the act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Part 6
Fish and Wildlife Crimestoppers

Part Law Review Articles

The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking, Anderson, 16 Pub. Land L. Rev. 27 (1995).

Poachers, Tigers and Bears ... Oh My! Asia's Illegal Wildlife Trade, Lee, Nw. J. Int'l L. & Bus. 497 (1996).

Poachers Have Their Wings Clipped, 17 Nat'l L.J. A10 (1995).

87-5-601. Short title.

Compiler's Comments

1997 Amendment: Chapter 393 inserted "and Parks"; and made minor changes in style. Amendment effective April 28, 1997.

87-5-602. Definitions.

Compiler's Comments

1997 Amendment: Chapter 393 in definition of Board and program inserted "and parks"; and made minor changes in style. Amendment effective April 28, 1997.

87-5-603. Functions of board.

Compiler's Comments

1997 Amendment: Chapter 393 substituted "fish, wildlife, and parks" for "fish and wildlife"; and made minor changes in style. Amendment effective April 28, 1997.

87-5-605. Powers and duties of department — rules.

Compiler's Comments

1997 Amendment: Chapter 393 throughout section, in four places, substituted "fish, wildlife, and parks" for "fish and wildlife"; in (2)(a) inserted "including neighborhood watch programs"; and made minor changes in style. Amendment effective April 28, 1997.

Statement of Intent: The statement of intent attached to SB 209 (Ch. 305, L. 1985) provided: "A statement of intent is required for this bill because it [87-5-605] grants rulemaking authority to the department of fish, wildlife, and parks for the purpose of administering the fish and game crimestoppers program.

It is contemplated that the department establish rules for instituting an award program, including criteria to be used in determining who will receive the rewards and the amount of the rewards in order to guarantee that the rewards be granted through a reasonable and consistent procedure.

It is also contemplated that the department draft rules for guaranteeing the confidentiality of persons providing crime-related information. The rules must comply with the constitutional right to know and the right of privacy; confidentiality will be maintained only when the demand of individual privacy clearly exceeds the merits of public disclosure.

To facilitate the transmitting of crime-related information from the public to the department, the department would establish a toll-free telephone number throughout the state. This toll-free number should be publicized statewide on the radio and in the press."

Administrative Rules

Title 12, chapter 6, subchapter 20, ARM Crimestoppers program.

Part 7
Importation, Introduction, and Transplantation of Wildlife

Part Law Review Articles

Damage Caused by Reintroduced Wildlife: Should the Government Be Held Accountable?, Thompson, 1992, U. Ill. L. Rev. 1183 (1992).

The Introduction of Exotic Species Into the United States: There Goes the Neighborhood!, Kurdila, 16 B.C. Envtl. Aff. L. Rev. 95 (1988).

87-5-703. Applicability to other provisions for importation or introduction of wildlife.

Compiler's Comments

1989 Amendment: In (3) inserted "or 87-3-209, 87-3-210, and 87-3-225 through 87-3-227".

87-5-704. Rulemaking.

Compiler's Comments

Statement of Intent: The statement of intent attached to HB 770 (Ch. 624, L. 1985) provided: "A statement of intent is required for this bill because section 10 [87-5-704] grants rulemaking authority to both the fish and game commission [now fish, wildlife, and parks commission] and the department of fish, wildlife, and parks. Section 10 [87-5-704] specifies what sections each entity may implement.

It is the intent of the legislature that the department adopt detailed rules pertaining to the procedure for accepting and processing applications for permission to import for introduction, introduce, or transplant wildlife. The department should address information such as names of applicants, species of wildlife, source of obtaining wildlife, purpose for introducing or transplanting, benefit to the public, potential for harm, and processing fee.

It is the intent of the legislature that the commission review proposals for the introduction or transplantation of wildlife species in the state on a case-by-case basis. It is also the intent of the legislature that the department develop a plan for those applications approved by the commission to assure that the population can be controlled if unforeseen harm should occur."

Administrative Rules

Title 12, chapter 7, subchapter 5, ARM Importation of fish.

ARM 12.7.701 Authorization for Department and commercial fish planting.

Title 12, chapter 9, subchapter 4, ARM Transplant of nuisance animals — introduction of peregrine falcons.

87-5-711. Control of importation for introduction and transplantation or introduction of wildlife.

Compiler's Comments

1991 Amendment: Inserted (2) requiring environmental review prior to transplantation or introduction of fish species.

Preamble: The preamble attached to Ch. 501, L. 1991, provided: "WHEREAS, illegal importation, introduction, or transplantation of fish species can be extremely harmful to the management of the state's fisheries, especially the fisheries of sensitive and valuable native species; and

WHEREAS, illegal importation, introduction, and transplantation of fish species, when done knowingly and purposely, should be dealt with by law enforcement officials to their fullest capabilities; and

WHEREAS, the Legislature encourages the Department of Fish, Wildlife, and Parks to focus law enforcement efforts on apprehending persons who commit such criminal acts, including providing for public awareness of these crimes and providing rewards for citizen assistance in solving these crimes through the Department of Fish, Wildlife, and Parks' TIP-MONT program."

Administrative Rules

ARM 12.7.701 Authorization for department and commercial fish planting.

Title 12, chapter 9, subchapter 4, ARM Transplant of nuisance animals — introduction of peregrine falcons.

87-5-713. Control of wildlife species permitted to be transplanted or introduced.

Administrative Rules

ARM 12.7.540 Permit required for importation of bait leeches.

ARM 12.7.541 Importation of bait leeches — requirements.
ARM 12.7.542 Shipment inspections.
ARM 12.7.701 Authorization for Department and commercial fish planting.

87-5-714. Wildlife species authorized for introduction or transplantation.

Administrative Rules
ARM 12.7.701 Authorization for department and commercial fish planting.

87-5-715. Extermination or control of transplanted or introduced wildlife or feral species posing threat.

Compiler's Comments
1989 Amendment: At beginning of first sentence deleted clause referring to 87-5-714 and after "commission" deleted "after scientific investigation by the department and after public hearing"; and deleted third sentence authorizing Department to take action, by emergency rule without hearing, to control or exterminate transplanted wildlife or species posing threat.

87-5-721. Penalty — license and permit revocation and denial.

Compiler's Comments
1997 Amendment: Chapter 344 in (2)(a), in first sentence, substituted "an offense" for "a misdemeanor" and substituted "$5,000 and imprisonment for up to 1 year" for "$1,000 or imprisonment for not more than 6 months, or both" and inserted second and third sentences allowing sentencing court to consider community service in lieu of imprisonment and prohibiting the sentencing court from deferring or suspending $500 of the fine amount.
1993 Amendment: Chapter 223 in (2)(a), after "$500", substituted language concerning $1,000 fine or imprisonment for "and may be fined up to the amount necessary to eliminate or mitigate the effects of the violation"; inserted (2)(b) regarding civil liability and damages; and made minor changes in style.
1991 Amendment: At beginning of (1) inserted exception clause; and inserted (2) relating to penalty for illegal importation, introduction, or transplantation of fish.

Case Notes
Fish and Game Restitution Not Within Jurisdiction of Justice Court: The Justice Court imposed a $515 fine, suspended fishing privileges, and ordered restitution in an amount necessary to mitigate the effects of the violation to be paid by a plaintiff who had intentionally introduced fish into Lake Mary Ronan. On appeal, the Supreme Court vacated the conviction and sentence, holding that the potentially limitless fine that could be imposed to mitigate the effects of a violation of the fish and game statute is inconsistent with the statute that grants Justices' Courts jurisdiction over violations of fish and game statutes that are punishable by a fine not exceeding $1,000. Moseley v. Lake County Justice Court, 256 M 206, 845 P2d 732, 50 St. Rep. 28 (1993).

TITLES 88 AND 89

RESERVED

TITLE 90
PLANNING, RESEARCH, AND DEVELOPMENT

CHAPTER 1
DEVELOPMENT COORDINATION

Chapter Compiler's Comments

Interim Study: HJR 48 (1981) requested that an appropriate interim committee be assigned to conduct an interim study to determine how to improve the economic environment in Montana. The Legislative Council designated the Joint Subcommittee on Business to conduct the study. See subcommittee study report, Montana Legislative Council, 1982.

Chapter Law Review Articles

State-Sponsored Growth Management as a Remedy for Exclusionary Zoning, 108 Harv. L. Rev. 1127 (1995).

Economic Development Rates—Conservation on Hold as Economy Recovers?, Cross, 131 Pub. Util. Fort. 41(3) (1993).

Global Development Cooperation, Boutros-Ghali, 7 Emory Int'l L. Rev. 1 (1993).

Measuring the Aggregate High-Employment Budget for State and Local Governments, Kusko & Rubin, 46 Nat'l Tax J. 411 (1993).

A Parasite Economy Is Feeding on Its Own Growth, Rauch, 131 N.J.L.J. 15 (1992).

Organizing for Economic Development: New Realities Call for New Rules, Waits, Kahalley, & Heffernon, 52 Pub. Admin. Rev. 612 (1992).

Economic Development Projects: A Perspective, Gold, 19 Urb. Law. 193 (1987).

Federal Tax Reform and State-Local Economic Development Policy (Colloquium: Crisis and Opportunity; Economic Development for the '90s), Netzer, Rafuse, Schenk, & Willis, 15 N.Y.U. Rev. L. & Soc. Change 147 (1987).

Law and Economic Development, Theberge, 9 Den. J. Int'l & Pol'y 231 (1980).

Chapter Collateral References

83 Am. Jur. 2d Zoning and Planning §§497 through 517.

Public contracts: low bidder's monetary relief against state or local agency for nonaward of contract. 65 ALR 4th 93.

Bank's liability for breach of implied contract of good faith and fair dealing. 55 ALR 4th 1026.

Public contracts: authority of state or its subdivision to reject all bids. 52 ALR 4th 186.

Waiver of competitive bidding requirements for state and local public building and construction contracts. 40 ALR 4th 968.

Construction and Application of Public Works and Economic Development Act of 1965 (42 U.S.C. §3121, et. seq.). 17 ALR Fed. 574.

Report and Recommendations, Joint Subcommittee on Business, Legislative Council (1982).

Part 1
Planning and Economic Development

Part Collateral References

Montana Index of Environmental Permits, Environmental Quality Council (1998).

Proceedings—Environmental Regulations and Montana's Economy, Environmental Quality Council (1982).

Report of Select Committee on Economic Problems, Legislative Council (1981).

90-1-101. Declaration of necessity and public policy.

Compiler's Comments

1983 Amendment: Inserted (2) referring to consistency and continuity of environmental rules; and at end of (3) after "provisions of" changed "this part" to "90-1-102 through 90-1-109".

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in (2).

Interim Study Committee Bill: Chapter 679, L. 1983 (HB 228) was introduced by request of the Joint Subcommittee on Business. See subcommittee report, Montana Legislative Council, 1982.

Section Not Codified: Section 82-3701, R.C.M. 1947, a short title clause, was not codified in the MCA because it was not applicable. The clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 19, L. 1967, as amended by sec. 81, Ch. 348, L. 1974.

90-1-102. Functions of department of commerce — state planning.

Compiler's Comments

1993 Amendment: Chapter 148 deleted former (1) that read: "(1) develop and adopt a comprehensive plan for the physical development of the state"; and made minor changes in style.

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in the section introductory clause.

Law Review Articles

Land Use Planning and the Public—Zoning by Initiative, Davis, 36 Mont. L. Rev. 301 (1975).

Land Use Planning and the Montana Legislature—An Overview for 1973, Lundberg, 35 Mont. L. Rev. 38 (1973).

90-1-103. Functions of department of commerce — community development.

Compiler's Comments

2001 Amendment: Chapter 348 inserted (2) requiring department by January 1, 2003, to have developed and published examples of subdivision regulations that provide incentives for and remove disincentives for cluster development, requiring department to seek advice of interested parties, and requiring department to provide technical assistance to local governments developing cluster development regulations; and made minor changes in style. Amendment effective April 21, 2001.

Preamble: The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

1993 Amendment: Chapter 148 in second sentence of (4), after "analyses", inserted "and in providing technical assistance to communities" and before "problems" inserted "planning and financing of public facilities and to the"; and made minor changes in style.

1985 Amendment: Inserted (5) referring to federal community development block grant program.

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in the section introductory clause.

Statement of Intent: The statement of intent attached to Ch. 230, L. 1985, provided: "A statement of intent is required for this bill because it authorizes the department of commerce to adopt administrative rules necessary to administer the federal community development block grant (CDBG) program.

The purpose of this bill is to formalize within the context of the Montana Administrative Procedure Act the department's promulgation of policies, guidelines, ranking criteria, and requirements governing the CDBG program which the department has administered since it was authorized to do so by the November 1981 special session of the legislature. It is not the intention of this bill, however, to add unnecessarily to the cost or complexity of administering the program.

Currently the department's requirements for the program are contained in the publications described below:

1. The Montana Community Development Block Grant Program Application Guidelines describe the policies governing the program, the threshold requirements for CDBG applicants, and the procedure and criteria for evaluating applications.

2. The Montana Community Development Block Grant Program — Grant Administration Manual describes the administrative procedures for local project start up, environmental review of project activities, procurement of goods and services, financial management, protection of civil rights, assuring fair wages for labor, and acquisition of property and relocation of persons displaced thereby. It also discusses special administrative considerations peculiar to public facilities, housing rehabilitation, and economic development projects.

3. The Montana Community Development Block Grant Program — Requirements Notebook is a compilation of the federal and state statutes, regulations, and other standards which govern the CDBG program but which have been promulgated by agencies other than the department.

Because the conversion of these three lengthy publications to a rule format and their inclusion in the Montana Administrative Register or the Administrative Rules of Montana would be unduly cumbersome, expensive, and inexpedient, the legislature contemplates that the rules promulgated pursuant to this bill would be adopted by reference to the publications themselves as is authorized by section 2-4-307, MCA."

Administrative Rules

Title 8, chapter 94, subchapter 37, ARM Rules for administering CDBG program.

Law Review Articles

County Zoning in Montana—A New Look at an Old Problem, Lundberg, 33 Mont. L. Rev. 63 (1972).

City-County Planning in Montana—Its Status and Prospects, Keefer, 25 Mont. L. Rev. 185 (1964).

Master Plan Zoning Statutes Held to Be an Unconstitutional Delegation of Legislative Authority, Andriolo, 23 Mont. L. Rev. 125 (1961).

Collateral References

83 Am. Jur. 2d Zoning and Planning §§497 through 517.

Validity, construction, and application of enactment restricting land development by dredging or filling. 46 ALR 3d 1422.

90-1-104. Functions of department of commerce — recreational development.

Compiler's Comments

1991 Amendment: Inserted (4) requiring coordination of promotion of Indian tourism activities; and made minor changes in style.

1987 Amendment: Inserted (3) referring to the management and regulation of level of Flathead Lake.

Preamble: The preamble to Ch. 452, L. 1987, provided: "WHEREAS, Flathead Lake is an outstanding natural, scenic resource that attracts large numbers of vacationers, tourists, and recreationists and that supports a tourism industry that is important to Montana's economy; and

WHEREAS, the accessibility of Flathead Lake for recreational purposes is dependent on the level of the lake in relation to marina and other recreational facilities; and

WHEREAS, Flathead Lake is managed for a variety of purposes, including electric power generation, flood control, maintenance of wildlife and fisheries habitat, recreation, and irrigation; and

WHEREAS, management of the level of Flathead Lake is the continuing subject of numerous studies and meetings that include representatives of federal, regional, and state government agencies, the Montana Power Company, and other affected organizations but do not consistently include representatives of the tourism industry and recreationists."

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in the section introductory clause.

Collateral References

Validity and construction of statute or ordinance requiring land developer to dedicate portion of land for recreational purposes. 43 ALR 3d 862.

90-1-105. Functions of department of commerce — economic development.

Compiler's Comments

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

1999 Amendment: Chapter 512 inserted (8) concerning assistance to the state-tribal economic development commission. Amendment effective April 28, 1999, and terminates June 30, 2001.

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

1991 Amendment: In (1), (3), and (4) inserted "and Indian tribal governments"; and inserted (7) requiring Department to explore the use of cooperative agreements for promotion of reservation economic opportunities.

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in the section introductory clause.

90-1-106. Functions of department of commerce — housing.

Compiler's Comments

Severability Clause: Section 28, Ch. 461, L. 1975, was a severability section.

Attorney General's Opinions

Department of Commerce Authorized to Administer Housing Assistance Payments Program — No Restriction in Area Served by Municipal Housing Authority: The Montana Department of Commerce fits the description of a public housing authority under regulations of the United States Department of Housing and Urban Development (HUD) and is authorized to contract with HUD to administer HUD's Housing Assistance Payments Program, including federal Section 8 certificate and voucher programs. The restriction in 7-15-4414 applies only to municipal housing authorities operating in the same geographic location and therefore does not restrict the administration of federal Section 8 housing programs in the same area by an authorized state agency. 44 A.G. Op. 23 (1992).

Collateral References

Validity and construction of zoning ordinance requiring developer to devote specified part of development to low and moderate income housing. 62 ALR 3d 880.

Housing. 44 ALR 2d 1433 through 1441; 44 ALR 2d 1418; 130 ALR 1075, supplemented by 172 ALR 967.

90-1-107. Contracts and agreements for projects and programs — cooperation with other agencies.

Compiler's Comments

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in (1).

90-1-108. County land planning assistance.

Compiler's Comments

1995 Amendments: Chapter 199 in second sentence in (1), after "allotted", inserted "an equal percentage of the funds, up to"; at end of (3), after "year", deleted "beginning in June 1991"; and made minor changes in style.

Chapter 509 in (1), at end of first sentence, substituted "for county planning" for "from the county land planning account" and in second sentence, after "allotted", substituted "an equal percentage of the funds, up to $3,000" for "$3,000"; at end of (3) deleted "Surplus funds may be accumulated and rebudgeted for the purposes stated in subsection (2), except that funds rebudgeted by a local governing body or planning agency may not exceed the total revenue received under subsection (1) in the year immediately prior to the budget year. Any excess funds shall revert to the state special revenue fund for state equalization aid to public schools of the state at the end of each odd-numbered fiscal year, beginning in June 1991"; and made minor changes in style. Amendment effective July 1, 1995.

1989 Special Session Amendment: In last sentence of (3) substituted "state special revenue fund for state equalization aid to public schools of the state" for "education trust fund account" and at end substituted "1991" for "1987". Amendment effective August 11, 1989, and applies retroactively to July 1, 1989.

1985 Amendment: At end of (2) inserted "which include but are not limited to comprehensive planning, economic development planning, and capital improvements planning"; and in (3) inserted second sentence referring to accumulation and rebudgeting of surplus funds, at beginning of third sentence before "funds", substituted "excess" for "surplus", and at end of third sentence inserted "at the end of each odd-numbered fiscal year, beginning in June 1987".

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in (1).

90-1-109. State census and economic information center.

Compiler's Comments

1983 Amendment: Substituted language referring to state, federal, and local agencies and a central depository of information for "The department of administration shall, in cooperation with other state agencies and local governments, establish and maintain a central depository of statistical, graphic, library, and other information, including computer-retrievable files, concerning the significant characteristics of the state, its people, economy, land, and physical characteristics. The department shall analyze and disseminate such information to state and local agencies and the general public."

90-1-112. Policy — purpose.

Compiler's Comments

Effective Date: Section 222, Ch. 483, L. 2001, provided that this section is effective July 1, 2001.

90-1-113. Cooperation of state agencies.

Compiler's Comments

Effective Date: Section 222, Ch. 483, L. 2001, provided that this section is effective July 1, 2001.

90-1-114. Rulemaking authority.

Compiler's Comments

Effective Date: Section 222, Ch. 483, L. 2001, provided that this section is effective July 1, 2001.

90-1-116. State matching funds program for economic development — distribution of proceeds — criteria for grants — local economic development matching funds.

Compiler's Comments

1999 Amendment: Chapter 268 in (1) in definition of certified community lead organization inserted "or a tribal government, as defined in 90-6-701(3)(e)". Amendment effective October 1, 1999.

Effective Date: Section 2, Ch. 531, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 24, 1993.

90-1-130. Short title.

Compiler's Comments

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

Preamble: The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

Effective Date: Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

Termination: Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

90-1-131. State-tribal economic development commission — composition — compensation for members.

Compiler's Comments

2001 Amendment: Chapter 69 in (2) in opening clause increased membership from 9 to 10; in (2)(c) added a member from the Little Shell band of Chippewa and inserted first two full sentences providing that a tribal government may advertise for persons who want to serve on the commission and choose a nominee to recommend to the governor from an applicant list or may select an elected tribal official to recommend for membership; deleted former (3) allowing members to be reappointed; in (4) increased quorum from six to seven; and made minor changes in style. Amendment effective March 19, 2001.

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

Preamble: The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

Effective Date: Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

Termination: Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

90-1-132. Commission purposes — duties and responsibilities.

Compiler's Comments

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

Preamble: The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

Effective Date: Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

Termination: Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

90-1-133. Comprehensive assessment on reservations.

Compiler's Comments

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

Preamble: The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

Effective Date: Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

Termination: Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

90-1-134. No waiver of tribal sovereignty.

Compiler's Comments

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

Preamble: The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

Effective Date: Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

Termination: Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

90-1-135. Special revenue accounts.

Compiler's Comments

2001 Amendment: Chapter 69 in (5) substituted "2005" for "2001". Amendment effective March 19, 2001.

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

Preamble: The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

Effective Date: Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

Termination: Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

90-1-141. Short title.

Compiler's Comments
Effective Date: Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

90-1-142. Purposes.

Compiler's Comments
Effective Date: Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

90-1-143. Definitions.

Compiler's Comments
Effective Date: Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

90-1-144. Financial assistance center — department responsibilities.

Compiler's Comments
Effective Date: Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

90-1-145. Cooperation between state agencies and department — dissemination of information.

Compiler's Comments
Effective Date: Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

90-1-146. Information coordination.

Compiler's Comments
Effective Date: Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

90-1-147. Rulemaking.

Compiler's Comments
Effective Date: Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

CHAPTER 2
RESOURCE DEVELOPMENT AND RECLAMATION

Chapter Administrative Rules
Title 36, chapter 19, ARM Reclamation and development grants program.

Part 1
Renewable Resource Development Loans, Grants, and Bonds

Part Compiler's Comments
Severability: Section 18, Ch. 613, L. 1993, was a severability clause.

90-2-140. Energy conservation in agriculture.

Compiler's Comments
1995 Amendment: Chapter 418 at beginning of (1) and (2) substituted "department of environmental quality" for "department of natural resources and conservation". Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

90-2-141. State-owned building retrofitting.

Compiler's Comments
1995 Amendment: Chapter 418 in (1), in two places, and in (2) substituted "department of environmental quality" for "department of natural resources and conservation". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Law Review Articles

Dealing With Older or Damaged Buildings: Rehabilitation vs. New Construction, Colburn, Englebrecht, & Henderson, 19 J. Real Est. Tax'n 245 (1992).

New Uses for Old Structures: Improving the Quality of the Human and Natural Environment, Levitas & Hughes, 4 Ga. St. U.L. Rev. 1 (1988).

Part 11
Reclamation and Development Grants Program

Part Compiler's Comments

Saving Clause: Section 20, Ch. 418, L. 1987, was a saving clause.

Severability: Section 19, Ch. 418, L. 1987, was a severability section.

Part Administrative Rules

Title 36, chapter 19, ARM Reclamation and development grants program.

90-2-1103. Definitions.

Compiler's Comments

1993 Amendment: Chapter 478 deleted definition of Board as Board of Natural Resources and Conservation. Amendment effective July 1, 1993.

Administrative Rules

ARM 36.19.101 Definitions.

90-2-1104. Reclamation and development grants account.

Compiler's Comments

1999 Amendment: Chapter 144 in (2)(c) at end substituted "15-37-117(1)(d)" for "15-37-117(1)(e)"; and made minor changes in style. Amendment effective July 1, 1999.

The amendment to this section made by sec. 9, Ch. 552, L. 1999, was rendered void by sec. 12(2), Ch. 552, L. 1999, a contingent voidness provision.

1997 Amendments: Chapter 42 in (2)(b) substituted "resource indemnity and ground water assessment tax" for "resource indemnity trust tax". Amendment effective March 12, 1997.

Chapter 444 in (2)(b) substituted "resource indemnity and ground water assessment tax" for "resource indemnity trust tax"; inserted (2)(d) requiring money allocated from oil and gas production tax to be paid into reclamation and development grants account; and made minor changes in style. Amendment effective July 1, 1997.

The amendments to this section made by sec. 6, Ch. 120, L. 1997, were rendered void by sec. 7(1), Ch. 542, L. 1997 a coordination section.

1995 Amendment: Chapter 577 inserted (2)(c) concerning metal mines license tax proceeds; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 478 inserted (2)(b) including the resource indemnity trust tax under the provisions of 15-38-106. Amendment effective July 1, 1993.

90-2-1105. Adoption of rules.

Compiler's Comments

1993 Amendment: Chapter 478 at beginning substituted "department" for "board". Amendment effective July 1, 1993.

1987 Statement of Intent: The statement of intent attached to Ch. 418, L. 1987, read: "A statement of intent is required for this bill because it delegates rulemaking authority in section 9 [90-2-1105] to the board of natural resources and conservation [now department of natural resources and conservation] for the establishment and administration of the reclamation and development grants program.

The intent is to provide the board with the authority to adopt rules necessary to administer the reclamation and development grants program. The authority as described in section 9 [90-2-1105] includes establishing rules:

(1) prescribing the form and content of applications for grants;

(2) describing the terms and conditions of making grants;

(3) prescribing a monitoring program to evaluate the effectiveness of funded projects and activities; and

(4) developing any procedures necessary to accomplish the objectives of the reclamation and development grants program."

Administrative Rules

Title 36, chapter 19, ARM Reclamation and development grants program.

90-2-1112. Eligibility requirements.

Compiler's Comments

1999 Amendment: Chapter 552 in (2) near beginning after "If" deleted "sufficient eligible and qualified applications satisfying the mineral development objectives provided for in subsection (1) are not received or if", after "crucial state need" inserted "to protect Montana's environment", and after "funding for projects" substituted "in addition to those described in subsection (1)" for "that:

(a) enhance Montana's economy through the development of natural resources; or

(b) develop, promote, protect, or further Montana's total environment and public interest, including the general health, safety, welfare, and public resources of Montana citizens and communities". Amendment effective July 1, 1999.

Coordination Instruction: The coordination instruction in sec. 18, Ch. 418, L. 1987, provided for the deletion of 90-2-1112(1)(d) if House Bill 777, amending 15-38-202, was passed and approved. It was so enacted as Ch. 408, L. 1987, but sec. 5, Ch. 555, L. 1987, was a coordination instruction to replace sec. 18, Ch. 418. The replacement coordination instruction made no reference to deleting material in 90-2-1112.

90-2-1113. Evaluation criteria — priority.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 59 in (2)(a) substituted third sentence authorizing board to use maximum of 2.5% of grant amount for administrative costs associated with implementing grant projects for "A grant may not be used for personnel costs or general operating expenses of the board of oil and gas conservation"; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 552 in (1) near beginning substituted "subsections (2) and (3)" for "subsection (2)"; inserted (3) regarding grant requests for abandoned mine reclamation projects; and made minor changes in style. Amendment effective July 1, 1999.

1993 Amendment: Chapter 430 in (1), at beginning, inserted exception clause; inserted (2) concerning priority for grants for oil and gas reclamation projects; and made minor changes in style. Amendment effective July 1, 1993.

90-2-1121. Prohibited compensation to public officers or employees — penalty.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), in two places before "officer", deleted reference to member and before "the department" deleted "the board or"; and made minor changes in style. Amendment effective March 12, 1997.

CHAPTER 3
RESEARCH AND COMMERCIALIZATION

Part 10
Research and Commercialization Projects

Part Compiler's Comments

Preamble: The preamble attached to Ch. 563, L. 1999, provided: "WHEREAS, dedication to ongoing research and commercialization funding provides Montana with the opportunity to effectively compete in a rapidly changing global economy; and

WHEREAS, nonstate funding sources, including federal research and commercialization funding entities, seek a lasting commitment from the state to ensure that research and commercialization efforts are a funding priority in Montana; and

WHEREAS, the intention behind the coal severance tax and the coal tax permanent fund was to invest in the future of Montana and its citizens by strengthening the state's economic foundations; and

WHEREAS, productive economic possibilities, access to frontline research, and quality educational opportunities require an active and competitive research and commercialization base in Montana; and

WHEREAS, the development of a stable and diversified research and commercialization effort will help provide for a vibrant and diversified Montana economy."

Effective Date: Section 25, Ch. 563, L. 1999, provided that this part is effective July 1, 1999.

90-3-1001. Purpose — definition.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 34 in (1) in introductory clause substituted "commercialization special revenue account" for "commercialization expendable trust fund". Amendment effective July 1, 2001.

Chapter 483 in (2) near end after "private" deleted "nonprofit"; and made minor changes in style. Amendment effective July 1, 2001.

90-3-1002. Research and commercialization account.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 34 in (1) in first sentence substituted "commercialization special revenue account" for "commercialization expendable trust fund" and in second sentence after "purpose of the" substituted "account" for "fund"; and in (2) in first sentence substituted "commercialization account" for "commercialization expendable trust fund" and in second sentence after "Earnings on the" substituted "account" for "expendable trust fund" and after "deposited in the" substituted "account" for "fund". Amendment effective July 1, 2001.

Chapter 431 in (2) substituted reference to 90-3-1003(3), (4), and (7) for reference to 90-3-1003(3) and (5). Amendment effective April 30, 2001.

Saving Clause: Section 3, Ch. 431, L. 2001, was a saving clause.

90-3-1003. Research and commercialization account — use.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 34 throughout section substituted "account" for "expendable trust fund"; and in two places in (7) substituted "account" for "fund". Amendment effective July 1, 2001.

Chapter 431 in (3)(a) inserted "that are to be used for research and commercialization projects to be conducted at research and commercialization centers located in Montana"; inserted (3)(b) expanding use of account to grants used for production agriculture research and commercialization projects conducted at research and commercialization centers in Montana; in (4) substituted "trust funds approved for research and commercialization projects" for "investments made" and deleted former second sentence that read: "An amount allocated for matching funds must be matched by at least a 1-to-1 ratio"; inserted (5) requiring grant applicant to provide matching funds from nonstate sources equal to 25% of total project costs and providing that matching funds are qualifier, not criterion, for grant approval; and made minor changes in style. Amendment effective April 30, 2001.

Code Commissioner Instruction: Pursuant to sec. 38, Ch. 34, L. 2001, in (4) the code commissioner changed "trust funds" to "account funds".

Saving Clause: Section 3, Ch. 431, L. 2001, was a saving clause.

Administrative Rules

Title 8, chapter 100, ARM Montana Board of Research and Commercialization Technology — general provisions and application procedures.

CHAPTER 4
ENERGY DEVELOPMENT AND CONSERVATION

Chapter Collateral References

27A Am. Jur. 2d Energy and Power Sources §134.

Part 1
Renewable Energy Sources
Research and Development

Part Compiler's Comments

Commitment of Funds for Demonstration Purposes: Section 1, HB 801 (1981), provided in part: "The department may commit funds for demonstration purposes only when in its judgment such expenditures or commitments have good potential for producing savings of nonrenewable energy sources. The department may not commit funds for demonstration purposes when any of the following conditions are present:

(a) previous commitments of similar nature were not productive;

(b) a similar demonstration has been conducted within close geographic proximity of the location of the proposed demonstration project;

(c) the proposed demonstration project would not further the purpose of 90-4-101."

Part Administrative Rules

Title 17, chapter 84, subchapter 1, ARM Renewable energy grant and loan program.

Part Attorney General's Opinions

Alternative Renewable Energy Source Grants to Religious Organizations: Alternative renewable energy source grants may not be awarded to any church or to any school, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect, or denomination. Other religious organizations may be awarded grants if a substantial portion of their functions are secular and grants will only be used for such functions. 37 A.G. Op. 165 (1978).

Part Law Review Articles

Unplugged? The Effect of the New World Electric Power Order On Renewable Energy Industires, Armstrong, 22 N.C.J. Int'l L. & Com. Reg. 449 (1997).

Lessons From the Procedural Politics of the 'Comprehensive' National Energy Policy Act of 1992, Rossi, 19 Harv. Envtl. L. Rev. 195 (1995).

Energy Resource Law: Update on Environmental and Health and Safety Regulatory Issues, Kline, Porter, Hannapel, & Panzik, 28 Tort & Ins. L.J. 211 (1993).

Energy Resources Law: Update on Environmental Constraints on Energy Development, Kline, Gray, & Harris, 27 Tort & Ins. L.J. 208 (1992).

Part Collateral References

27A Am. Jur. 2d Energy and Power Sources §§43 through 58.

90-4-101. Purpose.

Compiler's Comments

1983 Amendment: Near beginning, substituted "and demonstration of energy conservation and of energy sources" for "demonstration and commercialization of energy sources"; in second sentence, inserted "to stimulate the commercialization of alternative renewable energy and"; at end of second sentence substituted "this purpose" for "commercialization of alternative renewable energy".

1981 Amendment: Inserted "and commercialization" before "of energy sources" in the first sentence; and inserted last sentence referring to loans for commercialization of alternative renewable energy.

1981 Appropriation — Commitment of Funds for Demonstration Purposes: Section 1, HB 801 (1981), provided in part: "The department may commit funds for demonstration purposes only when in its judgment such expenditures or commitments have good potential for producing savings of nonrenewable energy sources. The department may not commit funds for demonstration purposes when any of the following conditions are present:

(a) previous commitments of similar nature were not productive;

(b) a similar demonstration has been conducted within close geographic proximity of the location of the proposed demonstration project;

(c) the proposed demonstration project would not further the purpose of 90-4-101." Because HB 801 was a supplemental appropriations bill for the biennium ending June 30, 1981, the above-quoted language is likely to have direct authoritative application only to that period.

90-4-102. Definitions.

Compiler's Comments

2001 Amendment: Chapter 591 in definition of alternative renewable energy source after "wind energy" inserted "geothermal energy, conversion of biomass, fuel cells that do not require hydrocarbon fuel, small hydroelectric generators producing less than 1 megawatt" and after "mankind" inserted "including electricity". Amendment effective July 1, 2001.

Severability: Section 28, Ch. 591, L. 2001, was a severability clause.

1995 Amendment: Chapter 418 in definition of Department substituted "department of environmental quality" for "Montana department of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: Inserted definition of state governmental unit.

1983 Amendment: Inserted definition of energy conservation.

90-4-103. Alternative energy and energy conservation research development and demonstration program — allocation of funds.

Compiler's Comments

1999 Amendment: Chapter 389 in (1) in first sentence at beginning after "There is" deleted "within the state special revenue fund" and at end substituted "program" for "account", in second sentence after "Money" deleted "is paid into this account" and at end substituted "must be deposited in the general fund" for "from this account", and in third sentence after "from" substituted "appropriations provided for the program" for "this account"; in (2) near middle after "appropriated" substituted "for" for "from" and after "demonstration" substituted "program" for "account"; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 in (1), at end of first sentence, deleted "by the department of natural resources and conservation". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1989 Amendment: In (1) substituted "from repayments of grants and loans previously awarded from this account by the department of natural resources and conservation" for "under 15-35-108"; and made minor change in phraseology. Amendment effective July 1, 1989.

Coordination — Amendment Void: Section 8, Ch. 626, L. 1989, provided: "(1) If House Bill No. 683 is not passed and approved, [section 3(2) of this act] is void.

(2) If House Bill No. 683 is passed and approved, the language in [section 2 of this act] [90-4-103] that provides, "and by the department of commerce through the science and technology research program of the Montana science and technology board under 90-3-101 [now repealed] as it read before [the effective date of this act]", is void." House Bill No. 683 was approved March 24, 1989; therefore, the quoted language in subsection (2) was void.

1986 Enactment: Subsections (2) and (3), concerning Department allocation and reallocation of funds, were enacted by sec. 4, Ch. 8, Sp. L. June 1986.

1983 Amendments: Chapter 98 in first sentence of (1) inserted "and energy conservation" after "alternative energy".

Chapter 277 in first sentence of (1) substituted reference to state special revenue fund for reference to earmarked revenue fund.

90-4-104. General powers of department.

Compiler's Comments

1986 Amendment: Inserted (6) referring to repayment of grants and reduction of agency budgets.

1985 Amendment: In (3) after "granting", inserted "administration, and repayment"; and inserted (5) referring to application for and administration and grants to state government units.

1985 Statement of Intent: The statement of intent attached to Ch. 730, L. 1985, provided: "A statement of intent is required for this bill because it directs the department of natural resources and conservation to adopt rules for repayment of grants and awarding of grants to state governmental units. In adopting rules, the department should develop selection criteria that include, at a minimum, payback criteria for investments to pay for themselves through energy

savings. The department should consult with the department of administration when developing rules for awarding grants to state governmental units."

1983 Amendment: In (5) and (6), inserted "and energy conservation" after "alternative energy".

1983 Statement of Intent: The statement of intent attached to SB 356 (Ch. 98, L. 1983) provided: "It is the intent of this bill to allow the Department of Natural Resources to provide grants for projects concerned with energy conservation. The grant of rulemaking authority includes the power to establish criteria to be used in determining when a grant should be granted under the limitations of this act."

1981 Amendment: Inserted (4) referring to application for and administration and awarding of loans; in (5) relating to availability of funds deleted "for grants" after "applications" and inserted "or loans" after "award grants".

1981 Statement of Intent: The statement of intent attached to SB 141 (Ch. 356, L. 1981) provided: "It is the intent of this bill to allow the Department of Natural Resources and Conservation to make loans through financial institutions in Montana for commercialization of alternative renewable energy. The grant of rulemaking authority includes the power to establish criteria to be used in determining when a grant or a loan should be granted under the limitations of the act."

Administrative Rules

Title 17, chapter 84, subchapter 1, ARM Renewable energy grant and loan program.

90-4-105. Applications for grants or loans.

Compiler's Comments

1983 Amendment: Near beginning of first sentence, deleted "or loan" after "grant"; substituted "develop, or demonstrate energy conservation or alternative renewable energy sources" for "develop, demonstrate, or commercialize alternative renewable energy sources"; and inserted second sentence referring to loans to commercialize alternative renewable energy sources.

1981 Amendment: Inserted "or loan" after "grant" in the first sentence; inserted "or commercialize" after "demonstrate" in the first sentence.

90-4-106. Criteria for grant or loan awards.

Compiler's Comments

1999 Amendment: Chapter 389 in (2) in second sentence substituted "demonstration appropriations for matching funds" for "demonstration account for matching moneys"; and made minor changes in style. Amendment effective July 1, 1999.

1985 Amendment: In (6)(b) after "proposed demonstration project", inserted exception clause.

1983 Amendment: In (1), deleted "not" before "exceeding 1 year"; substituted "provided that all funds for the grant must be encumbered or accrued from the program appropriation for the year the grant is authorized" for "and the department may not commit itself to spending funds anticipated to be available more than 1 year after the grant period begins. The department may give an applicant a statement of intent to renew its support of his work, subject to the availability of funds and such other conditions as the department may express"; in (2) and (6), inserted "and energy conservation" after "alternative energy" and in (4) after "renewable energy sources"; at end of (5), deleted "and shall not become the private property of or under the exclusive control of any one company or person".

1981 Amendments: Chapter 356 inserted "or loans" after "grants" in the first sentence and in (3); substituted "funding" for "grants" in the first sentence of (2); substituted "projects" for "grants" in the first sentence of (2); added "or commercialization" at the end of (2).

Chapter 402 changed "is under no requirement to" to "may" near the beginning of (6); inserted "The department may commit funds for demonstration purposes only" at the beginning of second sentence of (6); deleted "would be unproductive" after "commitments" and added remainder of (6) relating to criteria for and for not committing funds.

90-4-109. State governmental unit grants.

Compiler's Comments

1999 Amendment: Chapter 389 in (1)(a) in first sentence after "demonstration" substituted "appropriations" for "account"; at end of (1)(c) substituted "general fund" for "alternative energy and energy conservation research development and demonstration account"; and made minor changes in style. Amendment effective July 1, 1999.

1986 Amendment: In (1)(a) at beginning deleted "Prior to July 1, 1987"; inserted (1)(d) referring to repayment of grant and reduction of budget; and in (2) substituted "All grants awarded under this section must be administered by the department of administration according to Title 18, chapter 2." for former (2) that read: "(2) (a) After June 30, 1987, the department may award grants from the alternative energy and energy conservation development and demonstration account to such state governmental units that have had projects approved by the legislature.

(b) (i) State governmental units must apply to the department for grants.

(ii) The department shall prescribe the form for applications and develop criteria for prioritizing grants.

(iii) The department shall prioritize grant applications submitted to it and shall submit its recommendations on the granting of awards to state governmental units with its budget request as provided in 17-7-111. The recommendations must include the names of proposed projects, their cost, and the expected annual energy savings, if any, resulting from the grant.

(c) Each agency awarded a grant by the legislature under the provisions of subsection (2) will have its budget reduced commensurate with the estimated energy savings resulting from the grant."

90-4-111. Biennial report.

Compiler's Comments

1993 Amendment: Chapter 349 near beginning, before "report", substituted "requested" for "provided in 5-11-210" and at end substituted "environmental quality council" for "legislature".

1991 Amendment: Near beginning inserted reference to 5-11-210 and at end, after "legislature", deleted "at the beginning of each regular legislative session". Amendment effective March 20, 1991.

1986 Amendment: Near beginning inserted "under 90-4-106 and 90-4-109".

1981 Amendment: Inserted "shall monitor the grants awarded and" after "department"; and changed "other activities" to "other information concerning the implementation and effectiveness of specific projects or programs for which grants were awarded".

Part 2
Home Weatherization Programs

Part Administrative Rules

Title 37, chapter 71, ARM Low income weatherization assistance program.

Part Law Review Articles

Weatherization: Seeing That Low-Income Tenants Share the Benefits, 28 Clearinghouse Rev. 156 (1994).

Lowering the Costs of Program Evaluation: Energy Conservation Programs in the Pacific Northwest, Tonn & Hirst, 10 Eval. Rev. 335 (1986).

Part Collateral References

27A Am. Jur. 2d Energy and Power Sources §§130 through 132.

90-4-201. Weatherization money sources — consolidation.

Compiler's Comments

1995 Amendment: Chapter 546 at end of (1) and beginning of (2) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Appropriation for Low-Income Home Weatherization: Section 5, Ch. 597, L. 1989, provided an appropriation of $900,000 for use in the program created under this section. See 1989 Session Law for text of the appropriation.

1985 Amendment: In (1) near beginning, after "provisions of the", substituted "U.S. department of energy" for "community services administration's emergency energy conservation program, the federal energy administration's", and after "weatherization assistance program", inserted "the U.S. department of health and human services low-income home energy assistance program"; and inserted (2) requiring minimum allocation of 5% of federal funds.

1981 Amendment: Substituted "department of social and rehabilitation services" for "department of community affairs".

Federal Statute: Title XX of the Social Security Act referred to in this section is codified at 42 U.S.C. §§1397 through 1397f.

Administrative Rules

Title 37, chapter 71, ARM Low income weatherization assistance program.

Collateral References

13 Am. Jur. 2d Buildings §§34 through 37.

90-4-202. Allocation formula.

Compiler's Comments

1995 Amendment: Chapter 546 throughout section substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1985 Amendment: Throughout section substituted "human resource development councils or other public or nonprofit entities" for "governor's substate planning districts"; and in (2), after "households in", substituted "its geographic area" for "the district".

1981 Amendment: Throughout section, substituted "department of social and rehabilitation services" for "department of community affairs".

Administrative Rules

Title 37, chapter 71, ARM Low income weatherization assistance program.

90-4-210. Policy.

Compiler's Comments

Appropriation of Oil Overcharge Money for State Programs: Chapter 49, L. 1999, appropriated certain oil overcharge money to various state programs as an implementation of the policy stated in this section. The text of Ch. 49 provided: "Section 1. Policy. [Sections 1 through 13] [not codified] implement the policy stated in 90-4-210.

Section 2. Definitions. As used in [sections 1 through 13] [not codified], the following definitions apply:

(1) "Carryover" means unspent oil overcharge funds previously appropriated and incorporated into an approved program plan for one of the federal energy conservation programs, but not included in unspent project funds as defined in subsection (8).

(2) "Cities service payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the consent agreement between cities service oil and gas and the U.S. department of energy, as affirmed by the federal energy regulatory commission, and any interest accrued on the payments.

(3) "Diamond shamrock payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the southern district of Ohio eastern division in civil action No. C2-84-1432 and any interest accrued on the payments.

(4) "Exxon payments" means the oil overcharge payments made by the exxon corporation to the U.S. treasury for distribution to the state of Montana pursuant to the order of the U.S. district court for the District of Columbia in civil action No. 78-1035 and any interest accrued on the payments.

(5) "Getty oil payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the order of disbursement issued in civil action No. 77-347 (MMS) in the U.S. district court for the district of Delaware and any interest accrued on the payments.

(6) "Stripper well payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the district of Kansas, Cause No. M.D.L. 378, and any interest accrued on the payments. The term also includes but is not limited to cities service payments, as defined in subsection (2), getty oil payments, as defined in subsection (5), texaco payments, as defined in subsection (7), and any unspent project funds, as defined in subsection (8).

(7) "Texaco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the texaco final consent order, 53 Fed. Reg. 32929, August 29, 1988, and any interest accrued on the payments.

(8) "Unspent project funds" means stripper well payments that were not expended or otherwise legally obligated during the 1999 biennium but were appropriated for the 1999 biennium in Chapter 526, Laws of 1997, in:

(a) section 4;
(b) section 5;
(c) section 6;
(d) section 7;
(e) section 8;
(f) section 9;
(g) section 10;
(h) section 11;
(i) section 12; and
(j) section 13.

Section 3. Deposit of oil overcharge revenue. All funds from stripper well and exxon payments must be deposited by the state treasurer in the federal special revenue fund. All interest earned on any of these funds or payments also must be deposited in the federal special revenue fund.

Section 4. Matching funds for low-income energy assistance — appropriation. (1) There is appropriated $300,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for the purpose described in subsection (2) and under the restrictions contained in subsection (3).

(2) The department of public health and human services shall match private contributions to energy share, inc. to be used to address home heating emergencies encountered by households with incomes between 0% and 150% of federal poverty guidelines who are not eligible for federal low-income energy assistance or who have not received federal low-income energy assistance in the current program year. All of the funds appropriated to the department for this purpose under subsection (1) must be used for clients' emergency energy needs.

(3) In the event a combination of the oil overcharge funds appropriated in subsection (1) and universal system benefits funds designated to energy share, inc. exceeds $400,000 in fiscal year 2000 or in fiscal year 2001, the excess amount must be subtracted from the appropriation of oil overcharge funds provided in subsection (1) for that fiscal year and a like amount shall be added to the oil overcharge funds appropriated in [section 5] [not codified] for low-income home weatherization, except that the biennial appropriation for low-income home weatherization provided in [section 5] [not codified] shall not exceed under any condition.

Section 5. Low-income home weatherization — appropriation. There is appropriated $500,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in the home weatherization program created in 90-4-201.

Section 6. Affordable, efficient housing plan book — appropriation. There is appropriated $40,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to assist in the preparation, production, and distribution of a plan book containing affordable, energy-efficient house designs developed in cooperation with the Montana building industries association, the department of commerce, local building code officials, and other entities.

Section 7. Food bank network transportation — appropriation. There is appropriated $15,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in assisting the Montana food bank network with coordinated energy-efficient transportation of food to drop sites and local food banks statewide.

Section 8. Transportation to nutrition sites — appropriation. There is appropriated $11,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for grants to the area agencies on aging to provide transportation for seniors to nutrition sites. The area agencies on aging shall apply to the department of public health and human services for these funds.

Section 9. Low-income weatherization — appropriation. In addition to the appropriations in [sections 4 and 5] [not codified], there is appropriated $200,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in the home weatherization program created in 90-4-201.

Section 10. Montana public and private organizations becoming consortium partners — appropriation. There is appropriated $50,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to provide a grant to the national center for appropriate technology to initiate the formation of a Montana advanced

transportation technologies consortium focusing on vehicles traditionally powered by two-stroke engines. The national center for appropriate technology will integrate its transportation technology development services with other western regional consortium and national programs, as recommended by the western governors' association and the western interstate energy board, to provide specialized business assistance, to attract development financing and production capital, and to promote regional industrial growth for the clean transportation technologies fostered by the consortium.

Section 11. Carryover — reappropriations. There is reappropriated $28,000 from the stripper well payments, $51,000 from the exxon payments, and $66,000 from the diamond shamrock payments contained in the federal special revenue fund to the department of environmental quality to fund the state energy program administered by the department pursuant to 10 CFR 420. There is reappropriated up to $40,000 of stripper well payments contained in the federal special revenue fund at the department of administration to help establish a refueling infrastructure that will support the use of ethanol-fueled vehicles.

Section 12. Conditions applied to appropriations. (1) The appropriations made in [sections 4 through 10] [not codified] are biennial appropriations. One-half of the total amount appropriated to each program in [sections 4 through 10] [not codified] is appropriated in fiscal year 2000, and the remainder is appropriated in fiscal year 2001. As biennial appropriations, the unexpended funds appropriated in fiscal year 2000 may be carried forward within each program to fiscal year 2001, subject to the specific conditions governing each appropriation.

(2) The appropriations in [section 11] [not codified] are limited to available funds. Expenditures of carryover funds for the state energy program may not exceed the actual amount of unspent funds available at the department of environmental quality. Total expenditures of stripper well funds to help establish a refueling infrastructure that will support the use of ethanol-fueled vehicles may not exceed $70,000 for

Section 13. Appropriations prioritized. (1) The appropriations in [sections 4 through 10] [not codified] are approved in order of priority as they appear in [sections 4 through 10] [not codified], with the appropriation in [section 4] [not codified] having the highest priority and the appropriation in [section 10] [not codified] having the lowest priority. If the U.S. department of energy does not approve one or more of the programs that are funded by [sections 4 through 10] [not codified], any stripper well payments that are not used to fund the higher priority program must be provided to the lower-ranked program up to the amounts appropriated in [sections 4 through 10] [not codified].

(2) If stripper well payments are insufficient to fully fund the appropriations made in [sections 4 through 10] [not codified], allocations to the lowest ranking program must be reduced until the deficiency is eliminated. If the deficiency is in excess of the appropriation to the lowest ranking program, the next lowest ranking program must have its appropriation reduced until the deficiency is eliminated and so forth as the programs are prioritized. These priorities must be applied to one-half of the total amount appropriated in [sections 4 through 10] [not codified] for fiscal year 2000 and to the remaining appropriation for fiscal year 2001.

(3) In order to provide continuity for the programs when establishing the appropriations for each fiscal year of the 2001 biennium, anticipated stripper well payments that will be received under terms of the stripper well agreement during the biennium may be considered as available to fund the activities.

(4) The expenditure of money appropriated by [sections 4 through 10] [not codified] may not exceed the amount of the stripper well payments available in the biennium."

Coordination: Section 14, Ch. 49, L. 1999, provided: "If House Bill No. 12 is passed and approved, the stripper well payments appropriated in House Bill No. 12 have a higher priority than any appropriation of stripper well payments in [sections 4 through 11] [not codified]." House Bill No. 12 was approved as Ch. 50, L. 1999.

Effective Date. Section 15, Ch. 49, L. 1999, provided: "[This act] is effective July 1, 1999."

Appropriation of Oil Overcharge Money for State Programs: Chapter 526, L. 1997, appropriated certain oil overcharge money to various state programs as an implementation of the policy stated in this section. The text of Ch. 526 provided:

"Section 1. Policy. [Sections 1 through 15] [not codified] implement the policy stated in 90-4-210.

Section 2. Definitions. As used in [sections 1 through 15] [not codified], the following definitions apply:

(1) "Amoco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the decision and order of the U.S. department of energy in Case No. HQF-0588 and any interest accrued on the payments.

(2) "Carryover" means unspent oil overcharge funds previously appropriated and incorporated into an approved program plan for one of the federal energy conservation programs, but not included in unspent project funds as defined in subsection (9).

(3) "Cities service payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the consent agreement between cities service oil and gas and the U.S. department of energy, as affirmed by the federal energy regulatory commission, and any interest accrued on the payments.

(4) "Diamond shamrock payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the southern district of Ohio eastern division in Civil Action No. C2-84-1432 and any interest accrued on the payments.

(5) "Exxon payments" means the oil overcharge payments made by the exxon corporation to the U.S. treasury for distribution to the state of Montana pursuant to the order of the U.S. district court for the District of Columbia in Civil Action No. 78-1035 and any interest accrued on the payments.

(6) "Getty oil payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the order of disbursement issued in Civil Action No. 77-347 (MMS) in the U.S. district court for the district of Delaware and any interest accrued on the payments.

(7) "Stripper well payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the district of Kansas, Cause No. M.D.L. 378, and any interest accrued on the payments. The term also includes but is not limited to cities service payments, as defined in subsection (3), getty oil payments, as defined in subsection (6), texaco payments, as defined in subsection (8), and any unspent project funds, as defined in subsection (9).

(8) "Texaco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the texaco final consent order, 53 Fed. Reg. 32929, August 29, 1988, and any interest accrued on the payments.

(9) "Unspent project funds" means stripper well payments that were not expended or otherwise legally obligated during the 1997 biennium but were appropriated for the 1997 biennium in Chapter 63, Laws of 1995, in:

(a) section 4;

(b) section 5;

(c) section 6;

(d) section 7; and

(e) section 8.

Section 3. Deposit of oil overcharge revenue. All funds from stripper well, amoco, and exxon payments must be deposited by the state treasurer in the federal special revenue fund. All interest earned on any of these funds or payments also must be deposited in the federal special revenue fund.

Section 4. Matching funds for low-income energy assistance — appropriation. (1) There is appropriated $180,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for the purpose described in subsection (2).

(2) The department of public health and human services shall use the funds appropriated in subsection (1) to match private contributions to energy share, inc., to be used to provide emergency energy assistance to residents with incomes between 125% and 150% of poverty guidelines who are not eligible for federal low-income energy assistance. All of the funds appropriated to the department for this purpose under subsection (1) must be used for clients' fuel bills or other emergency energy needs.

Section 5. Low-income home weatherization — appropriation. There is appropriated $230,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in the home weatherization program created in 90-4-201.

Section 6. Recommissioning state-owned buildings — appropriation. (1) There is appropriated $80,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to identify and implement low-cost maintenance activities and modifications to equipment and procedures that will enable state building systems to operate at their designed efficiencies, reducing energy consumption in buildings by 5% to 10%.

(2) Although the aggregate energy cost savings realized from this program could be significant, the amount of savings realized by individual agencies is not likely to be substantial.

Therefore, it is the intent of the legislature that agencies be allowed to keep and use any energy cost savings realized as an incentive to participate in this program. The department of environmental quality shall report the amount of savings to the 1999 legislature, at which time this policy may be reevaluated.

Section 7. Infrastructure to support purchase and use of ethanol-fueled vehicles — appropriation. There is appropriated $70,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to help establish a refueling infrastructure that will support the use of ethanol-fueled (E-85) vehicles. A one-time investment of oil overcharge dollars will be used to leverage private sector funds to provide pilot alternative refueling stations to supply alternative-fueled vehicles.

Section 8. Reduce petroleum use in Yellowstone region — appropriation. There is appropriated $25,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to promote expanded use of alternative fuels within Yellowstone park and neighboring Montana communities.

Section 9. Small business and tribal environmental compliance loan fund program — appropriation. There is appropriated $180,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to provide a grant to the department of commerce microbusiness finance program to offer loans to small businesses and tribal communities for pollution control equipment, petroleum-based chemical product substitution, equipment replacement, pollution prevention, energy conservation, and waste minimization.

Section 10. Recycling for mercury-containing lamps — appropriation. There is appropriated $36,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to reduce disposal costs and enhance energy savings from lighting retrofits by providing equipment and training to establish a self-sustaining lamp recycling program.

Section 11. Low-income home weatherization — appropriation. There is appropriated another $295,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in the home weatherization program created in 90-4-201.

Section 12. Food bank network transportation — appropriation. There is appropriated $5,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in assisting the Montana food bank network with coordinated energy-efficient transportation of food to drop sites and local food banks statewide.

Section 13. Carryover — reappropriations. There is reappropriated $25,000 from the stripper well payments, $50,000 from the exxon payments, $57,000 from the diamond shamrock payments, and $1,500 from the amoco payments contained in the federal special revenue fund to the department of environmental quality to fund the state energy program administered by the department pursuant to 10 CFR 420.

Section 14. Conditions applied to appropriations. (1) The appropriations made in [sections 4 through 13] [not codified] are biennial appropriations.

(2) One-half of the total amount appropriated to each program in [sections 4 through 13] [not codified] is appropriated in fiscal year 1998 and the remainder is appropriated in fiscal year 1999. As biennial appropriations, the unexpended funds appropriated in fiscal year 1998 may be carried forward within each program to fiscal year 1999.

(3) The appropriations in [section 13] [not codified] are limited to available funds. Expenditures of carryover funds may not exceed the actual amount of unspent funds available.

Section 15. Appropriations prioritized. (1) The appropriations in [sections 4 through 12] [not codified] are approved in order of priority as they appear in [sections 4 through 12] [not codified], with the appropriation in [section 4] [not codified] having the highest priority and the appropriation in [section 12] [not codified] having the lowest priority. If the U.S. department of energy does not approve one or more of the programs that are funded by [sections 4 through 12] [not codified], any stripper well payments that are not used to fund the higher-priority program must be provided to the lower-ranked program up to the amounts appropriated in [sections 4 through 12] [not codified].

(2) If stripper well payments are insufficient to fully fund the appropriations made in [sections 4 through 12] [not codified], allocations to the lowest-ranking program must be reduced until the deficiency is eliminated. If the deficiency is in excess of the appropriation to the lowest-ranking program, the next lowest-ranking program must have its appropriation reduced until the deficiency is eliminated and so forth as the programs are prioritized. These priorities

must be applied to one-half of the total amount appropriated in [sections 4 through 12] [not codified] for fiscal year 1998 and to the remaining appropriation for fiscal year 1999.

(3) In order to provide continuity for the programs when establishing the appropriations for each fiscal year of the 1999 biennium, anticipated stripper well payments that will be received under terms of the stripper well agreement during the biennium may be considered as available to fund the activities.

(4) The expenditure of money appropriated by [sections 4 through 12] [not codified] may not exceed the amount of the stripper well payments available in the biennium.

Coordination: Section 16, Ch. 526, provided: "If House Bill No. 12 is passed and approved, the stripper well payments appropriated in House Bill No. 12 have a higher priority than any appropriation of stripper well payments in [sections 4 through 12] [not codified]." House Bill No. 12 was approved as Ch. 81, L. 1997.

Effective date: Section 17, Ch. 526, L. 1997, provided: "[This act] is effective July 1, 1997."

Policy: Section 1, Ch. 63, L. 1995, provided: "[Sections 1 through 10] [not codified] implement the policy stated in 90-4-210."

Definitions: Section 2, Ch. 63, L. 1995, provided: "As used in [sections 1 through 10] [not codified], the following definitions apply:

(1) "Amoco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the decision and order of the U.S. department of energy in Case No. HQF-0588 and includes any interest accrued on the payments.

(2) "Carryover" means unspent oil overcharge funds previously appropriated and incorporated into an approved program plan for one of the federal energy conservation programs, but not included in unspent project funds as defined in subsection (9).

(3) "Cities service payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the consent agreement between cities service oil and gas and the U.S. department of energy, as affirmed by the federal energy regulatory commission, and includes any interest accrued on the payments.

(4) "Diamond shamrock payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the southern district of Ohio eastern division in Civil Action No. C2-84-1432 and includes any interest accrued on the payments.

(5) "Exxon payments" means the oil overcharge payments made by the exxon corporation to the U.S. treasury for distribution to the state of Montana pursuant to the order of the U.S. district court for the District of Columbia in Civil Action No. 78-1035 and includes any interest accrued on the payments.

(6) "Getty oil payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the order of disbursement issued in Civil Action No. 77-347 (MMS) in the U.S. district court for the district of Delaware and includes any interest accrued on the payments.

(7) "Stripper well payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the district of Kansas, Cause No. M.D.L. 378, and includes any interest accrued on the payments. The term also includes but is not limited to cities service payments, as defined in subsection (3), Getty oil payments, as defined in subsection (6), texaco payments, as defined in subsection (8), and any unspent project funds, as defined in subsection (9).

(8) "Texaco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the texaco final consent order, 53 Fed. Reg. 32929, August 29, 1988, and includes any interest accrued on the payments.

(9) "Unspent project funds" means stripper well payments that were not expended or otherwise legally obligated during the 1995 biennium but that were appropriated for the 1995 biennium in Chapter 496, Laws of 1993, in:

(a) section 5(1);

(b) section 6;

(c) section 7;

(d) section 8; and

(e) section 9.

(10) "Warner payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the Warner amendment (section 155 of P.L. 97-377) and includes any interest accrued on the payments."

Deposit of Oil Overcharge Revenue: Section 3, Ch. 63, L. 1995, provided: "All funds from stripper well, amoco, Warner, and exxon payments must be deposited by the state treasurer in the

federal special revenue fund. All interest earned on any of these funds or payments must also be deposited in the federal special revenue fund."

Matching Funds for Low-Income Energy Assistance — Appropriation: Section 4, Ch. 63, L. 1995, provided: "(1) There is appropriated $50,000 from the stripper well payments contained in the federal special revenue fund to the department of social and rehabilitation services [functions now transferred to department of public health and human services] for the purpose described in subsection (2).

(2) The department of social and rehabilitation services [functions now transferred to department of public health and human services] shall match private contributions to energy share, inc., to be used to assist persons not eligible for federal low-income energy assistance whose income is less than 150% of the federal poverty threshold published by the U.S. bureau of the census in the most recent edition of its publication, *Poverty in the United States*. All of the funds appropriated to the department for this purpose under subsection (1) must be used for clients' fuel bills or other energy needs."

Petroleum Substitutes From Agricultural Products — Appropriation: Section 5, Ch. 63, L. 1995, provided: "There is appropriated $10,000 from the stripper well payments contained in the federal special revenue fund to the department of natural resources and conservation to foster expanded use of alternative transportation fuels derived from agricultural products that may reduce petroleum consumption, produce environmental benefits to Montana, and result in potential new cash crops for Montana farmers. Money expended under this appropriation must be matched at least dollar for dollar with private or federal revenue, or both."

Institutional Conservation Program — Appropriation: Section 6, Ch. 63, L. 1995, provided: "There is appropriated $200,000 from the stripper well payments contained in the federal special revenue fund to the department of natural resources and conservation to fund the institutional conservation program for schools and hospitals administered by the department pursuant to 10 CFR 455."

Northern Montana College Tractor Resource Center (Now Montana State University-Northern) — Appropriation: Section 7, Ch. 63, L. 1995, provided: "There is appropriated $125,000 from the stripper well payments contained in the federal special revenue fund to northern Montana college [now Montana state university-northern] to support the ongoing activities of the northern Montana college [now Montana state university-northern] tractor resource center."

Carryover — Reappropriations: Section 8, Ch. 63, L. 1995, provided: "(1) There is reappropriated $20,000 from the stripper well payments, $5,000 from the exxon payments, $60,000 from the diamond shamrock payments, and $1,500 from the amoco payments contained in the federal special revenue fund to the department of natural resources and conservation to fund the state energy conservation program administered by the department pursuant to 10 CFR 420.

(2) There is reappropriated $100,000 from the stripper well payments, $5,000 from the exxon payments, and $800 from the Warner payments contained in the federal special revenue fund to the department of natural resources and conservation to fund the institutional conservation program for schools and hospitals administered by the department pursuant to 10 CFR 455."

Conditions Applied to Appropriations: Section 9, Ch. 63, L. 1995, provided: "The appropriations made in [sections 4 through 8] [not codified] are biennial appropriations.

(1) One-half of the total amount appropriated to each program in [sections 4 through 7] [not codified] is appropriated in fiscal year 1996, and the remainder is appropriated in fiscal year 1997. As biennial appropriations, the unexpended funds appropriated in fiscal year 1996 may be carried forward within each program to fiscal year 1997.

(2) The appropriations in [section 8] [not codified] are limited to available funds. Expenditures of carryover funds may not exceed the actual amount of unspent funds available."

Appropriations Prioritized: Section 10, Ch. 63, L. 1995, provided: "(1) The appropriations in [sections 4 through 7] [not codified] are approved in order of priority as they appear in [sections 4 through 7] [not codified]. If the U.S. department of energy does not approve one or more of the programs that are funded by [sections 4 through 7] [not codified], any stripper well payments that are not used to fund the higher priority program must be provided to the lower ranked program up to the amounts appropriated in [sections 4 through 7] [not codified].

(2) If stripper well payments are insufficient to fully fund the appropriations made in [sections 4 through 7] [not codified], allocations to the lowest ranking program must be reduced until the deficiency is eliminated. If the deficiency is in excess of the appropriation to the lowest ranking program, the next lowest ranking program must have its appropriation reduced until the deficiency is eliminated. These priorities must be applied to one-half of the total amount appropriated in [sections 4 through 7] [not codified] for fiscal year 1996 and to the remaining appropriation for fiscal year 1997.

(3) In order to provide continuity for the programs when establishing the appropriations for each fiscal year of the 1997 biennium, anticipated stripper well payments that will be received under terms of the stripper well agreements during the biennium may be considered as available to fund the activities.

(4) The expenditure of money appropriated by [sections 4 through 7] [not codified] may not exceed the amount of the stripper well payments available in the biennium."

Coordination Instruction: Section 11, Ch. 63, L. 1995, provided: "If House Bill No. 12 is passed and approved, the stripper well payments appropriated in House Bill No. 12 have a higher priority than any appropriation of stripper well payments in [sections 4 through 7] [not codified]." House Bill No. 12 was passed and approved as Ch. 61, L. 1995.

Effective Date: Section 12, Ch. 63, L. 1995, provided: "[This act] is effective July 1, 1995."

Effective Date: Section 16, Ch. 496, L. 1993, provided: "[This act] is effective July 1, 1993."

Policy Restated: Section 1, Ch. 597, L. 1989, was a policy statement on distribution of oil overcharge money. Although not enacted as an amendment to 90-4-210, the text was essentially identical and was not codified. See 1989 Session Law for text of the statement.

Deposit of Oil Overcharge Revenue: Section 3, Ch. 597, L. 1989, provided that all funds from stripper well payments must be deposited in the federal special revenue fund and also required the deposit of all interest in the federal special revenue fund.

90-4-215. Account established — use.

Compiler's Comments

1999 Amendment: Chapter 389 in (2) in first sentence after "account" substituted "may be used by" for "are statutorily appropriated, as provided in 17-7-502, to"; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment: Chapter 546 in (2) substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Part 3
Energy Supply Emergency Powers

Part Compiler's Comments

Repealer: Section 1, Ch. 29, L. 1991, repealed sec. 21, Ch. 473, L. 1979, that provided that Title 90, ch. 4, part 3, remained in effect until July 1, 1985.

Retroactive Applicability: Section 2, Ch. 29, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after June 30, 1985."

Severability: Section 20, Ch. 473, L. 1979, was a severability clause.

Period of Effectiveness: Section 21, Ch. 473, L. 1979, provided: "This act is effective on passage and approval and remains in effect until July 1, 1985." Approved April 9, 1979.

Part Administrative Rules

Title 14, chapter 8, ARM Energy shortages.

Part Law Review Articles

Energy Emergencies: Constitutional Constraints on State Efforts to Control Oil Supplies and Prices, O'Donnell & Glassman, 5 Energy L.J. 77 (1984).

Part Collateral References

27A Am. Jur. 2d Energy and Power Sources §142.

90-4-301. Legislative findings and intent.

Compiler's Comments

1981 Amendment: Inserted "regularly monitor energy supplies and demand" in the middle of the first sentence of (1); and inserted (2)(b) referring to regular monitoring of energy supplies and demand and prohibiting authorization of an independent state energy forecasting program.

Interim Study Committee Bill: Chapter 204, L. 1981 (HB 16), was introduced at the request of the Study Committee on Energy Forecasting. See committee report, Legislative Council, 1980.

Severability: Section 4, Ch. 204, L. 1981, was a severability section.

90-4-302. Definitions.

Compiler's Comments

2001 Amendment: Chapter 593 in definition of energy emergency near beginning after "shortage of energy" inserted "or a price of energy" and at end inserted "or to increase the available supply of energy"; and in definition of energy supply alert near middle after "supplies" inserted "or the price of energy" and at end inserted "or action is taken to increase the supply of energy". Amendment effective May 5, 2001.

1995 Amendment: Chapter 545 deleted definition of committee that read: ""Committee" means the energy policy committee established in 90-4-303"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1981 Amendment: Inserted definitions of petroleum products, refinery, refiner, prime petroleum supplier, petroleum pipeline company, and bulk pipeline terminal.

Interim Study Committee Bill: Chapter 204, L. 1981 (HB 16), was introduced at the request of the Study Committee on Energy Forecasting. See committee report, Legislative Council, 1980.

Severability: Section 4, Ch. 204, L. 1981, was a severability section.

90-4-304. Supply of vital public services during an energy supply alert and energy emergency.

Collateral References

27A Am. Jur. 2d Energy and Power Sources §§280, 282 through 286.

90-4-305. Information obtainable by governor.

Compiler's Comments

1995 Amendment: Chapter 545 in (1), in first sentence after "necessary for the governor", deleted "with advice of the committee"; deleted (7) that read: "(7) The governor shall forward to the committee such information collected under this section as the committee may request and shall advise the committee of the progress of the information gathering process"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the

executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1981 Amendment: Added "on a regular basis" after "The governor may obtain information" at the beginning of (1); added "other than for petroleum products" at the end of (1)(a); inserted (2) listing monthly reports to be submitted to the Governor; substituted "subsections (1) and (2)" for "subsection (1)" near the beginning of (3); deleted "seek to" before "avoid" at the beginning of (4)(a); inserted "Except as provided in subsection (2)" at the beginning of (5); and inserted (6) establishing restrictions on information in montly reports.

Commissioner Correction: The 1981 amendment, which added subsection (6), incorrectly referred to the functions of the Legislative Auditor "under Title 5, chapter 3" in (6)(b). Because Title 5, chapter 3, contains no functions of the Legislative Auditor, the Code Commissioner corrected the reference to read "Title 5, chapter 13", which is "The Legislative Audit Act".

Interim Study Committee Bill: Chapter 204, L. 1981 (HB 16), was introduced at the request of the Study Committee on Energy Forecasting. See committee report, Legislative Council, 1980.

Severability: Section 4, Ch. 204, L. 1981, was a severability section.

90-4-307. Submission and approval of curtailment plans.

Compiler's Comments

1995 Amendment: Chapter 545 deleted (2)(f) that read: "(f) the advice of the committee"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

90-4-308. Governor's considerations.

Compiler's Comments

1995 Amendment: Chapter 545 deleted former (5) that read "(5) the advice of the committee"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the

executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

90-4-310. Energy emergency powers of governor.

Compiler's Comments

2001 Amendment: Chapter 593 in (2) increased duration of energy emergency from 45 consecutive days to 90 consecutive days; in (4)(a) in first complete sentence after "governor" substituted "may" for "shall"; at beginning of (5) inserted exception clause; and made minor changes in style. Amendment effective May 5, 2001.

1995 Amendment: Chapter 545 in (1), near beginning after "governor", deleted "with the advice of the committee"; in (4), in introductory clause after "governor may", deleted "with the advice of the committee"; in (6), after "Policy Act", deleted "of 1971"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1981 Amendment: Increased the energy emergency condition duration period from 14 to 45 days in (2).

90-4-313. Compliance.

Compiler's Comments

2001 Amendment: Chapter 593 inserted second sentence allowing completion of project commenced under energy emergency. Amendment effective May 5, 2001.

1995 Amendment: Chapter 545 near middle, after "governor", deleted "with the advice of the committee". Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll,

personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

90-4-316. Rules and executive orders.

Administrative Rules

Title 14, chapter 8, ARM Energy shortages.

Part 4
Pacific Northwest Electric Power and Conservation Planning Council

90-4-401. Agreement to pacific northwest electric power and conservation planning council.

Compiler's Comments

Federal Statute: The Pacific Northwest Electric Power Planning and Conservation Act (P.L. 96-501), referred to in this section, is codified at 16 U.S.C. §§839 through 839h.

Law Review Articles

Implementing the Northwest Power Plan: Conflicts With Montana's Major Facility Siting Act, McBride, 5 Pub. Land L. Rev. 68 (1984).

90-4-402. Appointment of council members by governor.

Compiler's Comments

Federal Statute: P.L. 96-501 (the Pacific Northwest Electric Power Planning and Conservation Act), referred to in this section, is codified at 16 U.S.C. §§839 through 839h.

90-4-403. Duties of council members.

Compiler's Comments

1985 Amendment: Deleted former (3) that read: "submit to the governor and legislature an annual report detailing the council's expenditures, activities, and plans".

Code Commissioner Correction: "The council's" was substituted for "its" in (3) to correct an error in the use of that pronoun in the original bill.

Federal Statute: P.L. 96-501 (the Pacific Northwest Electric Power Planning and Conservation Act), referred to in this section, is codified at 16 U.S.C. §§839 through 839h.

Part 6
State Building Energy Conservation Program

Part Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 473, L. 1989, provided: "This bill requires a statement by the department of natural resources and conservation that the estimated annual energy savings to be derived from the installation of the energy saving improvements are expected to equal or exceed the annual debt service to be paid on the bonds issued to fund the improvements. In developing this savings statement, the department shall determine which energy improvements yield sufficient return on investment to be included in the financing package. In making this determination, the department should consider the projected savings of the improvement, the impact on project cash flow, the expected useful life of the improvement and the facility, the state's long-range plans for the facility, the potential impacts on the utility system, and any additional monetary and nonmonetary benefits to be derived from the improvement.

The department shall consult with the utility or utilities that serve the facilities on which the improvements are to be made. If a fuel switching measure is proposed, the department must demonstrate that the benefits to the state exceed the costs to the utility and its customers."

Coordination Instruction: Section 13, Ch. 473, L. 1989, provided: "If House Bill No. 563 is not passed and approved, [this act] is void." House Bill No. 563 was approved April 20, 1989. See Ch. 597, L. 1989, for text.

Severability: Section 14, Ch. 473, L. 1989, was a severability clause.

Effective Date: Section 16, Ch. 473, L. 1989, provided: "[This act] is effective on passage and approval." Approved April 8, 1989.

90-4-602. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 inserted introductory clause; and in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of natural resources and conservation provided for in 2-15-3301". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

90-4-605. Preparation of energy conservation program.

Compiler's Comments

2001 Amendment: Chapter 240 deleted former (3) that read: "(3) During the energy analyses, the department shall consult with the utilities that serve the selected facilities to discuss potential impacts on the utilities and their customers of making energy conservation improvements to these facilities"; in (3) in first sentence after "department shall" deleted "submit to the governor its findings and a list of projects recommended for funding under the energy conservation program" and inserted second and third sentences requiring department to notify department of administration of buildings that have a potential for energy savings and requiring department of administration to implement design and construction projects for those buildings; deleted former (5)(d) and (5)(e) that read: "(d) a description of measures taken by the department to address the issues that were raised in the consultation with the affected utilities; and

(e) if a fuel switching measure is proposed, an analysis of the costs to the affected utility and its customers and of the benefits to the state"; inserted (4)(d) requiring report to include additional projects under consideration; deleted former (6) that read: "(6) If a fuel switching measure is proposed, the department shall demonstrate through the analysis required by subsection (5)(e) that the benefits to the state exceed the costs to the utility and its customers"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 50 in (1) deleted former first sentence that read: "Before June 30 of each odd-numbered year, the department shall inform, in writing, each state agency of the energy conservation program and request agencies interested in participating in the program to contact the department"; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment: Chapter 61 substituted present (1) concerning participation in energy conservation program for former language that read: "Before June 30 of each odd-numbered year, state agencies shall submit to the department, on forms provided by the department, a list of any facilities operated by that agency that have a potential for energy savings, based on age, energy use, function, and condition of the building. Agencies may request assistance from the department to identify these facilities"; in (2), after "subsection (1)", inserted "and on the feasibility of leveraging other funds, such as federal and utility energy conservation program money"; in (4), in first sentence before "list", deleted "prioritized" and in second sentence, after "shall", substituted "identify estimated costs and savings" for "rank projects in terms of cost-effectiveness" and at end inserted "based on these analyses"; in (5)(a), after "listing of", substituted "contacts between the department and other" for "all requests submitted by"; in (5)(b), at end, inserted "and a selection of projects for in-depth analysis"; and in (5)(e), at end, deleted "of the fuel switching measure". Amendment effective July 1, 1995.

1989 Statement of Intent: The statement of intent attached to Ch. 473, L. 1989, provided: "This bill requires a statement by the department of natural resources and conservation that the estimated annual energy savings to be derived from the installation of the energy saving improvements are expected to equal or exceed the annual debt service to be paid on the bonds issued to fund the improvements. In developing this savings statement, the department shall determine which energy improvements yield sufficient return on investment to be included in the financing package. In making this determination, the department should consider the projected savings of the improvement, the impact on project cash flow, the expected useful life of the improvement and the facility, the state's long-range plans for the facility, the potential impacts on the utility system, and any additional monetary and nonmonetary benefits to be derived from the improvement.

The department shall consult with the utility or utilities that serve the facilities on which the improvements are to be made. If a fuel switching measure is proposed, the department must demonstrate that the benefits to the state exceed the costs to the utility and its customers."

90-4-606. Program report and recommendations.

Compiler's Comments

2001 Amendment: Chapter 240 deleted former (2) and (3) that read: "(2) a description of the improvements to be financed;

(3) the estimated cost of each project and the total cost of the program"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 349 at beginning of first sentence of introductory clause deleted "During the first week of the regular legislative session", after "submit" deleted "to the legislature for its approval", and at end, after "biennium", inserted "as a part of the budget required by 17-7-123" and substituted introductory portion of second sentence that read: "The governor shall make available, as provided by 17-7-124" for "In his recommendation, the governor shall include"; and made minor changes in style.

90-4-607. Duties of department.

Compiler's Comments

1999 Amendment: Chapter 50 inserted (3)(b) allowing the department to transfer funds and authority regarding cost-effective energy improvements; and made minor changes in style. Amendment effective July 1, 1999.

1993 Amendment: Chapter 350 in (3), before "transfer", deleted "administratively" and after "funds" inserted "and authority". Amendment effective April 16, 1993.

90-4-611. Authority to issue energy conservation program bonds.

Compiler's Comments

1999 Amendment Void: The amendment to this section made by sec. 13, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

Temporary Authorization of Bonds — 1990-91 Biennium: Section 10, Ch. 473, L. 1989, provided: "(1) At the request of the department, the board may issue and sell bonds of the state in an aggregate principal amount not exceeding $3 million to provide money for the 1990-91 biennium energy conservation program. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account. Any premium and accrued interest must be deposited to the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds and to pay costs of the energy conservation program, including the funding of the 1990-91 biennium energy conservation projects approved by the legislature. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. Such proceeds must be available to the department and may be used for the purposes authorized in [sections 1 through 8] [Title 90, ch. 4, part 6] without further budgetary authorization."

90-4-613. Use of energy conservation program account.

Compiler's Comments

Stripper-Well Payments — Reappropriation — Definition — Priority: Section 3, Ch. 50, L. 1999, provided: "(1) There is reappropriated from the stripper-well payments contained in the federal special revenue fund to the department of environmental quality $100,000 to fulfill duties authorized by 90-4-605 and 90-4-607. The original appropriation was contained in section 9, Chapter 597, Laws of 1989. The reappropriation is a biennial appropriation.

(2) (a) "Stripper-well payments" means the oil overcharge payments made to the United States treasury for distribution to the state of Montana as the result of the final settlement agreement in Cause No. M.D.L. 378, United States district court for the district of Kansas, and any interest accrued on the payments.

(b) The term does not include stripper-well payments that have been expended or legally obligated or that have been incorporated into any of the existing federal energy programs as the result of prior appropriations by the legislature.

(3) The stripper-well payments reappropriated in this section have a higher priority than any other appropriation of stripper-well payments for fiscal years 2000 and 2001." Effective July 1, 1999.

Appropriations of Bond Proceeds: Section 4, Ch. 50, L. 1999, provided: "There is appropriated from bond proceeds authorized by Chapter 571, Laws of 1991, Chapter 350, Laws of 1993, Chapter 61, Laws of 1995, Chapter 81, Laws of 1997, and [section 6] [not codified], $450,000 to the department of environmental quality to fulfill duties under 90-4-605 and 90-4-607. This appropriation is a biennial appropriation." Effective July 1, 1999.

Approval of Energy Conservation Projects — Definition: Section 5, Ch. 50, L. 1999, provided: "(1) Pursuant to Title 90, chapter 4, part 6, the legislature approves the following energy conservation projects for fiscal years 2000 and 2001.

University of Montana
  Science Complex, Missoula
Montana State University
  Cowan Hall Remodel, Havre
  Special Education Building, Billings
Department of Administration
  Justice Building
Department of Transportation
  Signal Light Retrofit Project
University of Montana
  Grizzly Pool
Department of Military Affairs
  Maintenance Shop Building, Helena

(2) In addition to the energy conservation projects listed in subsection (1), the department of environmental quality may expend funds appropriated under [section 6] [not codified] to respond to lost energy saving opportunities. This includes coordination of energy improvement projects with the long-range building program's capital improvement projects.

(3) For purposes of this section, a "lost energy saving opportunity" means an opportunity to improve energy use that would provide significant energy and cost savings to the state and that will be technically infeasible or uneconomical if the department of environmental quality is delayed in providing the necessary funds until specific legislative approval can be obtained.

(4) If the costs of the projects authorized in subsections (1) and (2) are substantially below the bond amount authorized in [section 6] [not codified], the department of environmental quality may fund projects that otherwise would be proposed as part of the state building energy conservation package for fiscal years 2002 and 2003." Effective July 1, 1999.

Bond Authorization — Appropriation of Bond Proceeds: Section 6, Ch. 50, L. 1999, provided: "(1) The board of examiners may, pursuant to 90-4-611, issue and sell bonds of the state in an aggregate principal amount not to exceed $3 million for fiscal years 2000 and 2001 for the projects approved in [section 5] [not codified] and to fulfill duties authorized by 90-4-605 and 90-4-607, as provided in [section 4] [not codified]. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest on the bonds. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account established by 90-4-612. Premiums and accrued interest must be deposited in the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds, to fulfill duties authorized by 90-4-605 and 90-4-607, and to fund the projects approved in [section 5] [not codified]. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. The bond proceeds must be available to the department of environmental quality and may be used for the purposes authorized in this section without further budgetary authorization." Effective July 1, 1999.

Requirements for Approval of State Debt: Section 7, Ch. 50, L. 1999,provided: "Because [section 6] [not codified] authorizes the creation of state debt, Article VIII, section 8, of the Montana constitution requires a vote of two-thirds of the members of each house of the legislature for enactment of [section 6] [not codified]."

Stripper-Well Payments — Reappropriation — Definition — Priority: Section 1, Ch. 61, L. 1995, provided: "(1) There is reappropriated from the stripper-well payments contained in the federal special revenue fund to the department of natural resources and conservation $100,000 to

fulfill duties authorized by 90-4-605 and 90-4-607. The original appropriation was contained in section 9, Chapter 597, Laws of 1989. The reappropriation is a biennial appropriation.

(2) (a) "Stripper-well payments" means the oil overcharge payments made to the United States treasury for distribution to the state of Montana as the result of the final settlement agreement in Cause No. M.D.L. 378, United States district court for the district of Kansas, and any interest accrued on the payments.

(b) The term does not include stripper-well payments that have been expended or legally obligated or have been incorporated into any of the existing federal energy programs as the result of prior appropriations by the legislature.

(3) The stripper-well payments reappropriated in this section have a higher priority than any other appropriation of stripper-well payments for fiscal years 1996 and 1997." Effective July 1, 1995.

Approval of Energy Conservation Projects — Definition: Section 3, Ch. 61, L. 1995, provided: "(1) Pursuant to Title 90, chapter 4, part 6, the legislature approves the following energy conservation projects for fiscal years 1996 and 1997:

FACILITIES

Montana Tech of the University of Montana
  Mining Geology Building
  Heating Plant Building
Montana State University at Billings
  College of Technology Building
  Physical Education Building
University of Montana at Missoula
  College of Technology Building
Department of Corrections and Human Services [functions now transferred to Department of Public Health and Human Services]
  Veterans' Home, Columbia Falls
Department of Military Affairs
  Kalispell National Guard Armory
  Helena National Guard Headquarters
Department of Administration
  Scott Hart Building
  State Capitol
  Office of Public Instruction Building
  Mitchell Building Heating System
  Montana State University-Northern

(2) In addition to the energy conservation projects listed in subsection (1), the department of natural resources and conservation may expend funds appropriated under [section 4] [not codified, see 1995 compiler's comment] to respond to lost energy saving opportunities.

(3) For purposes of this section, a "lost energy saving opportunity" means an opportunity to improve energy use that would provide significant energy and cost savings to the state and that will be technically infeasible or uneconomical if the department is delayed in providing the necessary funds until specific legislative approval can be obtained.

(4) If the costs of the projects authorized in subsections (1) and (2) are substantially below the bond amount authorized in [section 4] [not codified, see 1995 compiler's comment], the department of natural resources and conservation may fund projects that otherwise would be proposed as part of the state building energy conservation package for fiscal years 1998 and 1999.

(5) The retrofit of Montana state university-northern must be conducted as a pilot project, using performance contracting. Montana state university-northern shall use state general obligation bonds authorized under [section 4] [not codified, see 1995 compiler's comment] to fund energy efficiency improvements in campus buildings used for instructional purposes. Montana state university-northern may provide financing other than state general obligation bonds for energy efficiency improvements in buildings supported by student fees and revenue. Whenever state general obligation bonds are used, resulting energy cost savings must be transferred to the energy conservation program account as provided in 90-4-614. If funding other than state general obligation bonds is used for improvements in buildings supported by student fees and revenue, a performance contract must be developed jointly by Montana state university-northern, the department of natural resources and conservation, and the department of administration and any resulting energy cost savings in these buildings in excess of debt service and program costs must remain with the auxiliary services at Montana state university-northern." Effective July 1, 1995.

Bond Authorization — Appropriation of Bond Proceeds: Section 4, Ch. 61, L. 1995, provided: "(1) The board of examiners may, pursuant to 90-4-611, issue and sell bonds of the state in an aggregate principal amount not to exceed $5.5 million for fiscal years 1996 and 1997 for the projects approved in [section 3] [not codified, see 1995 compiler's comment] and to fulfill duties authorized by 90-4-605 and 90-4-607 as provided in [section 2] [not codified, see 1995 compiler's comment]. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest on the bonds. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account established by 90-4-612. Premiums and accrued interest must be deposited in the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds, to fulfill duties authorized by 90-4-605 and 90-4-607, and to fund the projects approved in [section 3] [not codified, see 1995 compiler's comment]. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. The bond proceeds must be available to the department of natural resources and conservation and may be used for the purposes authorized in this section without further budgetary authorization." Effective July 1, 1995.

Requirements for Approval of State Debt: Section 6, Ch. 61, L. 1995, provided: "Because [section 4] [not codified, see 1995 compiler's comment] authorizes the creation of a state debt, a vote of two-thirds of the members of each house is required for enactment of [section 4] [not codified, see 1995 compiler's comment]." Effective July 1, 1995.

Preamble: The preamble attached to Ch. 350, L. 1993, provided: "WHEREAS, Chapter 473, Laws of 1989, established the state building energy conservation program; and

WHEREAS, recommended projects for the state building energy conservation program for fiscal years 1994 and 1995 have been analyzed and are submitted to the Legislature as required by Title 90, chapter 4, part 6."

Temporary Bond Authorization — 1994-95 Biennium: Section 4, Ch. 350, L. 1993, provided: "(1) The board of examiners may, pursuant to 90-4-611, issue and sell bonds of the state in an aggregate principal amount not to exceed $3 million for the energy conservation and lighting retrofit projects approved in [section 3] [not codified, see 1993 compiler's comment] for fiscal years 1994 and 1995. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest on the bonds. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account established by 90-4-612. Premiums and accrued interest must be deposited in the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds and to fund the projects approved by the legislature in [section 3] [not codified, see 1993 compiler's comment]. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. The bond proceeds must be available to the department of natural resources and conservation and may be used for the purposes authorized in this section without further budgetary authorization."

1991 Amendment: At end, deleted "This money is statutorily appropriated as provided in 17-7-502". Amendment effective April 23, 1991.

Preamble: The preamble attached to Ch. 571, L. 1991, provided: "WHEREAS, Chapter 473, Laws of 1989, established the state building energy conservation program and authorized the issuance of up to $3 million of general obligation bonds to provide money for the state building energy conservation program for fiscal years 1990-91; and

WHEREAS, the Department of Natural Resources and Conservation determined that the issuance of the bonds was not necessary during fiscal years 1990-91 and that portions of the projects identified in section 9, Chapter 473, Laws of 1989, were either funded from other sources or not in the state's best interest at the time; and

WHEREAS, recommended projects for the state building energy conservation program for fiscal years 1992-93 have been identified as required by Title 90, chapter 4, part 6."

Temporary Bond Authorization — 1992-93 Biennium: Section 3, Ch. 571, L. 1991, provided: "(1) The board of examiners may, pursuant to 90-4-611, issue and sell bonds of the state in an aggregate principal amount not to exceed $3 million for fiscal years 1992-93. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest on the bonds. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account established by 90-4-612. Premiums and accrued interest must be deposited in the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds and to fund the projects approved by the legislature in [section 2] [not codified, see 1991 compiler's comment]. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. The bond proceeds must be available to the department of natural resources and conservation and may be used for the purposes authorized in this section without further budgetary authorization."

Withdrawal of Authorization for Previously Authorized Bonds: Section 6, Ch. 571, L. 1991, provided: "The authorization granted by section 10, Chapter 473, Laws of 1989, for the issuance of up to $3 million in bonds to provide money for fiscal years 1990-91 energy conservation program is withdrawn."

90-4-614. Appropriation of energy cost savings.

Compiler's Comments

Effective Date: Section 9, Ch. 350, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 16, 1993.

Part 10
State Energy Policy — Goal and Development Process

90-4-1001. State energy policy goal statement.

Compiler's Comments

1995 Amendment: Chapter 311 inserted (2)(c) promoting as a state policy the adoption and implementation of a state transportation energy policy and an alternative fuels policy.

Preamble: The preamble attached to Ch. 311, L. 1995, provided: "WHEREAS, in section 90-4-1003, MCA, the Legislature adopted a process for the incremental development of a comprehensive state energy policy; and

WHEREAS, under the provisions of that statute, the Department of Natural Resources and Conservation recommended to the Environmental Quality Council the development of a transportation energy policy as one component of a comprehensive state energy policy; and

WHEREAS, the Environmental Quality Council assigned a broad-based working group of stakeholders in the issues relating to development of a transportation energy policy to use a collaborative, consensus process to develop that policy; and

WHEREAS, these stakeholders included the Montana Department of Transportation, members of the Montana Highway Commission [now Transportation Commission], the Department of Natural Resources and Conservation, representatives of state and local governments, highway users, railroad interests, utilities, commercial transportation interests, environmental groups, agricultural producers, bicycle and pedestrian interests, transportation planners, and representatives of petroleum producers; and

WHEREAS, the collaborative working group met regularly over an 8-month period to develop the following transportation energy policy goal statement and to recommend a specific component of a transportation energy policy on alternative fuels, along with implementing guidelines."

90-4-1002. Definitions.

Compiler's Comments

1997 Amendment: Chapter 42 in introduction, after "90-4-1003", deleted "and 90-4-1004". Amendment effective March 12, 1997.

1995 Amendment: Chapter 418 in definition of Department substituted "department of environmental quality established in 2-15-3501" for "department of natural resources and conservation established in 2-15-3301". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

90-4-1010. Transportation energy policy.

Compiler's Comments

Preamble: The preamble attached to Ch. 311, L. 1995, provided: "WHEREAS, in section 90-4-1003, MCA, the Legislature adopted a process for the incremental development of a comprehensive state energy policy; and

WHEREAS, under the provisions of that statute, the Department of Natural Resources and Conservation recommended to the Environmental Quality Council the development of a transportation energy policy as one component of a comprehensive state energy policy; and

WHEREAS, the Environmental Quality Council assigned a broad-based working group of stakeholders in the issues relating to development of a transportation energy policy to use a collaborative, consensus process to develop that policy; and

WHEREAS, these stakeholders included the Montana Department of Transportation, members of the Montana Highway Commission [now Transportation Commission], the Department of Natural Resources and Conservation, representatives of state and local governments, highway users, railroad interests, utilities, commercial transportation interests, environmental groups, agricultural producers, bicycle and pedestrian interests, transportation planners, and representatives of petroleum producers; and

WHEREAS, the collaborative working group met regularly over an 8-month period to develop the following transportation energy policy goal statement and to recommend a specific component of a transportation energy policy on alternative fuels, along with implementing guidelines."

90-4-1011. Alternative fuels policy — implementing guidelines.

Compiler's Comments

Preamble: The preamble attached to Ch. 311, L. 1995, provided: "WHEREAS, in section 90-4-1003, MCA, the Legislature adopted a process for the incremental development of a comprehensive state energy policy; and

WHEREAS, under the provisions of that statute, the Department of Natural Resources and Conservation recommended to the Environmental Quality Council the development of a transportation energy policy as one component of a comprehensive state energy policy; and

WHEREAS, the Environmental Quality Council assigned a broad-based working group of stakeholders in the issues relating to development of a transportation energy policy to use a collaborative, consensus process to develop that policy; and

WHEREAS, these stakeholders included the Montana Department of Transportation, members of the Montana Highway Commission [now Transportation Commission], the Department of Natural Resources and Conservation, representatives of state and local governments, highway users, railroad interests, utilities, commercial transportation interests, environmental groups, agricultural producers, bicycle and pedestrian interests, transportation planners, and representatives of petroleum producers; and

WHEREAS, the collaborative working group met regularly over an 8-month period to develop the following transportation energy policy goal statement and to recommend a specific component of a transportation energy policy on alternative fuels, along with implementing guidelines."

CHAPTER 5
SECONDARY INDUSTRY AND COMMERCIAL DEVELOPMENT

Chapter Law Review Articles

Revenue and Finance Under Montana's 1972 Constitution, Towe, 51 Mont. L. Rev. 399 (1990).

Public Purpose and Economic Development: The Montana Perspective, Ellingson & Mahoney, 51 Mont. L. Rev. 356 (1990).

Chapter Collateral References

Municipal Corporations *key* 265 through 267, 278, 285, 286, 457 through 463, 858 through 861, 866, 867, 869, 872 through 877.

64A C.J.S. Municipal Corporations §§1573, 1645, 1647, 1650, 1654, 1655.

12 Am. Jur. 2d Bonds §39; 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§186, 187, 518, 543.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property. 62 ALR 4th 1183.

Part 1
Industrial Development Projects

Part Compiler's Comments

Severability Clause: Section 11, Ch. 51, L. 1965, was a severability section.

Part Case Notes

Special Purpose Law: This part is designed for a special purpose and prevails over and is not limited by general legislation that county not make lease longer than 10 years (7-8-2231), that county not sell land except at public auction (7-8-2212), or that county not contract for construction except on public bidding (7-5-2301). Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

Part Attorney General's Opinions

Revenue Bonds: A community college district may enter into an agreement with a city whereby the city would loan the district the proceeds from the sale of an industrial development revenue bond and the district would repay the loan from college revenues. 42 A.G. Op. 78 (1988).

County Authority to Construct Medical Facility: A county has no authority under 7-8-2102 or 53-2-321 (now repealed) to construct a medical facility for doctors. A county does have power under 90-5-101, et seq., to construct such facility using industrial revenue bonds or gifts but may not use federal revenue sharing funds or payments in lieu of taxes and may lease the facility to a hospital district in the county. 37 A.G. Op. 61 (1977).

Part Law Review Articles

Community Reinvestment Act and Consumer Lending, Ashton, 16 Ann. Rev. of Banking L. 2 (1997).

Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice, Jones, 4 Clinical L. Rev. 195 (1997).

Legal and Operational Issues for the Borrower in Project Financing, Hansen, 1994 Min. L. Series: Rocky Mtn. Min. L. Found. 18A (1994).

Making the Community Reinvestment Act Work, Swidler, 69 N.Y.U. L. Rev. 387 (1994).

Limitations on State and Local Government Borrowing for Private Purposes, Temple, 46 Nat'l Tax J. 41 (1993).

Tax-Exempt Bonds: A Sacred Cow That Gave (Some) Milk, Zimmerman, 42 Nat'l Tax J. 283 (1989).

Small Issue Bonds for Manufacturing Facilities, Bing, 41 Tax Notes 1435 (1988).

Life After Industrial Revenue Bonds: Small-Business Development Loans Will Cost More Now, Tell, 14 Current Mun. Probs. 227 (1987).

Public-Private Partnerships in Joint Development: The Legal and Financial Anatomy of Large-Scale Urban Development Projects, Freilich & Nichols, Inst. on Plan. Zoning & Eminent Domain 1 (1986).

Part Collateral References

Adverse impact upon existing business as factor affecting validity and substantive requisites of issuance, by state or local government agencies, of economic development bonds in support of private business enterprise. 39 ALR 4th 1096.

90-5-101. Definitions.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 353 inserted definition of family services providers; in definition of project near end inserted "family services provider facilities"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 541 inserted definition of electric energy generation facility; in definition of project near end after "higher education facilities" substituted "electric energy generation facilities" for "small-scale hydroelectric production facilities with a capacity of 50 megawatts or less"; and made minor changes in style. Amendment effective May 1, 2001.

Chapter 591 in definition of project near end before "hydroelectric production" deleted "small-scale" (amendment rendered void by Ch. 541) and inserted second to last clause concerning production of energy using alternative renewable energy sources. Amendment effective July 1, 2001.

Severability: Section 28, Ch. 591, L. 2001, was a severability clause.

1995 Amendment — Phrase Change: Section 21, Ch. 255, L. 1995, directed the Code Commissioner to change references in the MCA to a person who is developmentally disabled or to a developmentally disabled person to a person with developmental disabilities. The change was not to be made to the phrase "seriously developmentally disabled". In this section, the Code Commissioner has made the change in (8).

1993 Amendment: Chapter 254 near middle of definition of project inserted "community-based facilities for individuals who are developmentally disabled as defined in 53-20-102"; and made minor changes in style.

1986 Amendment: Inserted definitions of higher education facilities and institution of higher education; and near end of definition of project after "medical facilities" inserted "higher education facilities".

1981 Amendments: Chapter 318 in definition of project inserted "small-scale hydroelectric production facilities with a capacity of 50 megawatts or less".

Chapter 376 inserted definition of bonds.

Source: Chapter 318, L. 1981 (SB 138), was introduced at the request of the Environmental Quality Council as a result of an interim study conducted by EQC and the National Conference of State Legislatures. See 1980 report available from Environmental Quality Council.

90-5-102. General municipal and county powers.

Compiler's Comments

Composite Section: This section was amended by Ch. 51 and Ch. 656, L. 1979, and a composite section was prepared by the Code Commissioner, 1979. Chapter 51 was a Code Commissioner bill and was not intended to make substantive changes in the law. Therefore, a conflict of language in subsection (2) between Ch. 51 and Ch. 656 has been resolved in favor of the language in Ch. 656.

Case Notes

Judicial Review: When project was entirely within county, court would not consider hypothetical conflict between 7-1-2101 and provision in this section allowing project partially outside county. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

Constitutionality: Provision for issuance of revenue bonds under this part does not violate Art. XIII, sec. 1, 1889 Mont. Const. (now Art. VIII, sec. 10, 1972 Mont. Const.), since it is done for a public purpose, despite the fact that certain individual associations or corporations may benefit from the legislation. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

Attorney General's Opinions

Community College District Statutory Borrowing Authority: A community college district may enter into an agreement with a city whereby the city would loan the district the proceeds from the sale of an industrial development revenue bond and the district would repay the loan from college revenues. A district may also enter into a promissory note loan agreement with a private lender whereby the district would repay the loan from college revenues. A college district election is not required to approve these construction project financing arrangements; however, a city is required to hold a public hearing prior to issuing industrial development revenue bonds. A district is subject to the election requirement in 20-6-603 when acquiring or constructing sites or buildings. 42 A.G. Op. 78 (1988).

County Revenue Bonds to Finance Community College District Construction: Flathead Valley Community College District may use funds that Flathead County raised by issuing revenue bonds for school construction either by borrowing the funds from the county or by leasing the buildings constructed by the county, subject to applicable school law. 42 A.G. Op. 29 (1987).

Payment Directly to Purchaser Not Considered Interest: A payment made directly to the purchaser of industrial development revenue bonds by the user-beneficiary of the bond proceeds from the user-beneficiary's own funds need not be considered in applying the interest limitation of 17-5-102. 38 A.G. Op. 78 (1980).

Sale of Bonds of Less Than Face Value: The sale of industrial revenue bonds issued pursuant to Title 90, ch. 5, part 1, at a price less than the face value of the bonds does not violate 17-5-102 if the yield of the bonds exceeds 9%. 38 A.G. Op. 78 (1980).

90-5-103. Limited obligation bonds — form and contents — sale — negotiability — filing.

Compiler's Comments

1995 Amendment: Chapter 423 in (2) extended term of payment of bonds from 30 years to 40 years; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1981 Amendment: Inserted (5) referring to filing of bonds with Securities Commissioner.

Case Notes

Constitutionality: This section does not violate Art. XIII, sec. 5, 1889 Mont. Const. (now Art. VIII, sec. 10, 1972 Mont. Const.), since it provides for revenue bonds and does not create debt or liability within the meaning of Art. XIII, sec. 5, 1889 Mont. Const. (now Art. VIII, sec. 10, 1972 Mont. Const.). Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

Attorney General's Opinions

Payment Directly to Purchaser Not Considered Interest: A payment made directly to the purchaser of industrial development revenue bonds by the user-beneficiary of the bond proceeds from the user-beneficiary's own funds need not be considered in applying the interest limitation of 17-5-102. 38 A.G. Op. 78 (1980).

Sale of Bonds of Less Than Face Value: The sale of industrial revenue bonds issued pursuant to Title 90, ch. 5, part 1, at a price less than the face value of the bonds does not violate 17-5-102 if the yield of the bonds exceeds 9%. 38 A.G. Op. 78 (1980).

Law Review Articles

Tax-Exempt Bonds: A Sacred Cow That Gave (Some) Milk (Revenue Enhancement and Other Word Games: When Is It a Tax?), Zimmerman, 42 Nat'l Tax J. 283 (1989).

Life After Industrial Revenue Bonds: Small-Business Development Loans Will Cost More Now, Tell, 14 Current Mun. Probs. 227 (1987).

Collateral References

Municipal Corporations *key* 265 through 267, 278, 285, 286, 457 through 463, 858 through 861, 866, 867, 869, 872 through 877.

64A C.J.S. Municipal Corporations §§1573, 1645, 1647, 1650, 1654, 1655.

90-5-104. Hearing.

Compiler's Comments

1981 Amendment: In the first sentence of (1), inserted "to pay the costs of acquiring or improving a project" after "or county"; inserted "or user of the project" after "borrower" near the middle of (1); inserted "to pay the costs of acquiring or improving a project" after "issue the bonds" in the last sentence of (1); and inserted (2) referring to refunding bonds.

Attorney General's Opinions

Revenue Bonds: A community college district may enter into an agreement whereby the city would loan the district the proceeds from the sale of an industrial development revenue bond and the district would repay the loan from college revenues. However, a city is required to hold a public hearing under this section. 42 A.G. Op. 78 (1988).

90-5-106. Determination of costs — terms of lease.

Attorney General's Opinions

Payment Directly to Purchaser Not Considered Interest: A payment made directly to the purchaser of industrial development revenue bonds by the user-beneficiary of the bond proceeds from the user-beneficiary's own funds need not be considered in applying the interest limitation of 17-5-102. 38 A.G. Op. 78 (1980).

90-5-107. Refunding of bonds.

Compiler's Comments

1981 Amendment: Inserted "including without limitation short-term bonds issued in anticipation of the issuance of long-term bonds" after "any time outstanding" in the first sentence of (1); deleted "unpaid" after "together with any" near the middle of (1); deleted "and 90-5-104" after "90-5-103" near the end of (2); inserted (3) referring to use of principal proceeds from refunding bonds; inserted (4) referring to investment of trust fund money; and inserted (5) referring to limitation on duration of deposit in trust for the retirement of certain bonds.

Erroneous Reference: The compiler has substituted the reference to 90-5-106(1) for an apparently erroneous reference to "subsection (5)" in the first subsection.

90-5-108. Use of proceeds of bond sales.

Compiler's Comments

2001 Amendment: Chapter 353 in (1) at end of first sentence and middle of second sentence inserted reference to a family services provider facility; and made minor changes in style. Amendment effective October 1, 2001.

1986 Amendment: In (1) in two places after "long-term care facility" inserted "or higher education facility".

Case Notes

Equipment Acquired: Pollution controls or other equipment useful in industrial project created under this part may be acquired under provisions of this section from the proceeds of bond sales. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

90-5-110. Taxation of projects.

Compiler's Comments

1983 Amendment: In (2), substituted "warrant for distraint" for "distress warrant".

Case Notes

Constitutionality: This section does not violate provisions of Art. XII, sec. 2, 1889 Mont. Const. (now Art. VIII, sec. 5, 1972 Mont. Const.), against taxing property of county or municipality, since county or municipality has only trust as opposed to beneficial interest, and taxation is based on use of property. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

90-5-112. Economic development levy.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (1)(a) at end substituted "as provided in 15-10-425" for "voting in a city, county, or town election". Amendment effective October 1, 2001.

Chapter 574 in (1) in first sentence after "levy" substituted "a tax upon the taxable value of all taxable property in the city, county, or town" for "up to 1 mill upon the taxable value of all the property in the city, county, or town subject to taxation"; at end of (1)(a) substituted "as provided in 15-10-425" for "voting in a city, county, or town election"; and deleted former (4) that read: "(4) A tax authorized by a vote of the electorate, as provided in subsection (1)(a), may be levied for a period not to exceed 6 years." Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; at end of (4) after "years" deleted "and is not subject to the provisions of Title 15, chapter 10, part 4"; and made minor changes in style. Amendment effective May 10, 1999.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1995 Amendment: Chapter 279 in (4) increased from 5 years to 6 years the time in which an economic development levy is effective. Amendment effective March 29, 1995.

Applicability: Section 2, Ch. 279, L. 1995, provided: "[Section 1] [90-5-112] applies to all levies approved by the electorate after [the effective date of this act] [effective March 29, 1995]."

1993 Amendment: Chapter 386 substituted (1) authorizing 1-mill economic development levy by public vote or vote of governing body for former (1) that read: "Upon an affirmative vote of a majority of the qualified voters voting in a city, county, or town on the question of whether the governing body may levy a tax for economic development, the governing body of that city, county, or town is authorized to levy in any one election up to 1 mill upon the taxable value of all the property in the county, city, or town subject to taxation for the purpose of economic development for a period not to exceed 5 years"; and at beginning of (4) substituted language authorizing tax with a public vote for "The authorization to levy up to 1 mill for the purpose of economic development, as provided in subsection (1)".

1991 Amendment: At end of (4), after "part 4", deleted "if voter authorization for the levy occurred prior to December 31, 1990". Amendment effective April 16, 1991.

1989 Special Session Amendment: Inserted (4) exempting economic development levy from property tax freeze if approval by voters occurs prior to December 31, 1990. Amendment effective July 11, 1989.

90-5-113. Advice and information by department of commerce.

Compiler's Comments

1981 Amendment: Substituted "department of commerce" for "department of community affairs".

90-5-114. Preference of Montana labor.

Compiler's Comments

1993 Amendment: Chapter 464 inserted (2) requiring that a contract contain a statement that the contractor will pay the standard prevailing wage for work on certain projects financed from bond proceeds. Amendment effective April 21, 1993.

1987 Amendment: Deleted reference to subsection (4) of 18-2-401.

Part 2
Western Interstate Nuclear Compact
State Nuclear Policy

Part Collateral References

State regulation of nuclear power plants. 82 ALR 3d 751.

90-5-211. Declaration of policy.

Law Review Articles

Local Nuclear-Free Zone Legislation: Force of Law or Expressions of Political Sentiment?, 22 U.S.F.L. Rev. 561 (1988).

Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components, Borchers & Dauer, 40 Hastings L.J. 87 (1988).

The Legality of Nuclear Free Zones, 55 U. Chi. L. Rev. 965 (1988).

Part 3
Employee Ownership Opportunity Act

Part Compiler's Comments

Effective Date: Section 8, Ch. 671, L. 1989, provided that this part is effective May 16, 1989.

90-5-305. Department to offer employee ownership development assistance and counseling.

Compiler's Comments

1999 Amendment: Chapter 10 at beginning inserted "Upon request by an employee group or organization" and after "department of commerce shall" deleted former (1) through (4) that read: "(1) compile, organize, and make available to the public a library of resources on the subject of employee ownership and participatory management;

(2) research the role of employee ownership in successful state and local economic development programs of other states;

(3) provide public education on the beneficial aspects of employee-owned enterprises;

(4) conduct seminars, workshops, and conferences to increase awareness of the benefits found to be common to employee-owned enterprises. At least one seminar must be held annually for public officials dealing with economic development, business assistance, and business financing programs"; and made minor changes in style. Amendment effective February 16, 1999.

CHAPTER 6
COMMUNITY IMPACT — PLANNING AND ABATEMENT

Chapter Collateral References

Housing. 44 ALR 2d 1433 through 1441; 44 ALR 2d 1418; 130 ALR 1086, supplemented by 172 ALR 973; 130 ALR 1085; 130 ALR 1075, supplemented by 172 ALR 967; 77 ALR 21, supplemented by 118 ALR 57; 19 ALR 73.

Part 1
Financing of Housing

Part Administrative Rules

Title 8, chapter 111, ARM Board of Housing — procedural and program rules.

Part Case Notes

Constitutionality: Title 90, ch. 6, part 1, withstood constitutional challenges under Art. V, sec. 1; Art. V, sec. 11(5); Art. VI, sec. 9; and Art. VIII, sec. 1, 8, and 12 through 14, and the challenge that it conflicts with 32-1-412. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976).

Part Attorney General's Opinions

Buyer's Affidavit and Certification Subject to Public Disclosure: The buyer's affidavit and certification submitted to the Board of Housing pursuant to the mortgage credit certificate program is subject to public disclosure. 43 A.G. Op. 25 (1989).

Part Law Review Articles

The Rehabilitation Tax Credit: Historic Preservation, Affordable Housing, and Community Development, Curran, 6 J. of Affordable Housing & Community Dev. L. 145 (1997).

Affordable Housing: Update on Federal and State Activities, Salkin, Coan, & James, 26 Urb. Law. 859 (1994).

Tax Consequences of Common Improvements—Guidelines for the Developer, Witner & Lynch, 22 Real Est. L.J. 163 (1993).

A Framework for Evaluating Housing and Community Development Partnership Projects, Riggin, Grasso, & Westcott, 52 Pub. Admin. Rev. 40 (1992).

Part Collateral References

Zoning: what constitutes "incidental" or "accessory" use of property zoned, and primarily used, for residential purposes. 54 ALR 4th 1034.

Restrictive covenant limiting land use to "private residence" or "private residential purposes": interpretation and application. 43 ALR 4th 71.

Marital status: what constitutes illegal discrimination under state statutory prohibition against discrimination in housing accommodations on account of marital status. 33 ALR 4th 964.

Group homes: applicability and application of zoning regulations to single residences employed for group living of mentally retarded persons. 32 ALR 4th 1018.

Housing projects: necessity and sufficiency of environmental impact statement under §102(2)(C) of National Environmental Policy Act of 1969 (42 USCS §4332(2)(C)) in cases involving housing and urban renewal projects. 65 ALR Fed. 121.

90-6-102. Legislative declaration.

Administrative Rules

ARM 8.111.301 Purpose and objective.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §§1, 3, 4, 6, 16, 19 through 22.

90-6-103. Definitions.

Compiler's Comments

1997 Amendment: Chapter 472 in definition of persons and families of lower income, in (f), substituted "disabilities" for "handicaps"; and made minor changes in style.

1983 Amendments: Chapter 90 at beginning of definition of housing development, inserted "single-family homes, multifamily projects, housing for the elderly projects, nursing home projects, personal care projects, and"; and substituted "rehabilitating such accommodations" for "rehabilitating dwelling accommodations".

Chapter 359, in definition of bond, inserted "including those on which interest payments are taxable and those on which interest payments are tax exempt".

1981 Amendment: Substituted "department of commerce" for "department of administration" in definition of Department; and changed internal references to the Department and the Board.

Prior Transactions Not Impaired: Section 2, Ch. 357, L. 1979, provided: "Nothing herein affects or impairs any provision of resolutions, indentures, loans, contracts, bonds, or notes adopted, entered into or issued before the effective date of this act."

90-6-104. General powers of the board.

Compiler's Comments

1991 Amendment: Deleted (21) concerning lending money to Board of Investments to establish Montana economic development guaranty fund; and made minor changes in style. Amendment effective July 1, 1991.

Saving Clause: Section 20, Ch. 589, L. 1991, was a saving clause.

Severability: Section 21, Ch. 589, L. 1991, was a severability clause.

1987 Amendment: In (21), referring to Montana economic development guaranty fund, changed "economic development board" to "board of investments".

1983 Amendments: Chapter 249, at end of (13), substituted "housing authority enterprise fund" for "housing finance account".

Chapters 686 and 701 inserted (21) referring to the Montana economic development guaranty fund. Both Ch. 686, L. 1983, and Ch. 701, L. 1983, inserted the subsection in identical form. The Code Commissioner combined the amendments pursuant to sec. 32, Ch. 686, L. 1983, which provided for coordination.

Administrative Rules

Title 8, chapter 111, subchapter 2, ARM Procedural rules.
ARM 8.111.202 Meetings of Board.
Title 8, chapter 111, subchapter 3, ARM Program rules.
ARM 8.111.405 Income limits and loan amounts.
ARM 8.111.409 Cash advances.

Attorney General's Opinions

Legislative Authority to Direct Board of Housing Funds Not Pledged to Trust Indenture: The Legislature has clear authority to direct the placement of state funds under the Housing Act of 1975 and has given the Board of Housing explicit direction in the placement and use of funds under Board control. Therefore, Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority enterprise fund and invested in accordance with the unified investment program as provided in 90-6-107 and this section. 44 A.G. Op. 42 (1992).

Conflicts of Interest: Although no conflicts of interest were found, Board of Housing members (who were also bank officers) would be in conflict of interest if the Board were to contract with the institutions with which the members were associated. 37 A.G. Op. 2 (1977).

90-6-105. Meetings and acts of the board.

Administrative Rules

ARM 8.111.202 Meetings of the Board.

90-6-106. Adoption of rules.

Administrative Rules

Title 8, chapter 111, ARM Board of housing.
ARM 8.111.203 Confidentiality and disclosure of information.
Title 8, chapter 111, subchapter 3, ARM Program rules.
ARM 8.111.302 Lower-income persons and families.
ARM 8.111.303 Financing programs.
ARM 8.111.304 Conditions of financial assistance.
ARM 8.111.305 Qualified lending institutions.
ARM 8.111.305B Definition of regulatory agency.
ARM 8.111.305C Officer's certification.
ARM 8.111.305D False or misleading statements.
ARM 8.111.306 Housing sponsors.
ARM 8.111.405 Income limits and loan amounts.
ARM 8.111.409 Cash advances.

90-6-107. Deposit and expenditure of funds.

Compiler's Comments

2001 Amendment: Chapter 34 in (1) at end of first sentence substituted "17-2-102(2)" for "17-2-102(1)(b)"; and made minor changes in style. Amendment effective July 1, 2001.

1992 Special Session Amendment: Chapter 11, Sp. L. July 1992, in (1), near middle, inserted reference to subsection (4); and inserted (4) transferring $500,000 from the housing authority enterprise fund to the general fund. Amendment effective August 6, 1992, and terminates September 2, 1992.

Severability: Section 7, Ch. 11, Sp. L. July 1992, was a severability clause.

1983 Amendment: In (1), in first sentence, substituted reference to housing authority enterprise fund in the proprietary fund type for "There is a housing finance account in the bonds proceeds and insurance clearance fund provided for in 17-2-102(6).", in second and third

sentences, substituted "housing authority enterprise fund" for "housing finance account", at end of second sentence, deleted "and except as necessary to maintain the capital reserve and revolving accounts", and in middle of last sentence, inserted "except funds appropriated by the legislature for use of the board in payment of expenses incurred in carrying out this part"; in first sentence of (2), substituted "housing authority enterprise fund provided for in subsection (1)" for "sinking fund provided for in 17-2-102(3)"; and in (3), deleted former first sentence, which read: "There is a revolving account in the revolving fund provided for in 17-2-102(7).", at end of first sentence, changed "revolving account" to "housing authority enterprise fund", and in last sentence after "repaid by the board", deleted "into the revolving account".

Attorney General's Opinions

Legislative Authority to Direct Board of Housing Funds Not Pledged to Trust Indenture: The Legislature has clear authority to direct the placement of state funds under the Housing Act of 1975 and has given the Board of Housing explicit direction in the placement and use of funds under Board control. Therefore, Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority enterprise fund and invested in accordance with the unified investment program as provided in 90-6-104 and this section. 44 A.G. Op. 42 (1992).

90-6-108. Financing programs of the board.

Administrative Rules

ARM 8.111.304 Conditions of financial assistance.
ARM 8.111.305 Qualified lending institutions.
ARM 8.111.305A Qualified loan services.

Collateral References

40A Am. Jur. 2d Housing Laws and Urban Redevelopment §16.

90-6-109. Procedure prior to financing of housing developments.

Compiler's Comments

1983 Amendment: Inserted (2) requiring public hearing.

90-6-110. Supervision of housing sponsors.

Administrative Rules

ARM 8.111.306 Housing sponsors.

90-6-111. Bonds and notes.

Compiler's Comments

1985 Amendment: In (5) near beginning, after "outstanding at", substituted "any time" for "any one time", raised limit from $675 million to $975 million, and inserted last sentence making issue price of bonds sold at discount countable against statutory ceiling.

1983 Amendment: In (4), inserted second to last sentence referring to tax status of bond interest payments; and in (5), deleted former last two sentences, which read: "The rate of interest on bonds or notes issued by the board may not exceed an interest rate equal to 1% less than the interest rate established from time to time by the U.S. department of housing and urban development (HUD), federal housing administration (FHA). The interest rate shall be determined for each issue of bonds or notes according to the HUD/FHA rate in effect 30 days prior to the sale of the bonds or notes."

1981 Amendments: Chapter 53, in (5), substituted language tying interest rate limitation to HUD rate for "9% per annum".

Chapter 64 increased the bond debt limit in (5) from $375 million to $675 million.

Statement of Intent: The statement of intent attached to SB 91 (Ch. 64, L. 1981) provided: "A statement of intent was requested for this bill by the Senate Committee on Business and Industry.

It is the intent of the legislature that SB 91 not conflict with SB 90 [Ch. 53, L. 1981]. The bills are not in apparent conflict but both amend section 90-6-111. Both bills are effective on passage and approval. It is the intent of the legislature that should both SB 90 and SB 91 be enacted into law, section 90-6-111 should read as follows:

"90-6-111. Bonds and notes. (1) The board may by resolution, from time to time, issue negotiable notes and bonds in a principal amount as the board determines necessary to provide sufficient funds for achieving any of its purposes, including the payment of interest on notes and bonds of the board, establishment of reserves to secure the notes and bonds, including the reserve

funds created under 90-6-119, and all other expenditures of the board incident to and necessary or convenient to carry out this part.

(2) The board may by resolution, from time to time, issue notes to renew notes and bonds to pay notes, including interest, and whenever it deems refunding expedient, refund any bonds by the issuance of new bonds, whether the bonds to be refunded have or have not matured, and issue bonds partly to refund bonds outstanding and partly for any of its other purposes.

(3) Except as otherwise expressly provided by resolution of the board, every issue of its notes and bonds shall be obligations of the board payable out of any revenues, assets, or moneys of the board, subject only to agreements with the holders of particular notes or bonds pledging particular revenues, assets, or moneys.

(4) The notes and bonds shall be authorized by resolutions of the board, shall bear a date, and shall mature at times as the resolutions provide. A note shall not mature more than 10 years and a bond shall not mature more than 50 years from the date of its issue. The bonds may be issued as serial bonds payable in annual installments or as term bonds or as a combination thereof. The notes and bonds shall bear interest at a rate, or rates, be in denominations, be in a form, either coupon or registered, carry registration privileges, be executed in a manner, be payable in a medium of payment, at places within or without the state, and be subject to terms of redemption as provided in resolutions. The notes and bonds of the board may be sold at public or private sale at such prices, which may be above or below par, as are determined by the board.

(5) The total amount of notes and bonds outstanding at any one time, except notes or bonds as to which the board's obligation has been satisfied and discharged by refunding or for which reserve for payment or other means of payment have been otherwise provided, may not exceed $675 million. The rate of interest on bonds or notes issued by the board may not exceed an interest rate equal to 1% less than the interest rate established from time to time by the U.S. department of housing and urban development (HUD), federal housing administration (FHA). The interest rate shall be determined for each issue of bonds or notes according to the HUD/FHA rate in effect 30 days prior to the sale of the bonds or notes.""

Prior Transactions Not Impaired: Section 2, Ch. 522, L. 1979, provided: "Nothing herein affects or impairs any provision of resolutions, indentures, loans, contracts, bonds, or notes adopted, entered into, or issued before the effective date of this act."

Saving Clauses: Section 2, Ch. 518, L. 1979, sec. 2, Ch. 53, L. 1981, and sec. 2, Ch. 64, L. 1981, were saving clauses.

Collateral References

40A Am. Jur. 2d Housing Laws and Urban Redevelopment §§3, 4, 31.

90-6-112. Provision of bond resolutions.

Compiler's Comments

1981 Amendment: Substituted "department of commerce" for "department of administration" in (8).

Prior Transactions Not Impaired: Section 4, Ch. 143, L. 1979, provided: "Nothing herein shall affect or impair any provision of resolutions, indentures, loans, contracts, bonds, or notes adopted, entered into, or issued before the effective date of this act."

90-6-116. Trust indenture.

Attorney General's Opinions

Legislative Authority to Direct Board of Housing Funds Not Pledged to Trust Indenture: The Legislature has clear authority to direct the placement of state funds under the Housing Act of 1975 and has given the Board of Housing explicit direction in the placement and use of funds under Board control. Therefore, Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority enterprise fund and invested in accordance with the unified investment program as provided in 90-6-104 and 90-6-107. 44 A.G. Op. 42 (1992).

90-6-119. Reserve funds and appropriations.

Compiler's Comments

1983 Amendment: In (2), in middle of first sentence and near end of second sentence, substituted "debt service payments" for "sinking fund payments"; and in last sentence of (3), substituted "debt service fund" for "sinking fund".

90-6-125. Tax exemption of bonds.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 at end of first sentence deleted references to inheritance taxes and gift taxes; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

90-6-126. Pledge of the state.

Compiler's Comments

Prior Transactions Not Impaired: Section 4, Ch. 143, L. 1979, provided: "Nothing herein shall affect or impair any provision of resolutions, indentures, loans, contracts, bonds, or notes adopted, entered into, or issued before the effective date of this act."

90-6-127. Allocation of state limit.

Compiler's Comments

1997 Amendment: Chapter 42 in (1) and (2) inserted parenthetical references to sections of the Internal Revenue Code; in (1) substituted "section 146" for "section 103A(g)"; and in (2) substituted "section 143(j)(3)" for "section 103A(g)". Amendment effective March 12, 1997.

Statement of Intent: The statement of intent attached to SB 143 (Ch. 54, L. 1981) provided: "A statement of intent is required for this act as it grants the board of housing authority to adopt standards for determining and designating areas of chronic economic distress. It is the intent of the legislature that the board adopt rules consistent with section 103A(g) [now 143(j)(3)] of the Internal Revenue Code of 1954, as amended."

Saving Clause: Section 2, Ch. 54, L. 1981, provided: "Nothing in 90-6-127 affects or impairs any provision of resolution indentures, loans, contracts, bonds, or notes adopted, entered into or issued before March 16, 1981."

Administrative Rules

ARM 8.111.307 Areas of chronic economic distress.

90-6-131. Legislative declaration.

Compiler's Comments

Effective Date: Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

90-6-132. Definitions.

Compiler's Comments

Effective Date: Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

90-6-133. Revolving loan account — administration.

Compiler's Comments

2001 Amendment: Chapter 502 in (2)(a) inserted exception clause; and inserted (2)(b) allowing money transferred to the account under Ch. 502 to be used for temporary assistance for needy families. Amendment effective July 1, 2001.

Fund Transfer: Section 2, Ch. 502, L. 2001, provided: "The department of public health and human services shall transfer $3,415,928 of the TANF block grant received as federal special revenue to the affordable housing revolving loan account provided for in 90-6-133."

Effective Date: Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

90-6-134. Housing loan program — loan capital restricted to interest on principal — eligible applicants.

Compiler's Comments

Effective Date: Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

Administrative Rules

Title 8, chapter 111, subchapter 5, ARM Affordable housing revolving loan fund and TANF housing assistance funds.

90-6-135. Coordination with other programs.

Compiler's Comments

Effective Date: Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

90-6-136. Administrative rules.

Compiler's Comments

Effective Date: Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

Administrative Rules

Title 8, chapter 111, subchapter 5, ARM Affordable housing revolving loan fund and TANF housing assistance funds.

Part 2
Coal Impacts — Evaluation and Abatement Funding

Part Compiler's Comments

1981 Appropriations Act — Bona Fide Local Effort — Grants: Section 19, HB 500 (1981), provided in part: "Coal impact grants may be granted to local government units only to remedy a situation resulting from coal development. The local government unit must be making a bona fide local effort to provide for its own needs through normal financing channels (taxes, service fees, or bonds)." Because HB 500 was an appropriations bill for the biennium ending June 30, 1983, the above-quoted language is likely to have direct authoritative application only to that period.

Part Administrative Rules

Title 8, chapter 101, subchapters 1 and 2, ARM Coal Board — organization and rules of practice.

Title 8, chapter 101, subchapter 3, ARM Coal Board substantive rules.

Part Law Review Articles

Federal Constitutional Limitations on the Regulation of Coal Mining Activities, Fox, 3 J. Min. L. & Pol'y 1 (1987-88).

Controlling Boomtown Development: Lessons From the Intermountain Power Project, Part Two, Zillman, 21 Land & Water L. Rev. 325 (1986).

Part Collateral References

Statutory or contractual obligation to restore surface after strip or other surface mining. 1 ALR 2d 575.

90-6-201. Purpose.

Compiler's Comments

1997 Amendment: Chapter 204 near middle, after "complexes", inserted "or as a consequence of a major decline in coal mining or in the operation of coal-using energy complexes". Amendment effective July 1, 1997.

1995 Amendment: Chapter 509 before "support" deleted "invest a portion of the tax revenue from the coal mines in a permanent fund, the income from which shall be used for the"; and made minor changes in style. Amendment effective July 1, 1995.

Attorney General's Opinions

Definition of "Local Governmental Unit": Counties, incorporated cities and towns, school districts, and consolidated governments are the only "local governmental units" under this section and chapter. 36 A.G. Op. 74 (1976), overruled by 37 A.G. Op. 22 (1977).

90-6-202. Account established.

Compiler's Comments

1995 Amendment: Chapter 509 deleted (1) that read: "(1) There is within the state special revenue fund a local impact account. Moneys are payable into this account under 15-35-108. The state treasurer shall draw warrants from this account upon order of the coal board"; and made minor changes in style. Amendment effective July 1, 1995.

1989 Special Session Amendment: Deleted former (3) establishing the education trust fund account. Amendment effective August 11, 1989, and applies retroactively to July 1, 1989.

1987 Amendment: In (1), at end of first sentence after "local impact", deleted "and education trust fund"; and inserted (3) referring to education trust fund account.

Severability: Section 13, Ch. 662, L. 1987, was a severability section.

1983 Amendment: Substituted "state special revenue fund" for "earmarked revenue fund" in two places.

90-6-203. Definition of coal board.

Compiler's Comments

1981 Amendment: Changed internal reference to board.

90-6-205. Coal board — general powers.

Compiler's Comments

1997 Amendment: Chapter 204 deleted former (4) that read: "(4) consider applications for loans from available funds for periods and interest rates to be determined by the board"; in (4), in introductory clause after "grants", deleted "and loans"; in (4)(a), after "development", inserted "or a major decline in coal mining or in the operation of coal-using energy complexes" and near end, after "consequence of", inserted "an increase or decrease in" and after "coal development" inserted "or in the consumption of coal by a coal-using energy complex"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 509 in (3), (4), and (5) substituted "available funds" for "the local impact account"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1987 Amendment: In (3) and (4), after "local impact", deleted "and education trust fund"; in (5), after "90-6-207", substituted "from the local impact account" for "not to exceed in any one year seven-elevenths and after June 30, 1979, seven-fifteenths of the revenue paid into the local impact and education trust fund account"; and deleted former (5)(c) that read: "(c) provided that as used in this subsection (5), "revenue paid" does not include interest income from the account reinvested in the account in trust for the public schools and the university system. Grants and loans may be from current allocations only, and no part of the principal or income of the trust referred to in 90-6-211 may be used for this purpose. The money derived from loan repayments, including the interest thereon, must be deposited to the credit of the local impact fund referred to in 90-6-202."

Severability: Section 13, Ch. 662, L. 1987, was a severability section.

1986 Amendments: Chapter 5 in (5) at end of introductory clause of temporary version inserted "less the appropriation provided in section 1, Chapter 5, Special Laws of June 1986".

Chapter 19 in (5) in introductory clause of temporary version substituted "after June 30, 1987, the board may not exceed in any one year seven-fifteenths of the revenue paid into the local impact and education trust fund account. The board may award grants and loans" for "(5) award grants and loans, subject to 90-6-207, not to exceed in any one year seven-elevenths and after June 30, 1979, and before July 1, 1985, seven-fifteenths and after June 30, 1985, 23.08% of the revenue paid into the local impact and education trust fund account, less the appropriation provided in section 1, Chapter 733, Laws of 1985".

Effective Dates: Chapter 5 was effective June 30, 1986.

Chapter 19 was effective July 10, 1986, and applies to coal mined after April 1, 1986.

1985 Amendments: Chapter 619 inserted (5)(b) referring to loans to Department of Highways; and at beginning of (5)(c), made minor changes in phraseology due to subsection rearrangement.

Chapter 715 in (5) of temporary version near beginning inserted "and before July 1, 1985" and inserted "and after June 30, 1985, 23.08%". Amendment effective May 10, 1985, applicable to coal mined on or after April 1, 1985, and terminates July 1, 1987 (secs. 4 and 5, Ch. 715, L. 1985).

Chapter 733 in (5) of temporary version near beginning of first sentence, inserted "less the appropriation provided in section 1, Chapter 733, Laws of 1985". Amendment terminates July 1, 1986 (sec. 4. Ch. 733, L. 1985).

1983 Amendments: Chapter 250 enacted (6) referring to grant to a local government unit to pay credit for prepaid property taxes.

Chapter 690 made the following changes: inserted (4) referring to requiring local government unit to increase its bonded indebtedness; in opening clause of (5), after "grants" inserted "and loans"; in (5) inserted references to federally recognized Indian tribes and governing bodies thereof; and inserted last two sentences of (5) requiring grants and loans to be from current allocations only and referring to credit of loan repayments.

Oversight Subcommittee Bill: SB 186 (Ch. 690, L. 1983), which amended this section to allow Coal Board loans, was introduced by request of the Coal Tax Oversight Subcommittee. See committee report, Montana Legislative Council, November 1982.

Administrative Rules

ARM 8.101.202 Incorporation by reference of rules for implementing MEPA.
ARM 8.101.203 Categorical exclusions from environmental review process.
Title 8, chapter 101, subchapter 3, ARM Coal Board substantive rules.

Attorney General's Opinions

Limitation on Appropriation: The legislative interpretation of 90-6-205, as established by past appropriations, suggests that the Legislature intended to limit the Coal Board appropriations to 7/15 of the income projected to the local impact and education trust fund in each fiscal year and not up to 7/15 of the entire aggregate amount in the trust fund. 40 A.G. Op. 4 (1983), prior to 1987 amendments.

Governmental Service or Facility: The city of Billings and Yellowstone County proposed to purchase and renovate a building for use by a nonprofit corporation providing treatment for alcohol and drug-related problems. The city proposed to issue industrial revenue bonds (IRBs) to fund a portion of the project, and the county sought a grant from the Montana Coal Board. Under the proposal, title to the building would vest in the nonprofit corporation once the IRBs have been retired. The questions presented were whether: (1) the building in question is a "governmental facility"; (2) a city or county has the power to expend funds for a building the title to which will eventually vest in a private corporation; and (3) contracting with a private corporation is a legitimate means of providing a governmental service. In the opinion of the Attorney General, a local government unit with self-government powers and counties with general government powers are authorized to provide alcohol and drug abuse treatment services under Title 53, ch. 24. Local governments may contract with nonprofit corporations for the provision of such services. A program of alcohol and drug abuse treatment services provided by contract with a private nonprofit corporation is a "governmental service or facility" under 90-6-205 for the purpose of determining eligibility for coal impact assistance. 39 A.G. Op. 31 (1981).

Eligibility for Coal Impact Grants: "Local governmental units" eligible to receive impact grants from the Coal Board under 90-6-205 and 90-6-206 include counties, incorporated cities and towns, consolidated local governments, school districts, and any other statutorily created governmental unit or district empowered to exercise delegated sovereign powers over a defined geographical region of the state, viz., county water and sewer districts, rural improvement districts which include areas of more than one county and have separate governing bodies (counties may apply for grants to pay for rural improvement district expenses), and special improvement districts within cities, towns, and consolidated units. Opinion No. 74, Volume 36, of the Official Opinions of the Attorney General is overruled except that portion excluding Indian tribes from impact grant eligibility. 37 A.G. Op. 22 (1977), prior to 1983 amendments.

90-6-206. Basis for awarding grants.

Compiler's Comments

1997 Amendment: Chapter 204 throughout section, in three places, inserted reference to increase or decrease in coal development and reference to consumption of coal by a coal-using energy complex; in (1), after "grants", deleted "and loans"; in (2) substituted "the year of application for assistance" for "coal development in that area or 1970, whichever is later, which impacts the local government units applying for assistance; in (3) substituted "the year of application for assistance" for "coal development in that area or 1970, whichever is later"; and made minor changes in style. Amendment effective July 1, 1997.

1983 Amendment: At beginning after "Grants" inserted "and loans".

Attorney General's Opinions

Eligibility for Coal Impact Grants: "Local governmental units" eligible to receive impact grants from the Coal Board under 90-6-205 and 90-6-206 include counties, incorporated cities and towns, consolidated local governments, school districts, and any other statutorily created governmental unit or district empowered to exercise delegated sovereign powers over a defined geographical region of the state, viz., county water and sewer districts, rural improvement districts which include areas of more than one county and have separate governing bodies (counties may apply for grants to pay for rural improvement district expenses), and special improvement districts within cities, towns, and consolidated units. Opinion No. 74, Volume 36, of the Official Opinions of the Attorney General is overruled except that portion excluding Indian tribes from impact grant eligibility. 37 A.G. Op. 22 (1977), prior to 1983 amendments.

90-6-207. Priorities for impact grants.

Compiler's Comments

1997 Amendment: Chapter 204 in (1), in introductory clause, substituted "biennially" for "annually"; in (1)(a), near middle after "increased", inserted "or decrease"; in (1)(b)(ii), after "increase", inserted "or decrease" and after "expanded" inserted "or reduced"; deleted (3)(a) that read: "(a) Except as provided in 90-6-205(5)(b), beginning July 1, 1993, and ending June 30, 1995, the coal board may not award more than 20% of the funds appropriated to it each year for grants and loans to governmental units and state agencies for meeting the needs caused by coal development to local governmental units other than those governmental units designated under subsection (1)"; in (3) substituted "90-6-205(4)(b)" for "90-6-205(5)(b)", after that citation deleted "beginning July 1, 1995, and thereafter", increased from 10% to 50% the maximum funds that Board may award to certain local governmental units, before "coal development" inserted "an increase or decrease", and after "coal development" inserted "or in the consumption of coal by a coal-using energy complex"; in (5), near end after "growth", inserted "or decline"; in (7), near beginning, inserted "based on an increase in coal development or in the consumption of coal by a coal-using energy complex", substituted "subsection (1)(a), (1)(b), or (1)(c)" for "this section", after "coal impact grants" deleted "and loans", substituted "50%" of Board funds for "20% and beginning July 1, 1995, not more than 10%", and after "board for grants" deleted "and loans"; in (7)(a) substituted "coal-using energy complex" for "mines"; substituted (7)(b) concerning cessation or reduction for "tax revenue is not available to mitigate the impact due to the closure of a mine or facility"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments: Chapter 418 in (1)(b)(i) substituted "department of environmental quality" for "department of state lands"; and in (1)(b)(iv) substituted "board of environmental review" for "board of natural resources and conservation". Amendment effective July 1, 1995.

Chapter 509 in (6) substituted "appropriated" for "placed in the local impact account established" and after "are" deleted "subject to appropriations by the legislature". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendment: Chapter 503 in (1)(b)(i) and (1)(d)(i) substituted "300,000 tons" for "1 million tons"; in (1)(b)(i), at end after "year", inserted "and that the department of commerce determines will commence production within 2 years"; in (1)(b)(ii), at beginning, substituted "the department of commerce has determined that" for "or that will increase", after "mine" inserted "will increase", after "year and" deleted "for which the department of commerce determines", and after "production" deleted "authorized by the permit"; in (1)(b)(ii) and (1)(b)(iv), before "years", reduced time from 3 years to 2 years; inserted (1)(b)(iii) requiring Department to annually designate each county and all local governmental units within each county in which a newly constructed railroad serves a new, existing, or expanding coal mine; in (1)(b)(iv), before "steam-generating" and "coal-burning", inserted "new"; in (1)(c) increased distance from 50 miles to 100 miles and at end inserted reference to subsection (1)(b)(iv); substituted (3) relating to awarding grants and loans for former (3) that read: "(3) Except as provided in 90-6-205(5)(b), the coal board shall, subject to the appropriations of the legislature, award at least 50% of all grants awarded to governmental units and state agencies for meeting the needs caused by coal development each year to these designated governmental units"; inserted (7) relating to impact grant designation; and made minor changes in style. Amendment effective July 1, 1993.

1987 Amendment: In (6), after "local impact", deleted "and educational trust fund", after "this part" deleted "subject to the limitations imposed by 90-6-211", and at end, after "local impact", deleted "or for transfer to a permanent trust for education".

Severability: Section 13, Ch. 662, L. 1987, was a severability section.

1985 Amendments: Chapter 462 in (1)(a) at beginning, changed references to government entities from plural to singular and made corresponding change in predicate; and inserted (1)(b) through (2) referring to designation of counties and local governmental units.

Chapter 619 in (3) at beginning inserted "Except as provided in 90-6-205(5)(b)".

1983 Amendment: Near beginning of (1), inserted "annually"; after "counties," inserted "incorporated cities and"; in middle of first sentence, substituted "as a result of the impact of coal development a net increase" for "an increase"; at end of first sentence, substituted "over one of the 3-year periods specified in subsection (2)" for "during any 3 years since 1972 as a result of the impact of coal development"; and inserted (2) listing five 3-year periods.

Attorney General's Opinions

Reversion of Coal Board Funds: The provision of 17-7-304, requiring the reversion of unexpended and unencumbered portions of appropriations at the close of the fiscal year, applies to the appropriations to the Coal Board from the local impact and education trust fund. The Legislature appropriates money to the Coal Board as a discretionary matter under 90-6-207. There is no constitutional impediment to the reversion of the funds, nor is there any indication of legislative intent to except the Coal Board grant money from the operation of 17-7-304. The Board must follow the legislatively created financial requirements. 40 A.G. Op. 4 (1983), prior to 1987 amendments.

90-6-208. Applications for grants.

Compiler's Comments

1997 Amendment: Chapter 204 in first sentence, after "apply for a grant", deleted "or a loan", after "consequence of" inserted "an increase or decrease of", and after "coal development" inserted "or of an increase or decrease in the consumption of coal by a coal-using energy complex"; and made minor changes in style. Amendment effective July 1, 1997.

1983 Amendment: In first sentence, after "agency" inserted "or the governing body of a federally recognized Indian tribe" and after "a grant" inserted "or a loan".

Attorney General's Opinions

Eligibility for Coal Impact Grants: "Local governmental units" eligible to receive impact grants from the Coal Board under 90-6-205 and 90-6-206 include counties, incorporated cities and towns, consolidated local governments, school districts, and any other statutorily created governmental unit or district empowered to exercise delegated sovereign powers over a defined geographical region of the state, viz., county water and sewer districts, rural improvement districts which include areas of more than one county and have separate governing bodies (counties may apply for grants to pay for rural improvement district expenses), and special improvement districts within cities, towns, and consolidated units. Opinion No. 74, Volume 36, of the Official Opinions of the Attorney General is overruled except that portion excluding Indian tribes from impact grant eligibility. 37 A.G. Op. 22 (1977), prior to 1983 amendments.

90-6-209. Limitations on grants.

Compiler's Comments

1997 Amendment: Chapter 204 in (1), in first sentence, substituted prohibition on obligation of unappropriated funds for "as long as the grant or loan does not extend over more than 10 years and does not exceed reasonable revenue expectations" and in second sentence, after "grants", deleted "and loans" and substituted "90-6-205(4)(b)" for "90-6-205(5)(b)"; deleted former (2) relating to loans (see 1997 Session Law for text); in (2), in introductory clause in two places, deleted reference to loan; and made minor changes in style. Amendment effective July 1, 1997.

1985 Amendments: Chapter 420 in (2)(a) inserted second sentence listing authorized sources of repayment; and Ch. 420 and Ch. 619 in (2)(e) corrected reference from "subsection (4)" to "subsection (2)(d)".

Chapter 619 in (1) near end inserted "except grants made pursuant to 90-6-205(5)(b)".

1983 Amendment: In (1), in first sentence after "grant" inserted "or loan", and substituted second sentence concerning limitation on amount of grants and loans for "No state agency may receive grants which exceed 5% of the money allocated to the board." Subsections (2) and (3) relating to loan repayment sources and loans to Indian tribes (see 1983 Session Law for text) were enacted as separate sections by sec. 5 and 6, Ch. 690, L. 1983; they have been codified as part of this section for convenience.

90-6-210. Coal area highway reconstruction program.

Compiler's Comments

1997 Amendment: Chapter 42 in (2), in two places, and in (3), in two places, substituted "section" for "subsection"; and made minor changes in style. Amendment effective March 12, 1997.

1995 Amendment — Phrase Change: Section 6, Ch. 75, L. 1995, directed the Code Commissioner to change references in the MCA to Highway Commission to Transportation Commission. In this section, the Code Commissioner has made the change in (2). Amendment effective July 1, 1995.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1981 Amendment: Added "in consultation with the governing bodies of the counties in the area" at the end of (1).

Section Not Codified: Section 50-1803(1), R.C.M. 1947, an appropriations clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 502, L. 1975, as amended by sec. 2, Ch. 540, L. 1977.

Collateral References

39 Am. Jur. 2d Highways, Streets, and Bridges §§191, 195; 53A Am. Jur. 2d Mines and Minerals §348.

Part 3
Hard-Rock Mining Impact

Part Compiler's Comments

Severability: Section 15, Ch. 617, L. 1981, was a severability section.

Part Administrative Rules

Title 8, chapter 104, ARM Hard-Rock Mining Impact Board — substantive and procedural rules.

Part Law Review Articles

Controlling Boomtown Development: Lessons From the Intermountain Power Project, Part Two, Zillman, 21 Land & Water L. Rev. 325 (1986).

90-6-301. Declaration of necessity and purpose.

Compiler's Comments

1987 Amendment: In first sentence, after "state", substituted "may cause an influx of people directly related to the area of the development" for "causes an influx of people into the area of the development many times larger than the number of people directly involved in the mining operation"; and in second sentence, after "services", substituted "may create" for "creates".

90-6-302. Definitions.

Compiler's Comments

2001 Amendment: Chapter 7 in definition of local government unit in (c) substituted "solid waste management district" for "refuse disposal district"; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 464 in first sentence in (4) after "82-4-335" deleted "on or after May 18, 1981"; and inserted definition of property tax prepayment. Amendment effective April 22, 1999.

1991 Amendment: Inserted definition of facility; in definition of local government unit inserted (g) including a park district as a local government unit; and made minor changes in style. Amendment effective March 29, 1991.

1985 Amendments: Chapters 453 and 582 at end of definition of large-scale mineral development substituted "82-4-303" for "82-4-303(10)".

Chapter 582 in definition of local government unit after "means" substituted reference to county, city, town, school district, and the list of independent special districts for "a political subdivision of this state, including a county, city, town, school district, or other special district that provides any of the services referred to in subsection (1)(c) of 90-6-307"; and in in definition of large-scale mineral development, in first sentence after "milling facility", substituted reference to average number of persons on the payroll for a 6-month period for "that will:

(a) employ at any given time at least 100 people; or

(b) cause, or be expected to cause, an increase in estimated population of at least 15% in a local government unit when measured against the average population of the local government unit in the 3-year period immediately preceding the commencement of the construction of the mining facility".

90-6-303. Chairman — meetings — facilities — funding.

Compiler's Comments

1983 Amendment: In (4), substituted "deposited to the credit of the hard-rock mining impact trust account" for "generated".

90-6-304. Accounts established.

Compiler's Comments

1999 Amendment: Chapter 389 in (2)(a)(iii) substituted "90-6-331" for "90-6-331(1)". Amendment effective July 1, 1999.

1993 Amendment: Chapter 349 deleted (2)(c) that read: "(c) The board shall report to the legislature any expenditure from the hard-rock mining impact trust reserve account."

1991 Amendment: In (1), near beginning, substituted "agency fund type" for "special revenue fund"; in (2), at end of introductory clause, inserted provision that within the trust account, there is a reserve account not to exceed $100,000; inserted (2)(a), (2)(b), and (2)(c) relating to use of money in the impact trust account, use of money in the impact trust reserve account, and a report to the Legislature of expenditures from the reserve account; in (3), near beginning, substituted "the hard-rock mining impact trust account" for "this account", after "as provided in 90-6-303" inserted "and then establishing and maintaining the reserve account in the amount of $100,000, as provided in subsection (2) of this section, the remaining", and at end deleted "If money available to pay administrative and operating expenses is insufficient, the board may apply for supplemental money from the general fund"; and made minor changes in style. Amendment effective April 24, 1991.

1989 Amendment: In (2) inserted last sentence relating to availability of supplemental money from general fund to pay administrative and operating expenses of the Board. Amendment effective May 16, 1989.

Saving Clause: Section 22, Ch. 672, L. 1989, was a saving clause.

Effective Date — Retroactive Applicability: Section 23, Ch. 672, L. 1989, provided: "[This act] is effective on passage and approval [approved May 16, 1989] and applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

1983 Amendments: Chapter 277 substituted references to state special revenue fund for references to earmarked revenue fund.

Chapter 619 inserted (2) referring to hard-rock mining impact trust account. The amendment made by Ch. 619 is effective July 1, 1985.

90-6-305. Hard-rock mining impact board — general powers.

Compiler's Comments

2001 Amendment: Chapter 307 deleted former (1)(c) that read: "(c) award grants to local government units subject to 90-6-306"; and made minor changes in style. Amendment effective July 1, 2001.

1991 Amendment: In (1)(a), after "staff", inserted "including its administrative staff, and retain"; in (1)(e), after "90-6-307", inserted "90-6-311, and 90-6-403(3)"; and made minor change in style. Amendment effective April 6, 1991.

1989 Amendment: Deleted former (1)(d) that read: "(d) award grants or loans to local government units from money paid into the hard-rock mining impact trust account subject to the provisions of 90-6-321 and 90-6-322"; and in (1)(e) deleted "90-6-321, and 90-6-322". Amendment effective May 16, 1989.

Saving Clause: Section 22, Ch. 672, L. 1989, was a saving clause.

Effective Date — Retroactive Applicability: Section 23, Ch. 672, L. 1989, provided: "[This act] is effective on passage and approval [approved May 16, 1989] and applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

1983 Amendments — Composite: Chapter 489, in (1)(b), inserted "and administration of this part".

Chapter 619, in (1)(b), inserted "and determinations"; inserted (1)(d) referring to grants and loans made from hard-rock mining impact trust account of the version effective July 1, 1985; and in (1)(f) inserted "90-6-321 and 90-6-322".

The Code Commissioner has arranged the amendments to (1)(b) for grammatical sequence.

The amendments made by Ch. 619 are effective July 1, 1985.

1983 Statement of Intent: The statement of intent attached to HB 472 (Ch. 489, L. 1983) provided: "A statement of intent is required for this bill because it expands the rulemaking authority of the hard-rock mining impact board.

(1) The legislature intends, under Section 2 [which amended this section], that the hard-rock mining impact board be authorized to adopt rules under the Montana Administrative Procedure Act that will facilitate and effectuate its role as a Quasi-Judicial Board responsible for administering the Hard-Rock Mining Impact Act. The rules must ensure that implementation of the act is consistent with the purpose of mitigating local government impacts that may result from the commencement of large-scale hard-rock mineral developments in this state.

(2) The legislature intends that the board adopt rules for implementing Section 3 [which amended 90-6-307] by establishing criteria that the board will use when making decisions on whether or not to grant a requested 30-day extension to an impact review period.

(3) The legislature further intends that the board adopt rules implementing Section 5 [which enacted 90-6-311] that provide:

(a) a procedure for conducting hearings on objections to proposed impact plan amendments that is consistent with the Montana Administrative Procedure Act; and

(b) a list of factors that will be used to determine the validity of objections to the proposed impact plan amendments.

The rulemaking authority granted in this bill is intended to supersede the existing authority that the hard-rock mining impact board has pursuant to Chapter 617, Laws of 1981."

1981 Statement of Intent: The statement of intent attached to HB 718 (Ch. 617, L. 1981) provided: "A statement of intent is required for HB 718 because [90-6-305] grants rulemaking authority to the hard-rock mining impact board.

The legislature intends that the rules adopted by the board governing its proceedings be procedural in nature.

(1) The legislature intends that the board may adopt forms for notice required by the board and to be given by the board.

(2) The board is intended to act as a "referee" in hearing disputes between local government units and large-scale mineral developers over the impact plan submitted to the board under the provisions of [90-6-307]. The hearings are subject to Montana Administrative Procedure Act and any rules adopted by the board governing the hearings must be consistent with that act.

(3) The legislature intends that the rules adopted by the board governing the awarding of grants shall be consistent with the criteria set out in [90-6-306] [now repealed]."

Administrative Rules

Title 8, chapter 104, ARM Hard-Rock Mining Impact Board — substantive and procedural rules.

90-6-307. Impact plan to be submitted.

Compiler's Comments

1995 Amendment: Chapter 418 in (11) and (14) substituted "department of environmental quality" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (2), in middle of first sentence, after "industrial" substituted "local government facility" for "educational". Amendment effective March 29, 1991.

1987 Amendment: In (1), at end of introductory material, substituted reference to the mineral developer and the affected local government units ensuring contents of impact plan for "The impact plan shall include"; inserted (4) requiring public hearing on impact plan; inserted (5) allowing objection by affected local government unit not identified in impact plan; in (6), in fourth sentence, substituted "the impact plan is approved without any review by the board" for "the impact plan shall be approved by the board" and inserted last sentence referring to alteration of approved plan; and in (13) substituted "subsections (5) and (6)" for "subsection (4)".

1987 Amendment of Rule: Rule 8.104.203A, ARM, was amended by sec. 6, Ch. 311, L. 1987.

1987 Statement of Intent: The statement of intent attached to Ch. 311, L. 1987, provided: "A statement of intent is required for this bill in order to clarify the role of the hard-rock mining impact board. The amendments to section 3 of this bill [90-6-307] are designed to ensure that the board is not involved in reviewing the plan unless objections are filed under 90-6-307 or amendments are sought under 90-6-311.

The amendment of Rule 8.104.203A, Administrative Rules of Montana, does not indicate a legislative intent to define population changes associated with a mineral development. This matter should be determined by the mineral developer and the affected local governments. The amendment further indicates that the legislature desires that the hard-rock mining impact board should not influence this determination by enacting rules on matters that should be the product of discussions between the mineral developer and the affected local governments, except when the board is required to address impact plan concerns during the objections and amendment processes.

This bill also attempts to stress the cooperation role of the mineral developer and the affected local governments in formulating the impact plan. The impact plan, as a result, should reflect the concerns and agreements among these entities. Furthermore, to ensure public involvement in the planning process, a mandatory public hearing is required."

Applicability: Sections 8 and 9, Ch. 311, L. 1987, provided that the amendments made by that chapter were effective on passage and approval (approved March 31, 1987) and apply to all impact plans submitted after that date.

1985 Amendments: Chapter 24 near end of (10) after "hard-rock mining impact" changed "fund" to "account".

Chapter 582 in (1)(c) after "services" deleted "including but not limited to police and fire protection, sewage, water treatment, schools, road construction and upkeep, education, and medical care"; in (2) in first sentence inserted "as identified in the impact plan" and inserted second sentence referring to other revenue sources and funding mechanisms; in first sentence of (3) substituted "the end" for "commencement"; in (5) in second sentence substituted language referring to extension of 30-day period for "If within 30 days the local government unit and the developer cannot resolve the objection", and in third sentence inserted "If the objections are not resolved"; in (7) substituted "guarantee" for "guaranty", and substituted "meet the increased costs of public services and facilities as specified" for "make all the payments to the board required"; in (8) substituted reference to payment to a local government unit or the Board and deposit and verification of payments for "The board shall deposit all payments received from the developer into the hard-rock mining impact account established by 90-6-304"; in (9) substituted "guarantee" for "guaranty", and after "payment" deleted "of each required payment"; in (10) inserted "if the hard-rock mining impact account is used to deliver payments to the local government unit"; in (11) inserted "or 90-6-311(3)"; inserted (12) referring to waiver of impact plan requirement; and inserted (13) referring to certification of compliance and failure to comply.

1983 Amendment: In (1), in first sentence substituted "After" for "When" and made minor change in sentence structure, and inserted second sentence referring to cooperation to eliminate duplication of effort in data collection; inserted (3) referring to financial assistance to prepare for and evaluate the impact plan; in (4), inserted second and third sentences referring to extension of 90-day period and in last sentence inserted "or any extension thereof"; in (5) near beginning substituted "within 10 days" for "promptly"; and in (11), in first sentence inserted "and it results in some remedial order by the board or court of competent jurisdiction", and near end inserted "administrative or judicial".

In (11) the Code Commissioner corrected subsection reference from "(3)" to "(4)" which was apparently overlooked when new (3) was inserted and former (3) renumbered as (4). Only (4) relates to filing of objection.

Case Notes

Issue Not Raised Before Agency Not Allowed to Be Raised on Judicial Review: Lincoln County argued in District Court that Sanders County had not objected to an impact plan before the Hard-Rock Mining Board and therefore had no standing to appeal the Board's decision in District Court. The Supreme Court held that Lincoln County had not argued that Sanders County was without standing when the issue was before the agency; therefore, Lincoln County could not raise the standing issue for the first time in District Court. Lincoln County v. Sanders County, 261 M 344, 862 P2d 1133, 50 St. Rep. 1352 (1993), followed in Hilands Golf Club v. Ashmore, 2002 MT 8, 308 M 111, 39 P3d 697 (2002).

Mining Board's Amendment of Mine's Allocation of Taxes Not Beyond Its Authority: Lincoln County argued that the Hard-Rock Mining Board had exceeded its authority in amending Noranda's tax allocation plan because it allocated an additional amount of the taxes to Sanders County, which was not anticipated to be negatively impacted by an influx of workers. The Supreme Court ruled that the Board could modify tax allocation plans for any affected county not just counties impacted by an influx of workers and that the Board had not acted unreasonably in amending the plan on the basis that after 5 years, the majority of increased property valuation would be in Lincoln County and not Sanders County where the ore body was located. Lincoln County v. Sanders County, 261 M 344, 862 P2d 1133, 50 St. Rep. 1352 (1993).

90-6-308. Permit procedure and review of impact plan to run concurrently.

Compiler's Comments

1987 Amendment: At end of section substituted "under 90-6-307(5) and (6), if review occurs" for "under 90-6-307".

90-6-309. Tax prepayment — large-scale mineral development.

Compiler's Comments

Name Change — Short Form Amendment: Section 55(1), Ch. 633, L. 1993, directed the Code Commissioner to change the term "foundation program", when it refers to equalization aid for schools, to "BASE funding program" in this section.

1989 Special Session Amendment: In (1), after "university levy" inserted "established under 20-25-423" and after "foundation program" substituted "established in 20-9-331 and 20-9-333" for "of 45 mills"; and made minor changes in phraseology. Amendment effective August 11, 1989, and applies retroactively to July 1, 1989.

1985 Amendment: In (1) at end of first sentence substituted "as specified in the impact plan" for "in an amount equal to at least three times the estimated property tax due the year the large-scale mineral development facility commences operation" and in last sentence increased mills from 40 to 45; and in (5) after "shall provide for", substituted reference to tax credit and limitations thereon for "repayment according to the following procedure:

(a) In each year after the commencement of mining, the local government shall:

(i) divide its budget by the average mill levy of its jurisdiction during the 3 years immediately preceding commencement of mining operations, to arrive at a taxable valuation needed to fund its budget using the average 3-year mill levy;

(ii) reduce the taxable valuation of property of a person who prepaid property taxes by the excess, if any, of the total taxable value of the taxing jurisdiction including the person's property over the taxable value determined under subsection (5)(a)(i), but in no case by an amount greater than the taxable value of the person's property.

(b) The reduction in taxable value, if any, determined under subsection (5)(a)(ii) times the average mill levy used in subsection (5)(a)(i) equals the property tax prepayment credit allowed for the taxable year for that local government unit. Any local government unit not receiving a payment shall not be affected by this section, and no reduction in value shall be used in the computation of taxes due that unit of local government. In no event shall the credit allowed under this part extend more than 10 years beyond the date the prepayment is made under this section.

(c) The procedure established under subsection (5)(a) shall continue from year to year until the total credit allowed the person who prepaid property taxes equals the total property taxes prepaid".

1983 Amendment: Near beginning of (1), substituted "governing body" for "board of county commissioners"; and in (3), substituted "through an appropriate financial institution" for "with appropriate bank guarantees".

90-6-310. Local government facility impact bonds.

Compiler's Comments

1999 Amendment: Chapter 464 in first sentence in (2) after "guarantee" inserted "through a third-party financial institution"; and made minor changes in style. Amendment effective April 22, 1999.

1991 Amendment: In (1), in first sentence near beginning, substituted "the construction, renovation, improvement, or acquisition of local government" for "new school", after "facilities" inserted language relating to mineral development, after "determined" inserted "under 90-6-307", after "agreement with the" substituted "local government unit having" for "trustees of a school district that has", and at end, after "the burden of the", deleted "issuance of bonds to cover the cost of such new construction" and inserted language referring to increased capital and operating costs and in second sentence, at beginning, substituted "local government unit" for "trustees of a school district" and near end, after "industrial", substituted "local government facility" for "educational"; in (2), near middle of first sentence, substituted "local government unit" for "school district", in third sentence substituted "local government unit" for "trustees or the school district" and inserted language making bonds special limited obligations, and inserted last sentence requiring levy and pledge of special fund; in (3) inserted references to 7-7-2203 and 7-7-4201 and deleted references to 20-9-410 and 20-9-421 through 20-9-432; inserted (4) relating to impact bond resolution; inserted (5) specifying registration and payment of bonds; inserted (6) authorizing sale of bonds; inserted (7) relating to combined bond offerings; inserted (8) specifying content of interlocal agreement; and made minor changes in style. Amendment effective March 29, 1991.

90-6-311. Impact plan amendments.

Compiler's Comments

1991 Amendment: In (1)(a) changed subsection reference to 90-6-302. Amendment effective March 29, 1991.

1985 Amendment: In first sentence of (1) inserted "specified in the plan"; in (1)(a) substituted "75 persons, as determined under 90-6-302(4)" for "100 people"; and deleted former (1)(b) that read: "changes in the large-scale mineral development cause, or can be expected to cause, an increase in estimated population of at least 15% in a local government unit when measured against the average population of the local government unit in the 3-year period preceding the commencement of new construction or new operations of the mining facility; or".

90-6-331. Fund transfer.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 389 deleted former (2) that read: "(2) The transfer of funds required by this section is a statutory appropriation pursuant to 17-7-502"; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 464 at beginning substituted "Prior to each October 31" for "On July 1, 1990, and prior to each October 1 thereafter" and substituted "September 30" for "September 1"; and made minor changes in style. Amendment effective April 22, 1999.

1991 Amendments: Chapter 376 in (1) substituted "prior to each October 1" for "on each July 1", substituted "money segregated by county" for "funds remaining", and substituted "as of September 1" for "after June 30". Amendment effective April 6, 1991.

Chapter 616 in (1) substituted "prior to each October 1" for "on each July 1", substituted "money segregated by county" for "funds remaining", inserted "following allocation to the hard-rock mining impact trust reserve account", and substituted "as of September 1" for "after June 30". Amendment effective April 24, 1991.

Saving Clause: Section 22, Ch. 672, L. 1989, was a saving clause.

Effective Date — Retroactive Applicability: Section 23, Ch. 672, L. 1989, provided: "[This act] is effective on passage and approval [approved May 16, 1989] and applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

Part 4
Hard-Rock Mining Impact
Property Tax Base Sharing

90-6-402. Definitions.

Compiler's Comments

1989 Special Session Amendment: In definition of taxable valuation deleted reference to subsection (2)(a) of 15-6-132. Amendment effective August 11, 1989, and applies retroactively to net proceeds taxes, severance taxes, and local government taxes on oil and gas, other than interim production and new production, produced after December 31, 1988.

90-6-403. Jurisdictional revenue disparity — conditioned exemption and reallocation of certain taxable valuation.

Compiler's Comments

1999 Amendment: Chapter 584 in fourth sentence in (1) and at beginning of (2) inserted reference to 15-10-420; inserted fifth sentence in (1) providing that increase in taxable valuation allocated to local government unit is considered newly taxable property pursuant to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Name Change — Short Form Amendment: Section 55(1), Ch. 633, L. 1993, directed the Code Commissioner to change the term "foundation program", when it refers to equalization aid for schools, to "BASE funding program" in this section.

1987 Amendment: In (1), near beginning of first sentence after "approved", deleted "by the board".

90-6-404. Allocation of taxable valuation for local taxation purposes.

Compiler's Comments

1999 Amendment: Chapter 464 at beginning of (1) deleted "If the board determines that", after "located" substituted "must be allocated" for "is not affected by the development and if this determination is shown on the impact plan", and after "proceeds" deleted "must be allocated to that local government unit" and deleted second sentence that read: "This provision is intended to establish a minimum allocation for the units and does not prohibit proof by a unit that actual direct impacts would exceed 20% of the total impacts of the development"; and made minor changes in style. Amendment effective April 22, 1999.

1991 Amendment: Inserted (1) requiring that if Board determines that local government unit in which ore body or mineral deposit being mined is located is not affected by development as shown on impact plan, 20% of total increase in taxable valuation of proceeds must be allocated to local government unit and providing that provision does not prohibit proof by unit that impacts would exceed 20% of total developmental impacts; at beginning of (2) substituted "remaining" for "total"; in (3) and (4), at beginning before "increase", deleted "total" and after "valuation" inserted "equal to that subject to subsection (2)"; and inserted (5) authorizing modification of distribution formula by approved or amended impact plan if needed to ensure reasonable correspondence between costs of mineral development and allocation of taxable valuation from development.

Retroactive Applicability: Section 3, Ch. 760, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all large-scale mineral developments required to comply with 90-6-307 that did not have an impact plan approved pursuant to 90-6-307, as of December 31, 1990."

Case Notes

Mining Board's Amendment of Mine's Allocation of Taxes Not Beyond Its Authority: Lincoln County argued that the Hard-Rock Mining Board had exceeded its authority in amending Noranda's tax allocation plan because it allocated an additional amount of the taxes to Sanders County, which was not anticipated to be negatively impacted by an influx of workers. The Supreme Court ruled that the Board could modify tax allocation plans for any affected county not just counties impacted by an influx of workers and that the Board had not acted unreasonably in amending the plan on the basis that after 5 years, the majority of increased property valuation would be in Lincoln County and not Sanders County where the ore body was located. Lincoln County v. Sanders County, 261 M 344, 862 P2d 1133, 50 St. Rep. 1352 (1993).

Part 5
Reverse Annuity Mortgage Loan

Part Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 178, L. 1989, provided: "A statement of intent is required for this bill because it grants the board of housing authority to adopt rules to secure, implement, and administer a reverse annuity mortgage loan program to be utilized by elderly Montanans. The legislature intends that the rules adopted by the board recognize the necessity for some elderly Montanans to draw income for essential living expenses and other purposes from the equity accumulated in their single-family homes during their lifetimes while continuing to enjoy the shelter and security afforded by those residences. The rules must afford the elderly homeowner monthly payments over 10 years, as provided in the loan agreement, under terms that assure life tenancy and the right to repay the loan balance at any time. The rules must be consistent with other statutory or regulatory provisions requiring sufficient security for a loan provided by the board. The rules must prescribe forms and procedures necessary to apply for and receive reverse annuity mortgages."

Severability: Section 9, Ch. 178, L. 1989, was a severability clause.

Part Administrative Rules

Title 8, chapter 111, subchapter 4, ARM Reverse annuity mortgage loan.

Part Law Review Articles

The Reverse Mortgage, Powell, 10 Tax Mgmt. Fin. Plan. J. 3 (1994).

Reverse Mortgages: An Untapped Resource, Edelstein, 26 Md. B.J. 26(5) (1993).

Reverse Mortgages: Mandatory Counseling and Other Protections for the Elderly Homeowner, 27 Clearinghouse Rev. 622 (1993).

Reverse Annuity Mortgages and the Lien Priority Problem, O'Brien, 8 Ann. Rev. Banking L. 687 (1989).

Part Collateral References

Construction and application of statutes expressly protecting borrowers in second mortgage transactions. 43 ALR 4th 675.

90-6-503. Definitions.

Compiler's Comments

1997 Amendment: Chapter 39 in definition of mortgagor, in (b) after "older", inserted exception clause; in (3)(c), at end, deleted "that is unencumbered by any prior mortgage, lien, or pledge"; in definition of single-family dwelling, at end, deleted "excluding a condominium as defined in 70-23-102"; and made minor changes in style. Amendment effective March 12, 1997.

90-6-507. Rulemaking authority.

Administrative Rules

Title 8, chapter 111, subchapter 4, ARM Reverse annuity mortgage loan.

Part 7
Treasure State Endowment Program

Part Compiler's Comments

Severability: Section 11, Ch. 517, L. 1993, was a severability clause.

Endowment Fund to Continue: Section 7, Ch. 3, Sp. L. January 1992, provided: "The treasure state endowment fund created in 17-5-703 must be maintained even though transfers to the fund from the coal severance tax bond fund cease on June 30 of the 20th year following the initial transfer to the fund, as provided in [section 10]. Interest earnings from the treasure state endowment fund must continue to be paid annually to the treasure state endowment special revenue account as provided in 17-5-703(4)(b)."

Trust Fund Inviolate: Section 8, Ch. 3, Sp. L. January 1992, provided: "[Sections 1, 2, and 5 through 10] [Title 90, ch. 6, part 7] do not authorize or permit the expenditure of any part of the coal severance tax trust fund created by Article IX, section 5, of the Montana constitution."

Coal Tax Transfer: Section 10, Ch. 3, Sp. L. January 1992, provided: "On July 1, 1993, $10 million is transferred from the coal severance tax permanent fund to the treasure state endowment fund and is dedicated for the purposes provided in [this act]."

Part Administrative Rules

Title 8, chapter 94, subchapter 38, ARM Treasure state endowment program.

Part Law Review Articles

Reviewing Infrastructure Trends, Manvel, 61 Tax Notes 1125 (1993).

Infrastructure Financing: Special Tax Districts, Newman, 6 Prob. & Prop. 10(5) (1992).

Why County Public Financing Is Inadequate to Meet the Infrastructure Crisis, Thomas, 20 Stetson L. Rev. 799 (1991).

Part Collateral References

Amount of appropriation as limitation on damages for breach of contract recoverable by one contracting with government agency. 40 ALR 4th 998.

90-6-701. Treasure state endowment program created — definitions.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 268 in definition of local government inserted "a tribal government"; and inserted definition of tribal government. Amendment effective October 1, 1999.

Chapter 498 at end of definition of local government inserted reference to regional water and wastewater authorities; and made minor changes in style. Amendment effective April 27, 1999.

Severability: Section 26, Ch. 498, L. 1999, was a severability clause.

1993 Amendment: Chapter 432 inserted (1)(b) authorizing program to borrow from Board of Investments; in (2), at end, inserted "and to repay loans from board of investments"; in (3)(b), at end, inserted "or a county or multicounty water, sewer, or solid waste district"; and made minor changes in style.

Effective Date: Chapter 3, Sp. L. January 1992, approved by the electorate June 2, 1992, did not contain an effective date. Pursuant to 1-2-201, this section is effective October 1, 1992.

90-6-702. Purpose.

Compiler's Comments

Effective Date: Chapter 3, Sp. L. January 1992, approved by the electorate June 2, 1992, did not contain an effective date. Pursuant to 1-2-201, this section is effective October 1, 1992.

90-6-703. Types of financial assistance available.

Compiler's Comments

1995 Purported Amendment: Chapter 418 purported to amend this section, but as enacted, no changes were made.

1993 Amendment: Chapter 432 inserted (2) authorizing the adoption of rules and making of deferred loans; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 432, L. 1993, provided: "This bill requires a statement of intent because it grants the department of natural resources and conservation and the department of commerce additional rulemaking authority. It allows the departments to adopt rules allowing interest rate subsidies for local infrastructure projects to be paid over the life of the loan or bonding period. The rules adopted by the departments must be consistent with the priorities for projects contained in 90-6-710. The bill also allows the departments to make loans for preliminary engineering study costs. These loans must be repaid at the time overall construction financing is arranged."

Effective Date: Chapter 3, Sp. L. January 1992, approved by the electorate June 2, 1992, did not contain an effective date. Pursuant to 1-2-201, this section is effective October 1, 1992.

90-6-709. Agreements with tribal governments.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

90-6-710. Priorities for projects — procedure — rulemaking.

Compiler's Comments

2000 Amendment: (Version effective July 1, 2001) Chapter 10 inserted (1) concerning statutory appropriation for engineering work; and made minor changes in style. Amendment effective July 1, 2001, and terminates June 30, 2005.

1999 Amendment: Chapter 453 in (1) in fourth sentence after "form" inserted "and amount"; in (2) in introductory clause after "given to" inserted "infrastructure"; inserted (2)(b) establishing a priority for projects that reflect greater need for financial assistance than other projects; in (2)(d) after "projects that" substituted "reflect substantial past efforts to ensure sound, effective, long-term planning and management of public facilities and that attempt to resolve the infrastructure problem with local resources" for "result in a benefit to the public commensurate with the amount of financial assistance. However, the benefit to the public may not be measured by population alone"; deleted former (2)(e) that read: "(e) projects that reflect greater need for financial assistance than other projects"; in (2)(f) near end before "expansion" substituted "encourage" for "do not discourage"; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 2, Ch. 453, L. 1999, was a saving clause.

Applicability: Section 4, Ch. 453, L. 1999, provided: "[This act] applies to projects funded with interest earnings from the treasure state endowment fund earned after June 30, 2001."

1993 Amendment: Chapter 432 in (1), in fifth sentence after "by the department", deleted "of natural resources and conservation under Title 85, chapter 1, part 6"; inserted (2)(c) concerning long-term solutions, (2)(d) concerning benefit to the public, and (2)(e) concerning need for financial assistance; deleted former (2)(f) and (2)(g) that read: "(f) projects that result in a benefit to the public commensurate with the amount of financial assistance;

(g) projects that reflect greater need for financial assistance than other projects"; in (4), after "The department", deleted "of natural resources and conservation shall adopt rules to implement the prioritization and recommendation of projects to be financed pursuant to 17-5-701" and at end, before "shall adopt", deleted part of former (5) that read: "Except as provided in subsection (4), the department of commerce"; and made minor changes in style.

1992 Statement of Intent: The statement of intent attached to Ch. 3, Sp. L. January 1992, provided: "A statement of intent is necessary for [this act] [this part] because [section 6] [90-6-710] delegates rulemaking authority to the department of natural resources and conservation and to the department of commerce. It is the intent of the legislature that in adopting rules to implement the prioritization of projects, the agencies shall use the rules established for

determining priorities for water development projects as guidelines. The department of commerce should use its existing procedures for determining the local governments that are eligible for financing as a guide in adopting rules to implement the treasure state endowment program. In adopting rules to implement [this act] [this part], the departments shall take into consideration any coordination between [this act] [this part] and the coal severance tax school bond contingency loan fund."

Effective Date: Chapter 3, Sp. L. January 1992, approved by the electorate June 2, 1992, did not contain an effective date. Pursuant to 1-2-201, this section is effective October 1, 1992.

Administrative Rules

Title 8, chapter 94, subchapter 38, ARM Treasure state endowment program.

90-6-715. Special revenue account — use.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 233 inserted (2) allowing up to 25% of local matching funds required for the treasure state endowment regional water system to be in the form of debt incurred by local government entities included in the regional water system to construct individual drinking water systems before the individual systems were connected to the regional system and limiting amount of debt that may be used for matching funds; and made minor changes in style. Amendment effective April 13, 2001.

Chapter 435 in (3) near beginning after "systems" inserted "that supply water to large geographical areas and serve multiple local governments". Amendment effective April 30, 2001.

Extension of Termination Date: Section 1, Ch. 70, L. 2001, amended sec. 6, Ch. 495, L. 1999, by extending the termination date imposed by Ch. 495 to June 30, 2016. Effective June 30, 2013.

Effective Date: Section 5, Ch. 495, L. 1999, provided that this section is effective July 1, 1999.

Termination: Section 6, Ch. 495, L. 1999, provided: "[This act] terminates June 30, 2013."

CHAPTER 7
HEALTH FACILITY DEVELOPMENT

Chapter Compiler's Comments

Source: Chapter 703, L. 1983, is based on Sections 39-1441 through 39-1460, Idaho Code.

Severability: Section 28, Ch. 703, L. 1983, is a severability clause.

Chapter Administrative Rules

Title 8, chapter 120, ARM Montana Health Facility Authority — substantive and procedural rules.

Chapter Law Review Articles

Public Purpose and Economic Development: The Montana Perspective, Ellingson & Mahoney, 51 Mont. L. Rev. 356 (1990).

Chapter Collateral References

Licensing and regulation of nursing or rest homes. 53 ALR 4th 689.

Validity, construction, and effect of statute requiring consultation with, or approval of, local governmental unit prior to locating group home, halfway house, or similar community residence for the mentally ill. 51 ALR 4th 1096.

Part 1
General Provisions

90-7-101. Short title.

Compiler's Comments

2001 Amendment: Chapter 137 substituted "Montana Facility Finance Authority" for "Montana Health Facility Authority". Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

90-7-102. Definitions.

Compiler's Comments

2001 Amendment: Chapter 137 in definition of authority substituted "Montana facility finance authority" for "Montana health facility authority"; inserted definition of eligible facility; deleted definition of facility that read: ""Facility" means any health care facility or prerelease center provided for in 90-7-104"; in definition of institution in (a)(i) near end substituted "an eligible facility" for "a health facility"; in definition of participating institution substituted "an institution" for "a health institution or prerelease center" and after "construction or acquisition of" substituted "an eligible facility" for "a facility"; in definition of revenue in two places before "facilities" inserted "eligible"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendments: Chapter 477 substituted definition of facility for definition of health facility that read: ""Health facility" means any facility provided for in 90-7-104"; substituted institution for health institution as defined term and inserted (a)(ii) defining institution to include nonprofit prerelease center, corporation, or other organization authorized to operate state prerelease center; substituted participating institution for participating health institution as defined term, after "health institution" inserted "or prerelease center", and before "facility" deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 in definition of institution inserted (b) to include a certain health care provider network, integrated delivery system, joint venture or partnership, purchasing alliance, or insurers and third-party administrators; and made minor changes in style.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

1991 Amendment: Inserted definition of capital reserve account. Amendment effective July 1, 1991.

90-7-103. Allowable costs.

Compiler's Comments

2001 Amendment: Chapter 137 throughout section before "facility" inserted "eligible". Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendment: Chapter 477 in (1), after "eligible", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

90-7-104. Eligible facility.

Compiler's Comments

2001 Amendment: Chapter 137 inserted (1)(k) regarding facility providing services for elderly; in (1)(l) near end of beginning clause substituted "an eligible facility" for "a health facility"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendments — Composite Section: Chapter 93 inserted (1)(b) regarding a public health center, as defined in 7-34-2102. Amendment effective March 19, 1997.

Chapter 472 in former (1)(c) substituted "facilities for persons with disabilities" for "center for persons with developmental disabilities"; and in (1)(d) substituted "chemical dependency treatment facilities" for "chemical dependency treatment center".

Chapter 477 throughout section, before "facility", deleted "health"; inserted (1)(i) regarding a prerelease center; in (1)(k), before "facility", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 in (1)(c) substituted "a facility" for "center"; inserted (1)(j) expanding eligible health facility definition to include diagnostic, treatment, or surgical center; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Saving Clause: Section 21, Ch. 93, L. 1997, was a saving clause.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

1995 Amendment — Phrase Change: Section 21, Ch. 255, L. 1995, directed the Code Commissioner to change references in the MCA to a person who is developmentally disabled or to a developmentally disabled person to a person with developmental disabilities. The change was not

to be made to the phrase "seriously developmentally disabled". In this section, the Code Commissioner has made the change in (1).

90-7-111. Credit of state not pledged — statement on obligation required.

Compiler's Comments

1997 Amendment: Chapter 477 near end of (1), before "institution", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

90-7-121. Biennial audit.

Compiler's Comments

1989 Amendment: In first sentence, after "each", changed "fiscal year" to "biennium". Amendment effective March 22, 1989.

Part 2
Authority
Administration, Powers, and Limitations

90-7-201. Authority — quorum — mode of action — expenses.

Compiler's Comments

1997 Amendment: Chapter 479 at end of first sentence in (2) substituted "as provided for in Title 2, chapter 3, part 2" for former second sentence that read: "Notice of meetings must be as provided in the bylaws of the authority"; and made minor changes in style.

1987 Amendment: Substituted (3) providing for compensation of members for former (3) that read: "Members of the authority may receive no compensation for services but are entitled to necessary expenses, as provided in 2-18-501 through 2-18-503, incurred in the discharge of their duties."

90-7-202. Powers of authority.

Compiler's Comments

2001 Amendment: Chapter 137 in (17) at end after "costs of eligible facilities" inserted "or to make grants for the purposes described in 90-7-211(2)(e)"; inserted (19) regarding program parameters for loan or grant approval; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1999 Amendment: Chapter 160 at beginning of (5) inserted exception clause; in (17) at beginning of second sentence inserted exception clause; inserted (18) allowing loans under 17-6-308; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendments — Composite Section: Chapter 477 in (15), after "eligible", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 near beginning of (5), after "funds", deleted "obtained from the issuance of bonds and notes" and at end, after "authority", inserted "to be used to carry out the purposes of this chapter"; at beginning of (10) inserted "establish programs to make" and at end inserted "from any funds"; at end of (17) inserted "and bond financing costs, and to provide funds to make loans to finance the costs of eligible facilities"; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

1983 Amendment: In (5), substituted "an enterprise fund to the credit of the authority" for "the bond proceeds fund"; and in (17), substituted "enterprise fund" for "earmarked revenue account".

Statement of Intent: The statement of intent attached to HB 721 (Ch. 703, L. 1983) provided: "A statement of intent is required for this bill because it grants the Health Facility Authority the power to adopt rules to administer this chapter. The Legislature intends that these rules include:

(1) procedural rules to govern the Authority;

(2) procedures for assessing applications;

(3) the establishment of fees to be charged by health institutions [before amendment by Ch. 477, L. 1997] using the procedures of the authority; and

(4) procedures for determining the eligibility of a facility.

The legislature declares that the purpose of this bill is health care cost containment [before amendment by Ch, 477, L. 1997]. By making this bonding authority available, the legislature intends that health care costs will be contained by reducing the costs of facilities and equipment so that these savings may be passed on to consumers."

Administrative Rules

Title 8, chapter 120, ARM Montana Health Facility Authority — substantive and procedural rules.

90-7-203. Staff of authority.

Compiler's Comments

Code Commissioner Correction: At end of section following "department", the Code Commissioner inserted "of commerce". "Department" is not defined in this chapter; however, reference to this section in 2-15-1815(4) indicates that "department" refers to "department of commerce".

90-7-204. Agent of the authority.

Compiler's Comments

1997 Amendment: Chapter 477 in two places in first sentence, after "participating" and "eligible", deleted "health". Amendment effective July 1, 1997.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

90-7-211. Necessary expenses — fees.

Compiler's Comments

2001 Amendment: Chapter 137 in (2) in first and second sentences near middle before "facilities" inserted "eligible"; in (2)(a) after "determine the need for" inserted "eligible"; inserted (2)(e) regarding grants to institutions; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendments — Composite Section: Chapter 477 in first and third sentences in (2), after "participating", and in (3), after "eligible", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 at end of second sentence in (2), after "financed", deleted "and is not refundable by the authority, whether or not any application is approved"; in (2)(b) inserted "operating, and financing"; in (2)(c) inserted "or loan losses"; inserted (2)(d) relating to loans to finance the costs of eligible facilities; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

90-7-213. Loan limitation.

Compiler's Comments

2001 Amendment: Chapter 137 in two places after "cost" deleted "or appraised value". Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendments — Composite Section: Chapter 477 after "eligible" deleted "health"; and made minor changes in style.

Amendment effective July 1, 1997. Chapter 479 in two places, after "cost", inserted "or appraised value"; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

90-7-214. Restriction on operating facility — leases.

Compiler's Comments

2001 Amendment: Chapter 137 in (3) in two places before "facility" inserted "eligible"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendment: Chapter 477 in (1), after "eligible", deleted "health"; in second sentence in (2), after "participating", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

90-7-220. Montana developmental center loan.

Compiler's Comments

2001 Amendment: Chapter 137 in (1) in first sentence after "agreement with the" substituted "Montana facility finance authority" for "Montana health facility authority"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendment: Chapter 422 in (2), near middle after "due under the loan agreement", deleted former fourth sentence that read: "Principal and interest payments constitute a statutory appropriation within the meaning of 17-7-502." Amendment effective July 1, 1997.

1995 Amendments — Phrase Change: Section 21, Ch. 255, L. 1995, directed the Code Commissioner to change references in the MCA to a person who is developmentally disabled or to a developmentally disabled person to a person with developmental disabilities. The change was not to be made to the phrase "seriously developmentally disabled". In this section, the Code Commissioner has made the change in (1) and (2).

Chapter 546 at beginning of (1) substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 513 in (1), in second sentence, increased maximum loan amount from "$8,665,000" to "$10.5 million" and inserted last sentence requiring investment earnings on bonds or funds held for bonds to be used to pay principal and interest on loan pursuant to loan agreement.

Name Change: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Effective Date: Section 5, Ch. 819, L. 1991, provided that this section is effective on passage and approval. Approved May 24, 1991.

90-7-221. Montana state hospital loan.

Compiler's Comments

1997 Amendment: Chapter 422 in (2), near middle after "due under the loan agreement", deleted former fourth sentence that read: "Principal and interest payments constitute a statutory appropriation within the meaning of 17-7-502." Amendment effective July 1, 1997.

Code Commissioner Change: Pursuant to sec. 6, Ch. 94, L. 1995, in four places, the Code Commissioner substituted Montana Mental Health Nursing Care Center for Montana Center for the Aged.

Pursuant to sec. 4, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Corrections and Human Services.

Severability: Section 9, Ch. 557, L. 1995, was a severability clause.

Effective Date: Section 11, Ch. 557, L. 1995, provided that this section is effective April 26, 1995.

90-7-226. Procedure prior to financing projects.

Compiler's Comments

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

Effective Date: Section 20, Ch. 477, L. 1997, provided: "[This act] is effective July 1, 1997."

90-7-227. Public hearing.

Compiler's Comments

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

Effective Date: Section 20, Ch. 477, L. 1997, provided: "[This act] is effective July 1, 1997."

90-7-228. Additional reserves, funds, and accounts.

Compiler's Comments

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

Effective Date: Section 20, Ch. 477, L. 1997, provided: "[This act] is effective July 1, 1997."

Part 3
Notes and Bonds

90-7-301. Notes.

Compiler's Comments

2001 Amendment: Chapter 137 in first sentence near middle before "facility" inserted "eligible"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

90-7-302. Bonds and notes of authority.

Compiler's Comments

2001 Amendment: Chapter 137 in (5) in introductory clause near middle after "agreement, regarding the" inserted "eligible"; in (6) after "that any contract let for a" inserted "public" and after "issued under this part" deleted "on or after July 1, 1993"; and in (7) near end after "more than one" inserted "eligible". Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendment: Chapter 479 in (1) increased bond authority from $150 million to $250 million; and made minor changes in style.

1993 Amendment: Chapter 464 inserted (6) requiring certification that an applicant has submitted a statement that the contractor will pay the standard prevailing wage for work on certain projects financed from bond proceeds; and made minor changes in style. Amendment effective April 21, 1993.

1985 Amendment: In (1) after "may", inserted "in each biennium" and after "issue bonds", substituted "and notes in an aggregate principal amount not to exceed $150 million, exclusive of bonds or notes issued to refund its outstanding bonds or notes" for "not in excess of $50 million for any 2-year period".

90-7-303. Procedure for issuance of bonds.

Compiler's Comments

2001 Amendment: Chapter 137 in (1) near middle after "find that the facility" inserted "is an eligible facility and", substituted "by an institution" for "by a health institution", and at end substituted "providing services contemplated by this chapter" for "fulfilling its obligation to provide health care facilities or by a prerelease center for the purpose of preparing persons to reenter society"; in (2) after "to be expended for any" inserted "eligible facility that is a"; in (3) substituted "any eligible facility unless the institution provides evidence that the eligible facility is" for "any facility until it has been shown that the facility is" and substituted "the institution reasonably expects that it will generate sufficient revenue to pay principal and interest payments" for "there will be sufficient revenues to ensure that principal and interest payments are made"; deleted former (4) and (5) that read: "(4) The authority may not allow the proceeds of any bonds or notes to be expended for any facility until it has considered the ability of the institution to operate the facility based on the institution's experience and expertise.

(5) The authority shall ensure that its financings consistently provide fair and realistic terms and covenants sufficient to protect the position of the lenders or bondholders"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendment: Chapter 477 near beginning of (1), after "eligible", deleted "health" and at end inserted "or by a prerelease center for the purpose of preparing persons to reenter society"; near beginning of (2), before "facility", inserted "health care"; in two places in (4), before "institution" and "institution's", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

1985 Amendment — Retroactive Application: In (2) at beginning inserted "The authority may not allow the proceeds of any bonds or notes to be expended for any facility unless", which has the effect of substituting requirement of review and approval prior to expenditure of proceeds for requirement of review and approval prior to issuance of bonds.

Section 3, Ch. 326, L. 1985, provided: "This act is effective on passage and approval and applies retroactively, within the meaning of 1-2-109, to any health facility financing undertaken after October 1, 1983."

90-7-304. Security of bondholders.

Compiler's Comments

2001 Amendment: Chapter 137 in (2)(a) after "all or any part of the" inserted "property of the"; in (2)(b), (3)(a), (3)(c), and (3)(d) before "facility" inserted "eligible"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

1997 Amendment: Chapter 477 in (2)(a), after "participating", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

90-7-305. Trust agreement to secure bonds.

Compiler's Comments

1997 Amendments — Composite Section: Chapter 477 in last sentence, near end of section after "eligible", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 at end of first sentence, after "Montana", inserted "or outside of Montana, if it is determined by the authority to be in the best interest of financing the bonds"; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

90-7-307. Conveyance of title.

Compiler's Comments

1997 Amendment: Chapter 477 near beginning, after "eligible", deleted "health" and near beginning and at end, after "participating", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

90-7-317. Capital reserve account.

Compiler's Comments

1997 Amendments: Chapter 477 at end of (2)(a) inserted "or bonds used to finance prerelease centers that contract with the state"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 inserted introductory clause in (3) providing authority to deposit into capital reserve account; and made minor changes in style.

Severability: Section 18, Ch. 477, L. 1997, was a severability clause.

1995 Amendment: Chapter 557 in (2)(a) substituted "facilities" for "facility" and inserted "and 90-7-221"; and made minor changes in style. Amendment effective April 26, 1995.

Severability: Section 9, Ch. 557, L. 1995, was a severability clause.

1993 Amendment: Chapter 513 at end of (2)(a) inserted "or bonds issued to finance the facility described in 90-7-220".

Preamble: The preamble attached to Ch. 673, L. 1991, provided: "WHEREAS, it is necessary to establish effective, low-cost financing options for the construction and development of health facilities in Montana; and

WHEREAS, health facility financing will promote affordable access and quality of health care services for the people of the state."

Effective Date: Section 7, Ch. 673, L. 1991, provided: "[This act] is effective July 1, 1991."

90-7-318. Administration of capital reserve account.

Compiler's Comments

Effective Date: Section 7, Ch. 673, L. 1991, provided: "[This act] is effective July 1, 1991."

90-7-319. Maintenance of capital reserve account.

Compiler's Comments

Effective Date: Section 7, Ch. 673, L. 1991, provided: "[This act] is effective July 1, 1991."

90-7-320. Loans — purchase of bonds and notes.

Compiler's Comments

Effective Date: Section 7, Ch. 673, L. 1991, provided: "[This act] is effective July 1, 1991."

CHAPTER 8
MONTANA CAPITAL COMPANY ACT

Chapter Administrative Rules

Title 8, chapter 97, subchapter 8, ARM Montana capital companies.

Chapter Law Review Articles

Revenue and Finance Under Montana's 1972 Constitution, Towe, 51 Mont. L. Rev. 399 (1990).

Montana's Constitutionally Established Investment Program: A State Investing Against Itself, Fitzgerald, 51 Mont. L. Rev. 378 (1990).

Public Purpose and Economic Development: The Montana Perspective, Ellingson & Mahoney, 51 Mont. L. Rev. 356 (1990).

Part 1
General Provisions

90-8-102. Declaration of policy.

Compiler's Comments

1991 Amendments: Chapter 263 in (3)(a), (3)(c), and (4) inserted reference to a Montana small business investment capital company; and made minor changes in style. Amendment effective March 29, 1991.

Chapter 589 in (4) substituted "permanent coal tax trust fund" for "in-state investment fund established by 17-6-306"; and made minor change in style. Amendment effective July 1, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

Saving Clause: Section 20, Ch. 589, L. 1991, was a saving clause.

Severability: Section 21, Ch. 589, L. 1991, was a severability clause.

1989 Amendment: In (4) changed "17-6-305" to "17-6-306".

1987 Amendment: Inserted (4) referring to purchase of debentures of capital companies.

90-8-104. Definitions.

Compiler's Comments

2001 Amendment: Chapter 591 in definition of qualified investment inserted (a)(i)(J) concerning production of energy using alternative renewable energy sources; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 28, Ch. 591, L. 2001, was a severability clause.

1999 Amendment: Chapter 410 in definition of qualified investment in (a)(ii) at end inserted "and is a small business pursuant to the regulations promulgated by the United States small business administration at 13 CFR 121, et seq."; and made minor changes in style. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendments: Chapter 263 in definitions of capital base and certified Montana capital company inserted reference to a certified Montana small business investment capital company; and inserted definition of qualified Montana small business investment capital company. Amendment effective March 29, 1991.

Chapter 467 in definition of qualified investment, in (a)(i)(D) after "generation", inserted "or the manufacture of low emission wood or biomass combustion devices". Amendment effective April 17, 1991.

Chapter 576 throughout section substituted "department" for "board"; deleted definition of Board; inserted definition of Department; in definition of qualified investment inserted provision concerning initial requirements for a qualified investment and inserted (c) concerning financing of a non-Montana business; and made minor changes in style. Amendment effective April 23, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

1991 Statement of Intent: The statement of intent attached to Ch. 467, L. 1991, provided: "A statement of intent is required for this bill because it is anticipated that rulemaking proceedings will be required for implementation.

Montana currently has nine communities that exceed the state and federal ambient air quality standards for particulate matter smaller than 10 microns in diameter (PM-10) and two communities that exceed carbon monoxide standards. Several other communities have PM-10 concentrations approaching the ambient standards.

It is the intention of the legislature that the tax credit available for the cost of purchasing and installing a low emission wood or biomass combustion device be restricted to only the most efficient devices available on the market. While replacing older wood stoves with newer low-emission wood stoves may reduce ambient levels of PM-10, carbon monoxide, and other pollutants, the legislature finds that the current tax incentives do not encourage the improvements in efficiency and reductions in pollutants that will be required in the future to improve air quality.

While it restricts the availability of these tax incentives, the legislature finds it appropriate to increase the amount of the incentive available for those devices that qualify. This action is intended to stimulate the availability of the more efficient devices and further promote their use. Changes are also being made, as appropriate, to preserve the application of other incentives to the installation and production of these devices."

Applicability: Section 5, Ch. 467, L. 1991, provided: "[This act] applies to taxable years beginning after December 31, 1991, and before January 1, 1996."

1989 Amendment: At end of definition of capital base deleted "and additions to net worth caused by increases in retained earnings".

1987 Amendments: Chapter 370 in portion of definition of qualified investment referring to nonfossil forms of energy generation deleted reference to subsection (5) of 15-32-102.

Chapter 581 substituted definition of Board for "the Montana economic development board provided for in 2-15-1805".

Chapter 583 in definition of capital base, after "equity capital", deleted "or net worth" and inserted remainder of subsection defining capital base; in portion of definition of qualified investment referring to a debt or equity financing, after "financing of", deleted "or a purchase and leaseback financing of"; and inserted portion of definition of qualified investment referring to businesses outside Montana.

Saving Clause: Section 6, Ch. 583, L. 1987, was a saving clause.

1983 Amendment: Section 18(1), Ch. 554, L. 1983, substituted references to the Montana Economic Development Board for references to the Department of Commerce.

90-8-105. Rulemaking.

Compiler's Comments

1991 Amendment: Substituted "department" for "board". Amendment effective April 23, 1991.

1983 Amendment: Section 18(1), Ch. 554, L. 1983, substituted reference to the Montana Economic Development Board for reference to the Department of Commerce.

Statement of Intent: The statement of intent attached to HB 685 (Ch. 554, L. 1983) provided: "A Statement of Intent is required for House Bill 685 because it grants rulemaking authority to the Department of Commerce to implement the act.

It is the intention of the legislature that the tax credits herein provided be applied only in the case of properly qualified investments. It is therefore the intention of the legislature that the department of commerce, in making rules to define a small business, use whatever means necessary to arrive at a definition of small business which takes into account the unique nature of Montana small business. It is similarly the intention of the legislature that in the development of rules for certification and qualification of capital companies, the department [board] shall take into account the capital needs of the state based upon such information made available to it on its own initiative and through such hearings as are necessary to achieve the purposes of the act. It is further the intention of the legislature that in determining such rules as are necessary to carry out the examination functions of the act, the department [board] shall take into account commonly accepted principles of financial institution examinations currently in use in the examination of banks and other such institutions. It is further the intention of the legislature that the rules authorized in the act be adopted in a timely fashion."

Administrative Rules

Title 8, chapter 97, ARM Organizational and procedural rules.

Title 8, chapter 97, subchapter 8, ARM Montana capital companies.

90-8-106. Fees.

Compiler's Comments

1999 Amendment: Chapter 410 in second sentence inserted "that is not a small business investment company that is licensed and regulated by the United States small business administration". Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

Effective Date: Section 15, Ch. 576, L. 1991, provided that this section is effective on passage and approval. Approved April 23, 1991.

Part 2
Tax Credits
Investments in Capital Company

Part Administrative Rules

Title 8, chapter 97, subchapter 8, ARM Montana capital companies.

90-8-201. Certification of Montana capital companies and small business investment capital companies.

Compiler's Comments

1999 Amendment: Chapter 410 throughout section removed requirement that there be a single company; in (1) deleted former last sentence that read: "The application and certificate must specify the level of capitalization that the company expects to qualify for the tax credits provided for in 90-8-202"; in (3) substituted "certified development companies" for "503 corporations"; at beginning of (5)(a) deleted "using the tax credits to" and after "being" substituted "licensed as" for "designated"; and made minor changes in style. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1997 Amendment: Chapter 549 in (5)(b), after "Montana university system research and development", deleted "the Montana board of science and technology development (second stage)"; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 14, Ch. 549, L. 1997, was a saving clause.

1991 Amendments: Chapter 263 in (1), at beginning of first sentence, inserted requirement that the Board (now Department, pursuant to sec. 13, Ch. 576, L. 1991, a coordination instruction) certify one Montana small business investment capital company and in second sentence inserted reference to Montana small business investment capital company; at end of (4) inserted reference to qualified Montana small business investment capital company; inserted (5) relating to eligibility for certification as Montana small business investment capital company; and made minor changes in style. Amendment effective March 29, 1991.

Chapter 576 throughout section substituted "department" for "board". Amendment effective April 23, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 263, L. 1991, provided: "A statement of intent is required for this bill in order to provide a guideline for the board of investments to follow in certifying a Montana small business investment capital company. The board shall take the steps necessary to ensure that the company certified as the small business investment capital company will represent and be concerned with the economic development needs of all communities of the state and not just one geographic area of the state."

Saving Clause: Section 18, Ch. 263, L. 1991, was a saving clause.

Severability: Section 19, Ch. 263, L. 1991, was a severability clause.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

Coordination Instruction: Section 13, Ch. 576, L. 1991, a coordination section, provided: "If House Bill No. 863 is passed and approved and if it contains new language referring to the board, defined as the board of investments, then the code commissioner is instructed to substitute the term "department", defined as the department of commerce, for the term "board" in House Bill No. 863." House Bill No. 863 was approved March 29, 1991, as Ch. 263, L. 1991.

1989 Amendment: In (1), at beginning, substituted "From time to time" for "Every 6 months, commencing January 1, 1984, or 3 months after rules are adopted to implement this chapter, whichever occurs first".

1987 Amendment: Substituted (2) explaining purpose to increase the general economic welfare of the state for "The application must show that the applicant's purpose is to encourage and assist in the creation, development, and expansion of Montana-based businesses and to provide maximum opportunities for the employment of Montanans by making venture capital available to sound small Montana firms."

Saving Clause: Section 6, Ch. 583, L. 1987, was a saving clause.

1983 Amendment: Section 18(1), Ch. 554, L. 1983, substituted references to the Montana Economic Development Board for references to the Department of Commerce.

90-8-202. Designation of qualified Montana capital companies — designation of qualified Montana small business investment capital company — tax credit.

Compiler's Comments

1999 Amendment: Chapter 410 throughout section removed requirement that there be a single company. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendments: Chapter 263 inserted (1)(b) relating to designation of the qualified Montana small business investment capital company; in (2) inserted reference to the qualified Montana small business investment capital company; in (3)(a), in first sentence, substituted "a single qualified capital company" for "a single qualified company", inserted reference to the qualified Montana small business investment capital company, and at end of sentence inserted exception clause and in second sentence substituted "a qualified capital company" for "the company"; at beginning of (4)(a) inserted "Before January 1, 1991"; inserted (4)(b) relating to allocation of tax credits after January 1, 1991; inserted (4)(c) relating to additional and reverted tax credits; in (5), in three places, inserted reference to the qualified Montana small business investment capital company and changed internal reference; in (6), in first sentence, changed internal reference, inserted reference to the qualified Montana small business investment capital company, and at end inserted exception clause; in (7) changed internal reference and inserted reference to the qualified Montana small business investment capital company; in (8) inserted reference to the qualified Montana small business investment capital company; in (9)(a) substituted "in excess of the limits" for "in excess of the $150,000 limit" and changed internal references; in (9)(b), in first sentence, inserted reference to $250,000 limit for the qualified Montana small business investment capital company, in second sentence substituted "the maximum credits allowed under this subsection (9)(b)" for "the maximum $150,000 credit", and inserted third sentence relating to no deduction for donation of stock; and made minor changes in style. Amendment effective March 29, 1991.

Chapter 576 throughout section substituted "department" for "board"; and in (6), near end of first sentence, inserted "for investments in all qualified Montana capital companies". Amendment effective April 23, 1991.

Chapter 807 in third sentence in (6) substituted "defined in 15-31-201" (renumbered 50-30-1101) for "electing to be taxed under 15-31-202". Amendment effective December 31, 1991.

Saving Clause: Section 18, Ch. 263, L. 1991, was a saving clause.

Severability: Section 19, Ch. 263, L. 1991, was a severability clause.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

Coordination Instruction: Section 13, Ch. 576, L. 1991, a coordination section, provided: "If House Bill No. 863 is passed and approved and if it contains new language referring to the board, defined as the board of investments, then the code commissioner is instructed to substitute the term "department", defined as the department of commerce, for the term "board" in House Bill No. 863." House Bill No. 863 was approved March 29, 1991, as Ch. 263, L. 1991.

Effective Dates — Applicability: Section 12, Ch. 807, L. 1991, provided: "(1) Except for the purposes of subsection (2), [this act] is effective December 31, 1991, and applies to tax years beginning after December 31, 1991.

(2) For the purpose of promulgating administrative rules to implement [sections 1 through 10] [15-30-111, 15-30-117, 15-30-126, 15-30-136, 15-30-161, 15-31-201 (renumbered 15-30-1101),

15-31-202 (now repealed), 15-31-204 [now repealed], and 90-8-202], [this act] is effective on passage and approval." Approved May 17, 1991.

1989 Amendments: Chapter 707 in (5), near beginning of first sentence, inserted reference to subsection (8) and at end of second sentence inserted reference to chapter 35; in (6), near middle of first sentence, inserted reference to coal severance tax liability; and inserted (8) providing taxpayer who obtains tax credit under subsection (5) may not obtain credits over $150,000 limit by investing as more than one entity, providing that partner and shareholder in small business corporation may not obtain credits over that amount as individual, partnership, or small business corporation, and providing that corporate taxpayer that obtains maximum credit may not obtain additional credits through wholly owned subsidiary or affiliate investments. Amendment effective May 22, 1989.

Chapter 708 in (5), near beginning of first sentence, inserted references to trust and decedent's estate; substituted (6)(a) and (6)(b) relating to manner of determining carrying back and carrying forward tax credits (see 1989 Session Law for text) for language allowing carrying back and carrying forward in accordance with section 46(b) of the Internal Revenue Code; and made minor change in phraseology.

1987 Amendment: In (2)(a), at end of first sentence, increased "$375,000" to "$1,500,000"; in (2)(b) inserted third and fourth sentences limiting credits to $3 million; in (5), near end of first sentence, increased "25%" to "50%" and "$25,000" to "$150,000"; at end of (6), after "Internal Revenue Code", deleted "of 1954"; and at end of (7) changed investment period from "within 5 years of April 18, 1983" to "within 4 years of July 1, 1987".

Saving Clause: Section 6, Ch. 583, L. 1987, was a saving clause.

1983 Amendment: Section 18(1), Ch. 554, L. 1983, substituted references to the Montana Economic Development Board for references to the Department of Commerce.

Administrative Rules

ARM 8.97.802 Definitions.
ARM 8.97.803 Application procedure to become a "certified" Montana capital company.
ARM 8.97.804 Application procedure to become a "qualified" Montana capital company.
ARM 8.97.805 Completed application date.
ARM 8.97.806 Amendment of application.
ARM 8.97.807 Allocation of tax credits.
ARM 8.97.809 Reservation of tax credits.

90-8-203. No recapture — unqualified investments — penalty.

Compiler's Comments

1999 Amendment: Chapter 410 in (1)(a) removed requirement that there be a single company and near end inserted exception clause; inserted (1)(b) concerning collection of penalty; in (2)(a) substituted "investor" for "investors"; in (2)(b) after "investment" inserted "other than the United States small business administration or its designee"; and made minor changes in style. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendments: Chapter 263 near middle of (1) inserted reference to the qualified Montana small business investment capital company and at end changed subsection reference to 90-8-301. Amendment effective March 29, 1991.

Chapter 576 inserted (2) relating to recovery of penalties from investors in certain capital companies. Amendment effective April 23, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

90-8-204. Application requirements.

Compiler's Comments

1999 Amendment: Chapter 410 throughout section removed requirement that there be a single company. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendment: In introductory clause inserted reference to the certified or qualified Montana small business investment capital company; in (1) inserted reference to the qualified Montana small business investment capital company and at end substituted "department" for "board", pursuant to the intent of sec. 13, Ch. 576, L. 1991, a coordination instruction; in (2) substituted "a qualified capital company" for "the company" and inserted requirements that the qualified Montana small business investment capital company must meet for tax credit; and made minor changes in style. Amendment effective March 29, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

1983 Amendment: Section 18(1), Ch. 554, L. 1983, substituted reference to the Montana Economic Development Board for reference to the Department of Commerce.

90-8-205. State liability disclaimed.

Compiler's Comments

1991 Amendment: Inserted (2) relating to failure to qualify as a certified or qualified Montana small business investment capital company; and made minor changes in style. Amendment effective March 29, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

Part 3
Regulation of Capital Companies

90-8-301. Qualified investments — penalty — extension permissible.

Compiler's Comments

1999 Amendment: Chapter 410 throughout section removed requirement that there be a single company; at beginning of (4)(a) inserted exception clause; inserted (4)(b) concerning licensure pursuant to federal law; and made minor changes in style. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1997 Amendment: Chapter 42 in (6) substituted "section" for "subsection". Amendment effective March 12, 1997.

1991 Amendments: Chapter 263 inserted (2) establishing schedule for qualified investments for the qualified Montana small business investment capital company; in (4), after "subsection (1)", inserted reference to the qualified Montana small business investment capital company failing to make qualified investments, in two places inserted reference to the Montana small business investment capital company, and near end inserted reference to subsection (2); and in (5) inserted reference to subsection (2) and the Montana small business investment capital company. Amendment effective March 29, 1991.

Chapter 576 throughout section substituted "department" for "board"; in (3), near beginning, substituted "department" for "commissioner of financial institutions"; in (4), near middle of first sentence, substituted "investors" for "taxpayers"; and inserted (7) relating to investment of tax credit funds in an existing business. Amendment effective April 23, 1991.

Saving Clause: Section 18, Ch. 263, L. 1991, was a saving clause.

Severability: Section 19, Ch. 263, L. 1991, was a severability clause.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

Coordination Instruction: Section 13, Ch. 576, L. 1991, a coordination section, provided: "If House Bill No. 863 is passed and approved and if it contains new language referring to the board, defined as the board of investments, then the code commissioner is instructed to substitute the term "department", defined as the department of commerce, for the term "board" in House Bill No. 863." House Bill No. 863 was approved March 29, 1991, as Ch. 263, L. 1991.

1989 Amendment: In (1)(a) deleted language requiring investment of 30% of retained earnings within 3 years of fiscal year ending and inserted language relating to investment of 30% of capital raised under amended application; in (1)(b) deleted language requiring investment of 50% of retained earnings within 4 years of fiscal year ending and inserted language relating to investment of 50% of capital raised under amended application; in (1)(c) deleted language requiring investment of 70% of retained earnings within 5 years of fiscal year ending and inserted language

relating to investment of 70% of capital raised under amended application; inserted (4) allowing Department of Revenue to grant extension to make qualified investments upon application showing reasonable cause; and made minor change in phraseology.

1987 Amendment: In (1)(a), (1)(b), and (1)(c), after "capital base", inserted "raised through investments for which tax credits were taken" and after "board" inserted language relating to percentage of capital base increased by retained earnings.

Saving Clause: Section 6, Ch. 583, L. 1987, was a saving clause.

1983 Amendment: Section 18(1), Ch. 554, L. 1983, substituted references to the Montana Economic Development Board for references to the Department of Commerce.

90-8-302. Restriction on investment.

Compiler's Comments

1999 Amendment: Chapter 410 removed requirement that there be a single company and inserted "subject to any lower percentage prescribed by the regulations promulgated by the United States small business administration that govern small business investment companies". Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendment: Section 20, Ch. 263, L. 1991, provided: Inserted reference to the Montana small business investment capital company. Amendment effective March 29, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

1989 Amendment: At beginning inserted "In addition to the requirements of 90-8-301" and in two places, before "business", deleted "Montana"; and made minor change in phraseology.

90-8-303. Conflict of interest.

Compiler's Comments

1999 Amendment: Chapter 410 in (2) removed requirement that there be a single company; and inserted (3) concerning licensure pursuant to federal law. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendments: Chapter 263 in three places inserted reference to the Montana small business investment capital company (two insertions rendered void by Ch. 576); and made minor changes in style. Amendment effective March 29, 1991.

Chapter 576 in (1) deleted former subsections (a) and (b) that read: "(a) The members of the board, the commissioner of financial institutions, or a bank examiner may not have a monetary interest in or be a borrower from any Montana capital company, either directly or indirectly.

(b) These restrictions do not prohibit the board, acting as a whole, from purchasing debentures issued by a Montana capital company" and inserted sentence prohibiting capital company from investing in certain business ventures. Amendment effective April 23, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

1987 Amendment: Inserted (1)(b) referring to purchase of debentures of Montana capital companies.

1983 Amendment: Section 18(1), Ch. 554, L. 1983, substituted reference to the Montana Economic Development Board for reference to the Department of Commerce.

90-8-304. Application of securities law.

Compiler's Comments

1999 Amendment: Chapter 410 removed requirement that there be a single company. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendment: Inserted reference to the certified Montana small business investment capital company; and made minor change in style. Amendment effective March 29, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

1987 Amendment: Near beginning of first sentence inserted "certified" before "Montana" and at end of second sentence deleted "or deposit".

90-8-305. Sale of debentures.

Compiler's Comments

1999 Amendment: Chapter 410 removed requirement that there be a single company. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendments: Chapter 263 in (1) and (2) inserted reference to the qualified Montana small business investment capital company. Amendment effective March 29, 1991.

Chapter 589 at end of (1) substituted "permanent coal tax trust fund" for "in-state investment fund established in 17-6-306"; and at end of (2) substituted "permanent coal tax trust fund" for "in-state investment fund". Amendment effective July 1, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

Saving Clause: Section 20, Ch. 589, L. 1991, was a saving clause.

Severability: Section 21, Ch. 589, L. 1991, was a severability clause.

90-8-311. Legislative review and oversight.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 19 substituted "appropriate legislative interim committee" for "revenue oversight committee of the legislature". Amendment effective February 17, 1999.

Chapter 410 removed requirement that there be a single company. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendments: Chapter 263 inserted reference to the Montana small business investment capital company. Amendment effective March 29, 1991.

Chapter 576 substituted "department" for "board". Amendment effective April 23, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

1983 Amendment: Section 18(1), Ch. 554, L. 1983, substituted reference to the Montana Economic Development Board for reference to the Department of Commerce.

90-8-312. Investment reporting and recordkeeping.

Compiler's Comments

1999 Amendment: Chapter 410 in (3) removed requirement that there be a single company; and in (4) near beginning substituted "each" for "the". Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendments: Chapter 263 in (1) inserted "and each qualified Montana small business investment capital company"; in (1)(a) inserted "or in the qualified Montana small business investment capital company"; in (3) inserted "and each investor in the qualified Montana small business investment capital company"; in (4) inserted "and the qualified Montana small business investment capital company"; and made minor change in style. Amendment effective March 29, 1991.

Chapter 576 throughout section substituted "department" for "board"; inserted (1)(d) relating to other information; inserted (5) concerning reports and making investments from a company's capital base; and made minor changes in style. Amendment effective April 23, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

1983 Amendment: Section 18(1), Ch. 554, L. 1983, substituted references to the Montana Economic Development Board for references to the Department of Commerce.

90-8-313. Examination.

Compiler's Comments

1999 Amendment: Chapter 410 in (1) removed requirement that there be a single company; and in (1) and (3) substituted "each" for "the". Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendments: Chapter 263 in (1), in two places, inserted reference to the qualified Montana small business investment capital company; and in (1) and (3) inserted reference to the Montana small business investment capital company. Amendment effective March 29, 1991.

Chapter 576 in (1) and in two places in (2), after "department", deleted "of commerce"; and in first sentence of (1), after "once a year", deleted "the bank examiners of". Amendment effective April 23, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

90-8-321. Decertification.

Compiler's Comments

1999 Amendment: Chapter 410 throughout section removed requirement that there be a single company; and inserted (1)(b) concerning obligations to small business administration. Amendment effective April 21, 1999.

Saving Clause: Section 17, Ch. 410, L. 1999, was a saving clause.

Applicability: Section 19, Ch. 410, L. 1999, provided: "[This act] applies to any capital company or small business investment capital company operating prior to or on or organized after [the effective date of this act]." Effective April 21, 1999.

1991 Amendments: Chapter 263 throughout section inserted reference to the Montana small business investment capital company; in (2) changed subsection reference to 90-8-301; and made minor change in style. Amendment effective March 29, 1991.

Chapter 576 in (1) and (2), after "department", deleted "of commerce"; inserted (5) authorizing Department to decertify capital companies; and inserted (6) requiring decertification of capital companies in certain instances. Amendment effective April 23, 1991.

Retroactive Applicability: Section 20, Ch. 263, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to events occurring after December 31, 1990."

1989 Amendment: In (2) inserted second sentence requiring Department to automatically decertify capital company assessed penalty under 90-8-301(3); and inserted (4) allowing company to apply for decertification.

CHAPTER 9
AGRICULTURE DEVELOPMENT

Chapter Administrative Rules

Title 4, chapter 16, ARM Procedural and substantive rules of Montana Agriculture Development Council.

Chapter Law Review Articles

The Role of Agriculture in Development, Mellor, 1 Transnat'l L. & Contemp. Probs. 313 (1991).

Rural America, Perspective on Policy, Long, 46 Pub. Admin. Rev. 279 (1986).

The Political Economy of American Rural Development, Guess, 43 Pub. Admin. Rev. 277 (1983).

Chapter Collateral References

Exemption of agricultural activities or occupations from business or occupation license or tax. 38 ALR 4th 1074.

Part 1
General Provisions

90-9-103. Definitions.

Compiler's Comments

2001 Amendment: Chapter 171 in definition of agricultural development project inserted "marketing, agribusiness development" and after "transfer" inserted "market"; deleted former definition of expansion capital project that read: ""Expansion capital project" means an agricultural technology development project undertaken to enable an individual or a company to expand its manufacturing and marketing activities in order to move its agricultural products or services into new markets or to expand existing markets"; at end of definition of investment substituted "this chapter" for "90-9-401"; in definition of matching funds in (a) after "received" deleted "in cash", in two places after "loan" inserted "or investment", after "from" substituted "private, federal, state, or commodity checkoff funds" for "nonstate appropriated sources", and after "funds" substituted "disbursed" for "loaned" and inserted (b) providing that matching funds may not include other state grants; at end of definition of private sector after "unit" deleted "that is associated with or involved in commercial activity"; substituted definition of seed capital project for former definition that read: ""Seed capital project" means a startup or expansion capital project"; deleted former definition of seed capital project loan that read: ""Seed capital project loan" means an agricultural development project loan entered into between the council and a loan recipient for a seed capital project"; deleted former definition of technology transfer and assistance project that read: ""Technology transfer and assistance project" means an agricultural development project that:

(a) transfers technology research from the laboratory to the marketplace; or

(b) provides better access and exposure to business development assistance or information for researchers or early-stage agricultural businesses that commercialize agricultural technology products"; and made minor changes in style. Amendment effective March 30, 2001.

Severability: Section 13, Ch. 171, L. 2001, was a severability clause.

Saving Clause: Section 14, Ch. 171, L. 2001, was a saving clause.

1991 Amendment: In definition of investment deleted reference to 90-9-302.

1989 Amendment: Inserted definitions of act, agricultural development project, agricultural development project loan agreement, company, convertible debenture, debenture or note, department, expansion capital project, innovative agricultural technology, matching funds, portfolio company, private sector, research and development project, research and development project loan, seed capital project, seed capital project loan, state, technology transfer and assistance project, and warrant; in definition of investment substituted "90-9-302 and 90-9-401" for "this chapter"; and made minor change in phraseology. Amendment effective March 23, 1989.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Part 2
Agriculture Development Council

Part Compiler's Comments

Severability: Section 13, Ch. 171, L. 2001, was a severability clause.

Saving Clause: Section 14, Ch. 171, L. 2001, was a saving clause.

90-9-201. Council organization — meetings.

Compiler's Comments

2001 Amendment: Chapter 171 at beginning of second sentence of (1) deleted "In addition to the chairmanship"; inserted (3) providing that members, other than department directors, are entitled to compensation while engaged in official business and to necessary travel expenses; and made minor changes in style. Amendment effective March 30, 2001.

90-9-202. Powers and duties of council.

Compiler's Comments

2001 Amendment: Chapter 171 at beginning of (2)(a) substituted "seed capital projects" for "seed capital loans"; deleted former (2)(b) that read: "(b) agricultural business incubators"; inserted (2)(d) concerning development projects; and made minor changes in style. Amendment effective March 30, 2001.

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

1999 Amendment: Chapter 512 at end of (1) inserted "including the Indian reservations in Montana"; and in (2) after "diversification in" inserted "rural, urban, and tribal settings in". Amendment effective April 28, 1999, and terminates June 30, 2001.

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

1989 Amendment: In (2), near beginning, inserted "or loans"; in (2)(a) substituted "loans" for "awards"; in (3) substituted "or loans authorized by" for "described in"; and deleted (4) that granted authority to adopt rules implementing this chapter. Amendment effective March 23, 1989.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

90-9-203. Rulemaking.

Compiler's Comments

2001 Amendment: Chapter 171 in middle of (2), (3), and (4) after "project loan" inserted "or investment"; and in (2) after "capital project" deleted "loan". Amendment effective March 30, 2001.

1989 Statement of Intent: The statement of intent attached to Ch. 284, L. 1989, provided: "A statement of intent is required for this bill because [section 9] [90-9-203] grants rulemaking authority to the Montana agriculture development council to implement the agricultural development project loan program.

It is the legislature's intent that the council adopt rules:

(1) governing the conduct of council business;

(2) establishing application procedures that, at a minimum, require the submittal of an executive summary for an agricultural development project loan, a business plan for a seed capital project loan, a research and development project proposal for a research and development project loan, and other documents necessary to meet the criteria established in the act;

(3) establishing procedures to be followed by the council in its review process prior to making an agricultural development project loan;

(4) establishing postdisbursement activities that describe the ongoing involvement or follow-along management of the council that may be required in an agricultural development project loan agreement."

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Effective Date: Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

Administrative Rules

Title 4, chapter 16, ARM Montana agriculture development council.

Part 3
Investments

Part Administrative Rules

Title 4, chapter 16, subchapter 3, ARM Procedure for seed capital project.

Title 4, chapter 16, subchapter 4, ARM Agricultural marketing development program.

Title 4, chapter 16, subchapter 5, ARM Loan programs.

90-9-301. Agriculture seed capital account — matching funds.

Compiler's Comments

2001 Amendment: Chapter 171 near beginning of (2) after "loan" inserted "or invest" and after "support" inserted "agricultural development projects and"; and in first sentence in (3) after "loan" inserted "or investment" and after "projects" substituted "unless the recipient provides matching funds" for "for which the matching funds have not been received" and at end of second sentence deleted "for research and development or seed capital projects". Amendment effective March 30, 2001.

Severability: Section 13, Ch. 171, L. 2001, was a severability clause.

Saving Clause: Section 14, Ch. 171, L. 2001, was a saving clause.

1989 Amendment: In (2), near beginning, substituted "loan" for "invest"; inserted (3) requiring matching funds for agricultural development project loans and for research and development or seed capital projects; and deleted former (3) and (4) that read: "(3) Investments from the account must be matched by at least an equal amount raised by the applicant from sources that are not state-appropriated.

(4) Preference must be given to applications that:

(a) can be reasonably expected to provide an economic return to the applicant within a reasonable time;

(b) demonstrate a potential commercial value to other entrepreneurs in Montana;

(c) require such a grant to obtain additional private capital;

(d) involve processing or adding value to agricultural commodities produced in Montana; or

(e) provide jobs that will be substantially filled by current Montana residents." Amendment effective March 23, 1989.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

90-9-303. Return-on-investment agreements.

Compiler's Comments

2001 Amendment: Chapter 171 near beginning of first sentence substituted "may" for "shall"; and made minor changes in style. Amendment effective March 30, 2001.

Severability: Section 13, Ch. 171, L. 2001, was a severability clause.

Saving Clause: Section 14, Ch. 171, L. 2001, was a saving clause.

90-9-306. Appropriation authority and funding — prohibited investments.

Compiler's Comments

2001 Amendment: Chapter 171 near middle of (2) inserted "if the council member is a board member or officer of the organization"; and made minor changes in style. Amendment effective March 30, 2001.

Severability: Section 13, Ch. 171, L. 2001, was a severability clause.

Saving Clause: Section 14, Ch. 171, L. 2001, was a saving clause.

1989 Amendments: Chapter 284 deleted former (2) that read: "(2) No investment may be made in projects for which matching funds or participation of financial intermediaries is required until such funds have been committed"; and in (2), near end of first sentence before "funds", deleted "investment". Amendment effective March 23, 1989.

Chapter 628 in (1), at end after "as provided in 17-7-502", inserted "for the purposes of this chapter" and inserted exception clause requiring the expenditures to be from temporary appropriations; and made minor changes in punctuation and phraseology. Amendment effective July 1, 1989.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

90-9-307. Accountability.

Compiler's Comments

1989 Amendment: In two places inserted references to loans; and deleted former (2) that read: "(2) The council's investment agreements must contain provisions considered necessary by the council to ensure the proper inspection and review of projects, the attainment of project goals, and the maintenance of adequate financial records by recipients of council funds." Amendment effective March 23, 1989.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

90-9-311. General criteria underlying agricultural development project loans and investments.

Compiler's Comments

2001 Amendment: Chapter 171 in middle of first sentence of introductory clause after "loan" inserted "or investment"; at end of first sentence in (1) inserted "adds value to Montana's agricultural products" and at beginning of second sentence inserted "Priority must be given to projects that"; and made minor changes in style. Amendment effective March 30, 2001.

Severability: Section 13, Ch. 171, L. 2001, was a severability clause.

Saving Clause: Section 14, Ch. 171, L. 2001, was a saving clause.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Effective Date: Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

90-9-312. Seed capital projects — program goals.

Compiler's Comments

2001 Amendment: Chapter 171 in (1) before "loan" deleted "seed capital project"; at end of (1)(a) after "90-9-313" deleted "and further determines that the project"; at beginning of (2)(a) after "to" substituted "provide" for "assist in the development of innovative technology in the state by providing" and before "agricultural-based" inserted "value-added"; inserted (3) outlining requirements of loan agreement upon approval of seed capital project; and made minor changes in style. Amendment effective March 30, 2001.

Severability: Section 13, Ch. 171, L. 2001, was a severability clause.

Saving Clause: Section 14, Ch. 171, L. 2001, was a saving clause.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Effective Date: Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

90-9-313. Specific criteria for seed capital project loans.

Compiler's Comments

2001 Amendment: Chapter 171 at end of first sentence in (1) inserted "adds value to Montana's agricultural products" and at beginning of second sentence inserted "Priority must be given to projects"; inserted (2)(b) allowing loan upon determination that project requires financing in partnership with conventional lending sources; and made minor changes in style. Amendment effective March 30, 2001.

Severability: Section 13, Ch. 171, L. 2001, was a severability clause.

Saving Clause: Section 14, Ch. 171, L. 2001, was a saving clause.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Effective Date: Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

90-9-314. Research and development project — program goals.

Compiler's Comments

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Effective Date: Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

90-9-315. Specific criteria for research and development project loans.

Compiler's Comments

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Effective Date: Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

90-9-316. Agricultural development project loan or investment agreement — contents — council decisions final.

Compiler's Comments

2001 Amendment: Chapter 171 near end of (1), (2), (2)(d), and (2)(f) after "loan" inserted "or investment"; and at end of introductory clause of (2) inserted "when applicable". Amendment effective March 30, 2001.

Severability: Section 13, Ch. 171, L. 2001, was a severability clause.

Saving Clause: Section 14, Ch. 171, L. 2001, was a saving clause.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Effective Date: Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

90-9-317. Seed capital project loan agreement — specific loan requirements — payback.

Compiler's Comments

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Effective Date: Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

Part 4
Marketing — Export Assistance

90-9-401. Agricultural marketing enhancement.

Compiler's Comments

1989 Amendment: In (1), at beginning, substituted "assist in placing" for "place" and after "Japan" inserted "or another Pacific Rim country". Amendment effective March 23, 1989.

Severability: Section 19, Ch. 284, L. 1989, was a severability clause.

Administrative Rules

Title 4, chapter 16, subchapter 7, ARM Agricultural marketing development program.

CHAPTER 11
INDIAN AFFAIRS
PLANNING AND COORDINATION

Chapter Law Review Articles

Montana Tribal Courts: Influencing the Development of Contemporary Indian Law, Brown & Desmond, 52 Mont. L. Rev. 211 (1991).

Crow Tribe v. Montana: New Limits on State Intrusion Into Reservation Rights, New Lessons for State and Tribal Cooperation, Bellis, 50 Mont. L. Rev. 133 (1989).

State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, a Judicial Sword Through the Heart of Tribal Self-Determination, Fredericks, 50 Mont. L. Rev. 49 (1989).

Harmony Among the People: Torts and Indian Courts, Zion, 45 Mont. L. Rev. 265 (1984).

Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Water Use Act, Lamb, 41 Mont. L. Rev. 73 (1980).

Comments on Indian Water Rights, Morrison, 41 Mont. L. Rev. 39 (1980).

Tribal Bedlands Claims Since Montana v. United States, Cole, 6 Pub. Land L. Rev. 119 (Spring 1985).

Regulatory Jurisdiction on Indian Reservations in Montana, Carter, 5 Pub. Land L. Rev. 147 (1984).

Economic Development on the Reservation: A Survey of Relevant Environmental Considerations, Tsosie, 29 Ariz. Att'y 26(7) (1993).

Structuring and Financing Natural Resource and Energy Development on Indian Lands, Slade, 7 Nat. Resources & Env't 7(7) (1993).

Chapter Collateral References

Indian Law Seminar, State Bar of Montana, December 1997.

Indian Law Seminar, State Bar of Montana, December 1996.

To Promote a Better Understanding: The 1995-96 Activities of the Committee on Indian Affairs, Legislative Services Division (1996).

Forging a New Relationship: 1993-94 Activities of the Committee on Indian Affairs, Legislative Council (1994).

Improving State-Tribal Relations, Legislative Council, 1992.

Taxation on Indian Reservations and Other Issues Before the Revenue Oversight Committee, Legislative Council, 1992.

Improving State-Tribal Relations: 1989-1990 Activities of the Committee on Indian Affairs, Legislative Council, 1990.

Committee on Indian Affairs 1987-1988 Activities: A Report to the 51st Legislature, Legislative Council, 1988.

Select Committee on Indian Affairs 1983-84 Activities: A Report to the 49th Legislature, Legislative Council, 1984.

Indian Country Jurisdiction, State Bar of Montana, June 1984.

Indian Jurisdiction Seminar, State Bar of Montana, March 1984.

Part 1
State Coordinator of Indian Affairs

90-11-101. Legislative policy.

Compiler's Comments

2001 Amendment: Chapter 178 inserted introductory clause; in (2) at beginning substituted "since statehood" for "in the course of the past 80 years", near beginning after "Montana have" substituted "lived" for "been driven from their native valleys and plains and are at present living and residing", and at end after "exist" deleted "and no suitable progress has been made to solve such problems by reason of the fact that the Indians and those who are attempting to aid them in the solution of their problems have never been able to present a coordinated and united effort in solving such problems"; in (3) at beginning deleted "Whereas, it is hereby declared that it is the legislative policy of this state that", near beginning after "served by" substituted "engaging in government-to-government relationships designed to recognize the" for "the fostering of a program which is designed to establish and place our Indian citizens in a position to take their rightful place in our society and assume the", and at end substituted "are entitled to as citizens of this state" for "it is therefore necessary that a state office of the coordinator of Indian affairs be established so that the problems of the Indians of Montana can be approached and reconciled from a state level in cooperation with the United States of America"; in (4) at beginning inserted "because tribes are domestic dependent nations" and after "jurisdiction" substituted "and a fiduciary duty throughout the state" for "on Indian reservations in the state"; deleted former (5) that read: "(5) Whereas, Indians who reside off reservations generally qualify for participation in federal programs but are often prohibited from voting on tribal affairs and for tribal officers"; inserted (5) stating that differences exist between the tribes and their respective relationships with the federal government; in (6) near middle after "needs for" inserted "social", after "environmental" inserted "educational, and economic", after "borne" inserted "in part", and at end after "agencies" deleted "and these needs are derived from problems shared by all Indians, whether they reside on reservations or not, and in consideration of their desire for official voice and representation in seeking solutions to their problems"; in (7) near beginning after "federal government" inserted "or tribal governments"; inserted (8) referring to the state and tribe working together in various types of agreements; in (9) at beginning substituted "to facilitate the discussion and resolution of issues and concerns that Indian tribes have in relation to the state, the federal government, and among themselves, the coordinator of Indian affairs shall" for "Then therefore, let it be resolved that the coordinator of Indian affairs should"; inserted (9)(a) requiring maintenance of tribal-state communication; in (9)(b) near beginning substituted "tribal and individual Indian concerns and interests to" for "the problems of all Indians to include those who reside off known reservations and who" and near middle after "communicating" substituted "these concerns and interests to relevant state agencies and to the legislature" for "their opinions and needs to agencies of responsibility"; in (9)(c) near beginning after "act as" substituted "a liaison for tribes and Indian people" for "representative and spokesman for organized bodies of Indian people"; inserted (10) requiring the coordinator to assist the tribes in creating agreements with the state and consensus with other parties; and made minor changes in style. Amendment effective April 2, 2001.

90-11-102. Duties and assistance.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 69 in temporary version in (2)(i) substituted "responsible for acting as a liaison between the legislature and the tribal governments" for "having jurisdiction over the office of the coordinator"; and made minor changes in style. Amendment effective March 19, 2001.

Chapter 178 at beginning of (2)(a) inserted "meet at least quarterly with tribal governments and"; inserted (2)(b) requiring coordinator to meet with executive branch directors on certain issues; inserted (2)(c) requiring coordinator to report to governor's cabinet on certain Indian issues; at end of (2)(d) and (2)(e) inserted "and issues"; in (2)(g) near beginning after "act" substituted "as a liaison" for "on behalf of" and at end substituted reference to tribal governmental entities for "tribal entities"; in (3) near end after "relating to" substituted "education, health, natural resources, and economic development" for "coal development" and at end after "lands" deleted reference to coordinator making an appropriate charge for assistance; and made minor changes in style. Amendment effective April 2, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

1999 Amendment: Chapter 512 inserted (2)(f) concerning service on state-tribal economic development commission; inserted (2)(g) concerning report to legislative committee; inserted (2)(h) concerning hiring certain personnel; and made minor changes in style. Amendment effective April 28, 1999, and terminates June 30, 2001.

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

1981 Amendment: Changed internal reference in (1) to correspond to renumbering.

CHAPTER 14
COMMUNITY SERVICE

Part 1
Montana Community Service Act

Part Compiler's Comments

Severability: Section 12, Ch. 534, L. 1993, was a severability clause.

Effective Date: Section 14, Ch. 534, L. 1993, provided: "[This act] [90-14-101 through 90-14-109] is effective on passage and approval." Approved April 24, 1993.

90-14-102. Definitions.

Compiler's Comments

1999 Amendment: Chapter 150 substituted "commission" for "advisory council" and "director" for "coordinator" as defined terms; deleted definitions of corps, corpsmember, and crewleader that read: "(4) "Corps" means the Montana community service corps, which includes any organization established to provide community services under this part and the Montana conservation corps created under 23-1-301.

(5) "Corpsmember" means a participant in the corps.

(6) "Crewleader" means a participant in the corps who supervises corpsmembers"; in definition of program after "service" deleted "corps", after "all of the" deleted "corps, education projects", and at end deleted "and under the Montana conservation corps in 23-1-301"; and made minor changes in style. Amendment effective October 1, 1999.

90-14-103. Office of community service.

Compiler's Comments

1999 Amendment: Chapter 150 throughout section substituted "director" for "coordinator" and "commission" for "advisory council"; in (2)(f) near beginning substituted "programs" for "corps" and at end deleted "by the corps"; in (5) near end of first sentence after "operation of" deleted "corps and"; in (6) near middle substituted "service learning program" for "serve America program" and after "military affairs" substituted "service" for "corps"; and made minor changes in style. Amendment effective October 1, 1999.

90-14-104. Commission on community service.

Compiler's Comments

1999 Amendment: Chapter 150 throughout section substituted references to commission for references to advisory council; in (5) near end after "recruitment of" deleted "corpsmembers and" and before "crewleaders" inserted "volunteer"; inserted (6) concerning payment of commission members; and made minor changes in style. Amendment effective October 1, 1999.

90-14-105. Duties and powers of state agencies.

Compiler's Comments

1999 Amendment: Chapter 150 at beginning of (1), deleted "In addition to the office of community service in the governor's office"; near beginning of (1)(a) after "instruction" substituted "implements" for "is the agency for corps and" and near end substituted "federal service learning grants" for "the federal serve America grants"; in (1)(c) at beginning of first

sentence inserted references to departments of environmental quality, natural resources and conservation, and transportation and deleted reference to corps projects, near middle inserted reference to tribal parks, and near end inserted reference to environmental projects and inserted second sentence concerning other types of projects; in (1)(d) near beginning substituted "may support" for "is the agency for corps", near middle before "crewleaders" inserted "volunteer", and near end substituted "activities" for "corps"; in (1)(e) near beginning substituted "director" for "coordinator" and "commission" for "advisory council" and near middle before "homes" inserted "or otherwise modifying"; near beginning of (2) substituted "designated by the governor" for "listed in this section"; near beginning of (3) substituted "involved in community service" for "listed in this section"; in (5) substituted "engaged in community service" for "listed in this section"; in (5)(c) substituted "volunteer crewleaders and other volunteers" for "crewleaders and corpsmembers"; in (5)(h) near beginning substituted "volunteers" for "the corps" and near end substituted "volunteers" for corpsmembers"; and made minor changes in style. Amendment effective October 1, 1999.

Code Commissioner Correction: Chapter 429, L. 1995, repealed Title 20, chapter 26, part 14. Pursuant to the authority contained in sec. 73, Ch. 18, L. 1995, the Code Commissioner has deleted the last sentence of (1)(b) that read: "The Montana university system shall provide assistance to the Montana student volunteer program established in Title 20, chapter 26, part 14."

1993 Statement of Intent: The statement of intent attached to Ch. 534, L. 1993, provided: "A statement of intent is required for this bill because [section 5] [90-14-105] authorizes the office of community service to adopt rules relating to the Montana community service corps.

It is the intent of the legislature that a variety of opportunities be developed, enhanced, and coordinated that maximize the resources and abilities of citizens of Montana to renew the ethic of civic involvement and responsibility by:

(1) encouraging Montanans, regardless of age, income, or ability, to engage in full-time or part-time service;

(2) involving youth in programs that benefit the state and improve their own lives;

(3) enabling young adults to make a sustained commitment to service; and

(4) involving participants in activities to help meet human, educational, environmental, service, and public safety needs that would not otherwise be performed by paid workers.

It is also the intent of the legislature that the rules address the following:

(1) procedures for recruitment and involvement in service;

(2) procedures for review and approval of volunteer or work experience projects;

(3) a service code of conduct and grievance procedure;

(4) standards and procedures to evaluate and report on the performance of participants and projects;

(5) training guidelines for service leaders and participants;

(6) requirements necessary to ensure cooperation and compliance with any federal programs or requirements related to national public service legislation; and

(7) other requirements necessary to accomplish the purposes of the Montana community, conservation, and volunteer service corps."

90-14-106. Prohibited activities.

Compiler's Comments

1999 Amendment: Chapter 150 in (1) after "90-14-105" inserted "that are designated by the governor and engaged"; and in first sentence of (2) substituted "volunteer, or volunteer crewleader" for "corpsmember, or crewleader". Amendment effective October 1, 1999.

90-14-107. Office of community service — accounts.

Compiler's Comments

Termination: Section 15, Ch. 534, L. 1993, provided: "[Section 7(4) [90-14-107(4)], the first sentence in section 7(6) [90-14-107(6)], and section 9 [amending 17-7-502]] terminate July 1, 1995."

90-14-108. Indemnification for Montana community service act.

Compiler's Comments

1999 Amendment: Chapter 150 near middle after "service" deleted "crewleaders, corpsmembers, and". Amendment effective October 1, 1999.

CHAPTER 15
NATURAL RESOURCE INFORMATION SYSTEM

Chapter Compiler's Comments

Preamble: The preamble attached to HB 785 (Ch. 650, L. 1983) provided: "WHEREAS, various departments of state government, including the Departments of Natural Resources and Conservation; Fish, Wildlife, and Parks; State Lands [functions now transferred to Department of Environmental Quality]; Health and Environmental Sciences [functions now transferred to Department of Environmental Quality]; and Agriculture and various branches of the university system independently collect natural resource information for different purposes, using manual and automated methods; and

WHEREAS, although ideally there should be an integrated natural resource information system, such a sophisticated system would be extremely costly because of the unique and distinctly different requirements of each department; and

WHEREAS, efforts should be made to expedite the development of separate but compatible systems and to catalog this data and make it available for department and statewide use; and

WHEREAS, a natural heritage program begins by developing a classification system to conceptually organize the elements of natural diversity in the state, and this classification serves as a framework for categorizing natural landscape information to facilitate comparison of similar elements and recognize dissimilar elements; and

WHEREAS, 33 states have already developed programs to collect and manage information on their natural heritage, and the methods used by those state programs are available to Montana; and

WHEREAS, the classification system embodied in the natural heritage program should be a working one that retains the flexibility to be changed as need dictates so that new categories may be added or preexisting categories subdivided and, within classes, elements may be added or deleted as new information becomes available; and

WHEREAS, a natural heritage program is needed to eliminate costly duplication and enhance the efficiency of natural resource data collection and to provide a valuable source of that information for state government, industry, and other groups.

THEREFORE, the State of Montana, as a first step in developing a natural resource information system establishes a Montana Natural Heritage Program."

Part 1
General

90-15-101. Purpose.

Compiler's Comments

1985 Amendment: Near middle after "information system", inserted "to implement the system".

90-15-102. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 in definition of principal data source agencies deleted "department of state lands" and substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1985 Amendment: Substituted definition of "Library" for ""Department" means the department of administration created by 2-15-1001."

90-15-103. Funding.

Compiler's Comments

1989 Amendment: At end deleted "and any such funds are statutorily appropriated to the library or to the appropriate principal data source agency for such purposes as provided in 17-7-502". Amendment effective July 1, 1989.

1985 Amendment: At beginning substituted "The library and each principal data source agency" for "The department of administration"; and near end substituted "are statutorily appropriated to the library or to the appropriate principal data source agency for such purposes as provided in 17-7-502" for "are appropriated to the department for such purposes".

Part 2
Advisory Committee

90-15-201. Duties of committee.

Compiler's Comments

1985 Amendment: Near end of lead-in clause, substituted "library" for "department head".

90-15-202. Committee staff.

Compiler's Comments

1985 Amendment: At beginning substituted "library" for "department" and at end substituted "library's" for "department's".

Part 3
Information System

90-15-301. Establishment of information system.

Compiler's Comments

1985 Amendment: In (1) in first sentence, at beginning substituted "library" for "department" and at end inserted "and shall begin implementation of the plan"; in (2) at beginning substituted "library" for "department"; and in (3) in first sentence, after "fieldwork", deleted "or literature searches".

90-15-302. Natural heritage program.

Compiler's Comments

1985 Amendment: In (1) at end of first sentence, substituted "library" for "department", and substituted second and third sentences referring to employment of an independent contractor or staff and the use of state resources and facilities by an independent contractor for "In order to establish the program, the department may contract with an independent contractor for a period not to exceed 2 years".

90-15-303. Interagency cooperation.

Compiler's Comments

1997 Amendment: Chapter 45 in (2), in first sentence before "Montana", inserted "natural resource information system and the".

1985 Amendment: Throughout section changed references to department of administration to references to the state library.

90-15-304. Availability of information.

Compiler's Comments

1985 Amendment: Throughout section changed references to department of administration to references to the state library.

TITLES 91 THROUGH 99

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